Study H-855 September 27, 2010

Memorandum 2010-49

Common Interest Development: Statutory Clarification and Simplification of CID Law (Comments on Property Ownership, Use, and Maintenance Provisions)

This memorandum continues the analysis and discussion of the public comments received on the Commission's tentative recommendation on *Statutory Clarification and Simplification of CID Law* (Feb. 2010). It addresses comments on provisions of the proposed law relating to property ownership, use, and maintenance.

The Comments discussed in this memorandum are set out in the Exhibit to Memorandum 2010-36.

Because of the large number of comments and the importance of completing review of those comments before the end of this year, if possible, this memorandum employs a practice that the Commission sometimes uses to expedite review of voluminous material — issues that appear to require Commission discussion at the meeting are marked with the "☞" symbol in the heading for that issue.

All other issues in the memorandum are presumed to be noncontroversial "consent" items, which are deemed approved without discussion. *That is only a presumption, and Commissioners and members of the public will have an opportunity to discuss those issues at the meeting, if discussion is needed.*

Where this memorandum sets out a provision of the proposed law, the text includes any changes that were made at the August 2010 meeting.

Except as otherwise indicated, all statutory references in this memorandum are to the Civil Code.

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.

OWNERSHIP OF COMMON AREA

Proposed Section 4500 continues an existing provision governing the ownership status of common area in a condominium or planned development where the common area is owned in common by the members:

> 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.

A working group of the California State Bar Real Property Law Section ("RPLS Working Group") suggests that the phrase "unit or lot" should be replaced with "separate interest." See Memorandum 2010-36, Exhibit p. 138.

In a condominium, the term "separate interest" means a "unit." See proposed Section 4185. Because the terms are effectively synonymous, the proposed substitution would have no substantive effect with respect to condominiums.

In a planned unit development, the term "separate interest" means a "lot, parcel, area, or space." *Id*. Consequently, substituting "separate interest" for "lot" in proposed Section 4500 could, theoretically, change the substance of the provision (by importing the concepts of "parcel, area, or space").

Nonetheless the staff recommends that this change be made. It seems likely that the terminological difference in the existing statute was inadvertent. There does not appear to be any good policy reason to distinguish between a "lot" and a "parcel, area, or space" in this provision. If the owners of separate interests own the common area, their shares of ownership should be based on the number of separate interests that they own, regardless of whether the separate interest is characterized as a lot, parcel, area, or space.

APPURTENANT RIGHTS AND EASEMENTS

Proposed Section 4505 continues, without change, an existing provision on easements of ingress, egress, and support, in a CID:

> 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.

The RPLS Working Group suggests making technical revisions to the language of this provision, as follows:

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~~ a nonexclusive easement for ingress, egress, and support, if necessary, appurtenant to each separate interest. The common area is subject to these easements.

See Memorandum 2010-36, Exhibit p. 138.

The staff recommends against making those changes, at least without further explanation of their necessity and effect. This provision involves significant property rights. It should not be changed without careful consideration of the section's purpose (which is not entirely clear) and the effect of the proposed changes (which is also not clear).

ACCESS TO SEPARATE INTEREST

Proposed Section 4510 would continue, with clarifying changes, an existing provision that guarantees a separate interest owner's right of access to the separate interest:

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.

The existing provision, Section 1361.5, uses the word "owner" rather than "member." The RPLS Working Group suggests reverting to that terminology. See Memorandum 2010-36, Exhibit p. 138.

The staff recommends against that change. The proposed law attempts to standardize terminology by using "member" wherever doing so would not cause confusion. The use of "member" in this provision should not cause confusion or any substantive change, because "member" is defined as an owner of a separate interest. See proposed Section 4160. In context, the meaning of the provision seems plain.

TRANSFER DISCLOSURE

Proposed Section 4525 would continue existing provisions requiring that the owner of a separate interest provide specified information to a prospective purchaser of the separate interest, as soon as practicable before transfer of title.

"True" Statement

Proposed Section 4525(d) would continue a requirement that a prospective purchaser be provided with a "true" statement of the association's assessments and fees and of any assessments, fines, or penalties owed by the current owner of the separate interest.

A group of attorneys who are expert in CID formation issues and CAI-CLAC both object to the word "true" in that provision. They suggest that it be struck. See Memorandum 2010-36, Exhibit pp. 37, 67, 202.

This issue was raised and discussed in a prior memorandum. See Memorandum 2009-53, pp. 39-40. The Commission recognized that the word "true" isn't strictly necessary and could create a troubling implication that other statements may be false. Nonetheless, the Commission ultimately decided against deleting the word. There is no evidence that the word is causing any problems. Furthermore, the *deletion* of the word could also create a problematic implication.

The staff has no new information that would require reconsideration of that prior decision.

Typographical Errors

Kazuko Artus points out some typographical errors in the current draft of proposed Section 4525. See Memorandum 2010-36, Exhibit p. 82. **The staff**

appreciates the comment and will correct those errors in the next draft of the proposed law.

Paragraph Order

The RPLS Working Group suggests moving paragraph (a)(8) so that it immediately follows paragraph (a)(4). The justification is that both paragraphs relate to assessments. See Memorandum 2010-36, Exhibit p. 138.

While there is logic to that suggestion, it isn't clear that it would make any practical difference. Both provisions are already in close proximity and are contained within the same subdivision. Any reader of the subdivision will find both, regardless of their location in the paragraph ordering. **The staff is not inclined to make this change.**

Singular v. Plural in Headings

The section heading of proposed Section 4525 is in the singular, rather than the plural: "Disclosure to prospective purchaser."

The RPLS Working Group suggests that this looks ungrammatical, because the section applies to all purchasers, not just one.

It is worth recalling that section headings are not part of statutory law. They are an editorial convenience only. The section headings drafted by the Commission have no effect on the law or on the section headings drafted by private publishers. Consequently, they should only be changed if they are not serving the Commission's purpose of clearly setting out and explaining its recommendations.

It is also worth noting that there is a general preference in statutory drafting toward the use of the singular. This practice can be seen in proposed Section 4525, which prescribes the duty of a separate interest owner (singular) even though the statute applies to all separate interest owners (plural). The heading is consistent with that syntax.

The staff does not see sufficient reason to revise its section headings to use plurals. Note that the RPLS Working Group makes similar suggestions about other section headings. See, e.g., Memorandum 2010-36, Exhibit p. 146 (regarding proposed Section 4775). The analysis above applies to those similar suggestions as well, without separate discussion.

Information Provided by Association

Proposed Section 4530 continues an existing provision on an association's duty to provide information required for compliance with proposed Section 4525:

> 4530. (a) Upon written request, an association shall, within 10 days of the mailing or delivery of the request, provide the owner of a separate interest with a copy of the requested items specified in Section 4525.
>
> (b) The items required to be made available pursuant to this section may be maintained in electronic form and requesting parties shall have the option of receiving them by electronic transmission or machine readable storage media if the association maintains these items in electronic form.
>
> (c) The association may charge a reasonable fee for this service based upon the association's actual cost to procure, prepare, and reproduce the requested items.

The RPLS Working Group suggests that subdivision (b) be replaced with language providing that the information be provided to a member by "individual delivery." See Memorandum 2010-36, Exhibit p. 139.

The staff recommends against that change. Under the procedure for "individual delivery," the *association* has the option on whether to deliver a notice electronically (provided that the member has assented to such delivery). By contrast, under proposed Section 4530(b) the *requesting member* has the option (provided that the information exists in electronic form). Thus, the proposed change would have a substantive effect, shifting control of the option from the member to the association. The staff sees no good policy reason for making such a shift.

The RPLS Working Group also suggests adding "delivery" costs to the list of recoverable costs set out in subdivision (c). See Memorandum 2010-36, Exhibit p. 138. As a matter of general policy, that seems sensible. However, we are likely to encounter strong resistance to any change that would shift costs from an association to an individual homeowner. **In the staff's view, this proposal would be too controversial for inclusion in the proposed law. It should be noted for separate study.**

ENFORCEMENT OF DISCLOSURE OBLIGATION

Proposed Section 4540 would continue an existing provision providing a remedy for a violation of the seller disclosure requirements discussed above.

The RPLS Working Group suggests, as a possible future study topic, the consolidation of the various judicial remedies provided in the Davis-Stirling Act, in order to make them more uniform. See Memorandum 2010-36, Exhibit p. 139. **This issue should be noted for possible future study.**

GRANT OF EXCLUSIVE USE OF COMMON AREA

With specified exceptions, a board may not grant exclusive use of part of the common area to a member without the approval of members owning at least 67% of the separate interests in the association. See Section 1363.07.

Proposed Section 4600 would continue that rule, but would add to the existing list of exemptions, as indicated below (with the proposed new exceptions in italics):

> 4600. (a) Unless the governing documents specify a different percentage, the affirmative vote of members owning at least 67 percent of the separate interests in the common interest development shall be required before the board may grant exclusive use of any portion of the common area to a member.
>
> (b) Subdivision (a) does not apply to the following actions:
>
> (1) A reconveyance of all or any portion of that common area to the subdivider to enable the continuation of development that is in substantial conformance with a detailed plan of phased development submitted to the Real Estate Commissioner with the application for a public report.
>
> (2) Any grant of exclusive use that is in substantial conformance with a detailed plan of phased development submitted to the Real Estate Commissioner with the application for a public report or in accordance with the governing documents approved by the Real Estate Commissioner.
>
> (3) Any grant of exclusive use that is for any of the following reasons:
>
> (A) To eliminate or correct engineering errors in documents recorded with the county recorder or on file with a public agency or utility company.
>
> (B) To eliminate or correct encroachments due to errors in construction of any improvements.
>
> (C) To permit changes in the plan of development submitted to the Real Estate Commissioner in circumstances where the changes are the result of topography, obstruction, hardship, aesthetic considerations, or environmental conditions.
>
> (D) To fulfill the requirement of a public agency.
>
> (E) To transfer the burden of management and maintenance of any common area that is generally inaccessible and not of general use to the membership at large of the association.
>
> *(F) To accommodate a disability.*

(G) To assign a parking space, storage unit, or other amenity, that is designated in the declaration as exclusive use common area but is not assigned by the declaration to a specific separate interest.

(H) To comply with governing law.

(c) Any measure placed before the members requesting that the board grant exclusive use of any portion of the common area shall specify whether the association will receive any monetary consideration for the grant and whether the association or the transferee will be responsible for providing any insurance coverage for exclusive use of the common area.

Character of Right Granted Under Proposed Section 4600

The RPLS Working Group is concerned that Section 4600 could be interpreted in more than one way. It refers to granting a member "exclusive use" of part of the "common area." Could such a grant result in the creation of "exclusive use common area" (a defined term in the Davis-Stirling Act)? See Memorandum 2010-36, Exhibit p. 120-21. If so, does the provision impliedly authorize an association to create such property rights, beyond what is designated in the declaration?

The group finds that possibility problematic. "Exclusive use common area" is a defined property right, appurtenant to a separate interest:

> "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.

Proposed Section 4145(a).

- A provision allowing the board to create new exclusive use common area, beyond what is designated in the declaration would raise a number of thorny questions:
- Would the grant be permanent (because it creates a property right that is appurtenant to a separate interest)?
- Should the grant be recorded?
- Could the grant have a problematic effect on lender expectations (or requirements) that the common area be open to the use and enjoyment of all owners?
- Would a grant affect property maintenance obligations? (Under existing law, the association is required to maintain the common area, *except for exclusive use common area*. The responsibility for maintenance of exclusive use common area falls on the individual separate interest owner who has the right to use the exclusive use common area. See proposed Section 4775(a).)

These questions are important. **However, the staff believes they are too complex to be resolved in the current study. Instead, they should be noted for possible future study.**

That said, the Commission's recommendation should not exacerbate the existing uncertainty about the meaning of Section 1363.07. The existing provision is consistent in referring only to "exclusive use" of "common area." It never uses the term "exclusive use common area." The proposed changes to that provision should follow suit.

For that reason, the staff recommends revising proposed Section 4600(b)(G) to eliminate the term "exclusive use common area":

> (b) Subdivision (a) does not apply to the following actions:
> …
> (3) Any grant of exclusive use that is for any of the following reasons:
> …
> (G) To assign a parking space, storage unit, or other amenity, that is designated in the declaration ~~as exclusive use common area~~ for assignment, but is not assigned by the declaration to a specific separate interest.

This should not cause any change in the substantive meaning of the provision, but would avoid reinforcing any implication that the section authorizes the creation of new exclusive use common area.

Effect of Exemptions

Proposed Section 4600 includes a list of exemptions. The RPLS Working Group suggests, as a possible future study topic, examination of whether the exemptions should be adjusted to provide some notification to members when an exempt grant is being made. See Memorandum 2010-36, Exhibit p. 141. **That issue should be noted for possible future study.**

ENFORCEMENT OF SECTION 4600

Proposed Section 4605 would continue relevant portions of an existing provision that provides a civil remedy for a violation of the requirements of proposed Section 4600.

The RPLS Working Group suggests that the provision be deleted as redundant. The group believes that proposed Section 5145 (providing a similar remedy for violation of the statutory member election procedures) could be used

to bring a civil action for a violation of Section 4600. See Memorandum 2010-36, Exhibit p. 141.

The staff is not sufficiently certain that proposed Section 5145 would be a complete substitute for proposed Section 4600. For example, it is clear that proposed Section 5145 could be used to challenge violation of the statutory election procedure, but it is not clear that the provision could also be used to enforce the notice requirements of proposed Section 4600(c):

> Any measure placed before the members requesting that the board grant exclusive use of any portion of the common area shall specify whether the association will receive any monetary consideration for the grant and whether the association or the transferee will be responsible for providing any insurance coverage for exclusive use of the common area.

That provision is not technically within the scope of the Section 5145 remedy.

At worst, proposed Section 4605 would be superfluous and cause no harm. By contrast, deletion of the section could narrow the scope of the existing remedy. **The staff therefore recommends against deleting proposed Section 4605.**

☞ PARTITION OF CONDOMINIUM PROJECT

Proposed Section 4610 would continue an existing provision restricting partition of the common area in a condominium project:

The RPLS Working Group believes that the first sentence of the section should be restated, because it reads like a sentence fragment. See Memorandum 2010-36, Exhibit p. 141.

The sentence reads:

> Except as provided in this section, the common area in a condominium project shall remain undivided, and there shall be no judicial partition thereof.

While the Commission's drafting style typically avoids words like "thereof," the sentence does not appear to the staff to be ungrammatical or particularly unclear. The language could perhaps be made clearer. For example:

> Except as provided in this section, the common area in a condominium project shall remain undivided, and ~~there shall be no judicial partition thereof~~ it shall not be partitioned by the court.

The staff is on the fence about making this change. It would probably be a nonsubstantive clarification. However, our practice in this study has been to preserve existing language except where it is plainly defective or hard to understand. It isn't clear that this provision meets that standard.

The RPLS Working Group suggests, as a possible future study topic, that the Commission examine whether the partition provision should be reformed to reflect the realities of aging condominium projects. **That issue should be noted for possible future study.**

TRANSFER OF SEPARATE INTEREST

Proposed Sections 4625, 4630, 4635, and 4640 would continue existing provisions governing the effect of the transfer of a separate interest in the various CID types.

The RPLS Working Group suggests the following revisions in two of those sections:

> 4630. In a condominium project the common area is not subject to partition, except as provided in Section 4610. Any conveyance, judicial sale, or other voluntary or involuntary transfer of ~~the~~ an owner's separate interest includes the undivided interest in the common area. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the owner's entire estate also includes the owner's membership interest in the association.
>
> 4635. In a planned development, any conveyance, judicial sale, or other voluntary or involuntary transfer of ~~the~~ an 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. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the owner's entire estate also includes the owner's membership interest in the association.

See Memorandum 2010-36, Exhibit p. 142.

If we were writing on a blank slate, it might make sense to make changes along those lines. However, as noted above, the Commission's practice in this study has been to preserve existing language except where it is plainly defective or unclear. **The staff does not believe that these provisions meet that standard.**

TRANSFER OF EXCLUSIVE USE COMMON AREA

Proposed Section 4645 would continue an existing provision declaring that Section 1358 does not preclude a transfer of exclusive use common area that is authorized by the association's declaration.

The RPLS Working Group suggests, as a possible future study topic, that the Commission consider whether that provision is inconsistent with the general theory of CID ownership (to the extent that it might be read to allow a transfer of exclusive use common area to a person who does not own a separate interest). See Memorandum 2010-36, Exhibit p. 142. **That issue should be noted for possible future study.**

SEPARATE INTEREST USE RIGHTS

The proposed law would create a new article that contains provisions limiting the authority of the governing documents to restrict specified uses of separate interest property. See proposed Sections 4700-4755.

Section 4700

Proposed Section 4700 would state the purpose of the article and would make clear that the new article has no effect on other similar provisions outside of the Davis-Stirling Act:

> 4700. This article includes provisions that limit the authority of an association to regulate the use of a member's separate interest. Nothing in this article is intended to affect the application of any other provision that limits the authority of an association to regulate the use of a member's separate interest, including, but not limited to, the following provisions:
>
> (a) Sections 712 and 713, relating to the display of signs.
>
> (b) Sections 714 and 714.1, relating to solar energy systems.
>
> (c) Section 714.5, relating to structures that are constructed offsite and moved to the property in sections or modules.
>
> (d) Sections 782, 782.5, and 6150 of this code and Section 12956.1 of the Government Code, relating to racial restrictions.
>
> (e) Section 12927 of the Government Code, relating to the modification of property to accommodate a disability.
>
> (f) Section 1597.40 of the Health and Safety Code, relating to the operation of a family day care home.

The RPLS Working Group suggests that the first sentence be revised as follows: "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." See Memorandum 2010-36, Exhibit p. 143.

The staff recommends that this change be made. The group is correct in pointing out that the association is not the only entity able to enforce a property use restriction in the association's governing documents. An individual CID member also has the right to bring a civil action to enforce a restriction in the governing documents. See proposed Section 5975 (continuing Section 1354). The sections in the article introduced by proposed Section 4700 limit the enforcement of certain restrictions in the governing documents, regardless of whether they are enforced by the association or an individual member.

The RPLS Working Group also suggests the possibility of expanding the illustrative (and non-exclusive) list of provisions set out in proposed Section 4700(a)-(f). See Memorandum 2010-36, Exhibit p. 143. **The staff solicits specific suggestions for provisions that should be added to the list.**

Noncommercial Signs

Proposed Section 4710 would continue an existing provision that limits the authority of the governing documents to regulate the display of noncommercial signs. Some members of the RPLS Working Group believe that the provision is misguided and needs to be reviewed and improved. See Memorandum 2010-36, Exhibit p. 143. **The staff believes that any narrowing of protected expressive activity would be too controversial for inclusion in the proposed law.**

Pet Ownership

Proposed Section 4715 would continue an existing provision limiting the authority of the governing documents to restrict pet ownership:

> 4715. (a) No governing documents shall prohibit the owner of a separate interest within a common interest development from keeping at least one pet within the common interest development, subject to reasonable rules and regulations of the association. This section may not be construed to affect any other rights provided by law to an owner of a separate interest to keep a pet within the development.
>
> (b) For purposes of this section, "pet" means any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the association and the homeowner.
>
> (c) If the association implements a rule or regulation restricting the number of pets an owner may keep, the new rule or regulation shall not apply to prohibit an owner from continuing to keep any pet that the owner currently keeps in the owner's separate interest

if the pet otherwise conforms with the previous rules or regulations relating to pets.

(d) For the purposes of this section, "governing documents" shall include, but are not limited to, the conditions, covenants, and restrictions of the common interest development, and the bylaws, rules, and regulations of the association.

(e) This section shall become operative on January 1, 2001, and shall only apply to governing documents entered into, amended, or otherwise modified on or after that date.

The RPLS Working Group suggests what it describes as non-substantive changes to the provision. Specifically, they suggest changes to the controlling definition of "governing documents" and the provision governing the date of application of the provision. See Memorandum 2010-36, Exhibit p. 144. Those provisions are at the heart of a contentious dispute about the appropriate scope of the provision. **The staff recommends against making any change to those provisions in the proposed law.**

The RPLS Working Group also suggests that the Commission examine whether proposed Section 4015(e) should be revised to substantively narrow the section's application. *Id*. **The issue should be noted for possible future study.**

Television Antenna or Satellite Dish

Proposed Section 4725 would continue an existing provision limiting the authority of the governing documents to restrict the installation of a television antenna or satellite dish.

The RPLS Working Group proposes that the section be repealed, on the grounds that it is superseded by and inconsistent with controlling federal law. See Memorandum 2010-36, Exhibit p. 144. This same basic point was discussed in a prior memorandum, in the context of a provision discussing the character of outside communications wiring. See Memorandum 2010-47, p. 16. In that memorandum, the staff concluded that the issue of federal preemption was too complex to be resolved in the current study and recommended that the language relevant to that issue be preserved without change for now (pending a possible future study of the issue). **The staff makes the same recommendation with respect to proposed Section 4725.** It should not be deleted in the proposed law. Rather, the issue of federal preemption should be noted for possible future study.

Use of "Void" in Property Use Provisions

There are three provisions of the proposed law, which continue existing language, that expressly "void" certain types of provisions in an association's governing documents:

> **§ 4725 (UNCHANGED). Television antenna or satellite dish**
>
> 4725. (a) Any covenant, condition, or restriction contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, a common interest development that effectively prohibits or restricts the installation or use of a video or television antenna, including a satellite dish, or that effectively prohibits or restricts the attachment of that antenna to a structure within that development where the antenna is not visible from any street or common area, except as otherwise prohibited or restricted by law, is *void* and unenforceable as to its application to the installation or use of a video or television antenna that has a diameter or diagonal measurement of 36 inches or less.
>
> …
>
> **§ 4730 (REVISED). Marketing restriction**
>
> 4730. (a) Any governing document of an association that arbitrarily or unreasonably restricts an owner's ability to market the owner's interest in a common interest development is *void*.
>
> …
>
> **§ 4755 (UNCHANGED). Low water-using plants**
>
> 4755. (a) Notwithstanding any other law, a provision of the governing documents shall be *void* and unenforceable if it does any of the following:
>
> …

(Emphasis added.)

Duncan McPherson objects to the use of the word "void" in these provisions. He is concerned that the concept of a provision being "void" could be interpreted too broadly. Rather than just invalidating the portion of the provision that is at odds with the statute, it could be understood as invalidating *the entire provision* (including content that is not at odds with any statutory mandate). See Memorandum 2010-36, Exhibit p. 65.

The staff sees the issue differently. The problem noted by Mr. McPherson seems to result from a lack of precision in describing what exactly would be voided, rather than from use of the word "void."

For example, proposed Section 4275 is very precise in defining what would be voided by that provision: a "covenant, condition, or restriction contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, a common interest development" that would have the prohibited effect. That seems precise enough to target and invalidate only the specific language that violates the statute's prohibition.

Similarly, proposed Section 4755 seems sufficiently precise in targeting a "provision" of the governing documents that has the specified prohibited effect. The word "provision" is fairly elastic and should be understood, in this context, to mean only the language having the prohibited effect.

By contrast, proposed Section 4730 appears to be overbroad. It purports to void a "governing document" that has the prohibited effect. The defined term "governing document" refers to a particular type of document (e.g., the declaration). Consequently, the language used in proposed Section 4730 could be read to invalidate the entire document, rather than just an offending provision of that document. That broad an effect is not necessary to achieve the statute's purpose.

The staff recommends that proposed Section 4730 be revised to state its purpose more precisely, thus:

> 4730. (a) Any provision of a governing document ~~of an association~~ that arbitrarily or unreasonably restricts an owner's ability to market the owner's interest in a common interest development is *void*.
>
> …

(The proposed deletion of "of an association" would be consistent with other similar changes deleting that phrase when it is unnecessary.)

MODIFICATION OF SEPARATE INTEREST

Proposed Section 4760 would continue and broaden an existing provision governing modification of a separate interest. Most of the existing provision only applies to a separate interest with boundaries that are "contained within a building." See Section 1360(a). One paragraph only applies to a separate interest in a condominium project. See Section 1360(a)(2). Proposed Section 4760 would broaden the provision to apply to *any* separate interest. The RPLS Working Group supports that broadening of the provision. See Memorandum 2010-36, Exhibit p. 144.

Duncan McPherson objects to the last sentence of proposed Section 4760(a)(2)(D), which he sees as unnecessary. See Memorandum 2010-36, Exhibit p. 67. That sentence, and its relevant context, read as follows:

> 4760. (a) Subject to the governing documents and applicable law, a member may do the following:
> …
> (2) Modify the member's separate interest, at the member's expense, to facilitate access for persons who are blind, visually handicapped, deaf, or physically disabled, or to alter conditions which could be hazardous to these persons. These modifications may also include modifications of the route from the public way to the door of the separate interest for the purposes of this paragraph if the separate interest is on the ground floor or already accessible by an existing ramp or elevator. The right granted by this paragraph is subject to the following conditions:
> (A) The modifications shall be consistent with applicable building code requirements.
> (B) The modifications shall be consistent with the intent of otherwise applicable provisions of the governing documents pertaining to safety or aesthetics.
> (C) Modifications external to the dwelling shall not prevent reasonable passage by other occupants, and shall be removed by the member when the separate interest is no longer occupied by persons requiring those modifications who are blind, visually handicapped, deaf, or physically disabled.
> (D) Any member who intends to modify a separate interest pursuant to this paragraph shall submit plans and specifications to the association for review to determine whether the modifications will comply with the provisions of this paragraph. *The association shall not deny approval of the proposed modifications under this paragraph without good cause.*

(Emphasis added.)

The staff sees Mr. McPherson's point. The provision already states, at the outset, that a modification *may* be made if it meets the specified criteria. Given that, there is no real need to add the italicized sentence.

Nonetheless, the staff recommends that the sentence be retained. At worst, it is superfluous. At best, it emphasizes the main thrust of the provision, so that there is no misunderstanding. Furthermore, if the sentence were deleted, some readers might misconstrue that deletion as a substantive change, somehow granting the association greater discretion in these decisions than they actually possess. That could lead to misunderstanding and unnecessary disputes.

Proposed Section 4765 would continue an existing provision stating basic requirements for a decision on a proposed modification of a member's separate interest. Comments on this provision are discussed below.

Primacy of Controlling Law

Proposed Section 4765(a)(3) would provide as follows:

> Notwithstanding a contrary provision of the governing documents, a decision on a proposed change may not violate any governing provision of law, including, but not limited to, the Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), or a building code or other applicable law governing land use or public safety.

Duncan McPherson suggests that this provision would not be necessary if a general provision were added to the proposed law, declaring the primacy of controlling law over an association's governing documents. See Memorandum 2010-36, Exhibit p. 66.

Such a provision has been recommended by the staff. See Memorandum 2010-48, pp. 3-5. **However, it is not clear that such a provision would make proposed Section 4765(a)(3) unnecessary.**

Proposed Section 4765(a)(3) requires that the association's *decision* not violate governing law. It is possible that an association could make a decision that is unlawful, without expressly relying on an unlawful provision of its governing documents. In that case, a provision requiring that the governing documents be consistent with controlling law would not be a complete substitute for proposed Section 4765(a)(3).

For example, an association might disapprove a legally required disability accommodation, exercising general aesthetic discretion granted by the governing documents. There is nothing unlawful about a grant of general aesthetic discretion. It is the exercise of that discretion that would be unlawful.

For that reason, proposed Section 4765(a)(3) seems to serve a useful function, even if the Commission adds a general provision declaring the primacy of controlling law over inconsistent provisions of the governing documents.

Drafting Problem

Duncan McPherson points out a drafting problem in proposed Section 4765(a)(5). See Memorandum 2010-36, Exhibit p. 67.

That paragraph would delete the words "of the association" from the existing language, as follows:

> If a proposed change is disapproved, the applicant is entitled to reconsideration by the board ~~of the association~~ that made the decision, at an open meeting of the board. This paragraph does not require reconsideration of a decision that is made by the board or a body that has the same membership as the board, at a meeting that satisfies the requirements of Article 2 (commencing with Section 4900) of Chapter 6. Reconsideration by the board does not constitute dispute resolution within the meaning of Section 5905.

That change was intended as a nonsubstantive deletion of superfluous language. Many sections of the Davis-Stirling Act use the words "of the association" needlessly. Unfortunately, in this instance, the deletion distorted the meaning of the provision.

The existing language provides for a board rehearing of a disapproval decision, unless it was the board itself that made the decision. The proposed language confuses that meaning (apparently requiring rehearing by the board *that made the decision*, unless it was the board that made the decision).

The staff recommends that proposed Section 4765(a)(5) be revised as follows:

> If a proposed change is disapproved, the applicant is entitled to reconsideration by the board ~~that made the decision~~, at an open meeting of the board. This paragraph does not require reconsideration of a decision that is made by the board or a body that has the same membership as the board, at a meeting that satisfies the requirements of Article 2 (commencing with Section 4900) of Chapter 6. Reconsideration by the board does not constitute dispute resolution within the meaning of Section 5905.

That would state the rule concisely and without ambiguity.

Architectural Review During Period of Developer Control

The RPLS Working Group suggests a topic for possible future study by the Commission: Should the procedure specified in proposed Section 4765 be modified during the period of developer control (when the developer still controls the board and other instrumentalities of the association)? See

Memorandum 2010-36, Exhibit pp. 145-46. **The staff recommends that this issue be noted for possible future study.**

MAINTENANCE OBLIGATIONS

General Rules

Proposed Section 4775 would continue the existing general rules on maintenance obligations in a CID:

> 4775. (a) Unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, or maintaining the common area, other than exclusive use common area, and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to the separate interest.
>
> (b) The costs of temporary relocation during the repair and maintenance of the areas within the responsibility of the association shall be borne by the owner of the separate interest affected.

The RPLS Working Group suggests revising proposed Section 4775(a) as follows:

> Unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, or maintaining the common area, other than exclusive use common area, and the owner of each separate interest is responsible for maintaining ~~that~~ the owner's separate interest and any exclusive use common area appurtenant to ~~the~~ that separate interest.

See Memorandum 2010-36, Exhibit p. 146.

As noted before, the Commission's approach in this study is to preserve existing language except where that language is clearly defective or unclear. This provision seems correct and clear as drafted. **The staff therefore recommends against making the suggested change.**

Wood Destroying Pests

Proposed Section 4780 would continue existing rules on maintenance obligations relating to wood destroying pests, without substantive change, as follows:

> 4780. (a) In a community apartment project, condominium project, or stock cooperative, unless otherwise provided in the declaration, the association is responsible for the repair and

maintenance of the common area occasioned by the presence of wood-destroying pests or organisms.

(b) In a planned development, unless a different maintenance scheme is provided in the declaration, each owner of a separate interest is responsible for the repair and maintenance of that separate interest as may be occasioned by the presence of wood-destroying pests or organisms. Upon approval of the majority of all members of the association, pursuant to Section 4065, that responsibility may be delegated to the association, which shall be entitled to recover the cost thereof as a special assessment.

Duncan McPherson notes that the existing provision on repair and maintenance related to wood destroying pests may be grounded on an incorrect premise. Specifically, the statutory allocation of maintenance responsibilities may be based on an assumption that separate interests are always *detached* in a planned unit development and always *attached* in a community apartment project, condominium project, or stock cooperative. As he points out, that is not the case. See Memorandum 2010-36, Exhibit p. 68. The statutory definitions of those types of development do not require either attachment or detachment.

In addition to this point made by Mr. McPherson, the staff has long seen a more fundamental problem in this provision. Substantively, the provisions are mostly redundant. Structurally, the provision is confusing.

Redundancy

Proposed Section 4775, discussed earlier, provides that the association has general responsibility for repair and maintenance of the common area and a member has general responsibility for repair and maintenance of that member's separate interest (and any appurtenant exclusive use common area).

Proposed Section 4780 purports to state special rules for repair and maintenance necessitated by the presence of wood destroying pests. But, in fact, it mostly restates the substance of the general rules provided in Section 4775:

- Proposed Section 4780(a) states that the association has responsibility for maintaining the common area.
- The first sentence of proposed Section 4780(b) states that an owner is responsible for maintenance of the owner's separate interest.

Both of those provisions duplicate the substance of proposed Section 4775.

It is only the second sentence of proposed Section 4780(b) that states any new substance. It authorizes the members to assign responsibility for wood pest

maintenance to the association, which can then recover its costs through a special assessment.

Confusing Implications

To make matters worse, the scope limitations on the redundant provisions in proposed Section 4780 lead to confusing implications:

- Subdivision (a) states that it only applies to a community apartment project, condominium project, or stock cooperative. Does this mean that a planned development is governed by a different rule (i.e., the individual members are responsible for maintenance of the common area)?
- Subdivision (b) is limited to a planned unit development. Does this mean that a community apartment project, condominium project, or stock cooperative is subject to a different rule (i.e., the association is responsible for maintenance of the separate interests)?

Those implications are contrary to the express rules stated in proposed Section 4775.

Conclusion

In the staff's view, proposed Section 4780 is deeply flawed. Most of its content is redundant and therefore unnecessary. The expressed scope limitations create negative inferences that lead to significant unanswered questions about the meaning of the provision.

In the first iteration of the proposed law, the Commission attempted to resolve these problems by entirely deleting the redundant provisions discussed above. The only provision that was carried forward was the second sentence of proposed Section 4780(b). That provision would have been generalized so that it applied in any CID, thus:

> Upon approval of the majority of all members (Section 4065), responsibility for the repair and maintenance of the separate interests occasioned by the presence of wood-destroying pests or organisms may be delegated to the association, which may recover its costs through a special assessment.

See *Statutory Clarification and Simplification of CID Law*, p. 114 (Dec. 2007).

That approach still appears to be a sensible way to resolve the problems with existing Section 1364(b). However, that change was deemed too substantive and potentially controversial to be included in the proposed law.

Unless we receive strong evidence of consensus support for such a change, the staff recommends leaving the provision as it is for now and noting the problems for future study.

Temporary Relocation

Proposed Section 4785 would continue an existing provision authorizing an association to compel the temporary removal of a CID occupant as required for wood pest treatment.

The RPLS Working Group questions whether that existing authority should be narrowed to only apply in circumstances where the association has responsibility for treatment. Said another way, should the association have the authority to relocate occupants to facilitate wood pest treatment that is conducted by individual members? See Memorandum 2010-36, Exhibit pp. 146-47. The group goes on to suggest that it might be appropriate to impose mandatory arbitration as a way of resolving member disputes about whether and how to treat wood pests affecting their separate interests (e.g., in an attached row of townhomes).

Those issues are too complex to be addressed in the proposed law. **They should be noted for possible future study.**

☞ **Maintenance Terminology**

The RPLS Working Group notes that a number of provisions use similar, but slightly different language in describing the repair and maintenance obligations of an association. Memorandum 2010-36, Exhibit p. 125. For example:

- Proposed Section 4177(a): "repair or replacement of, or additions to, those major components that the association is obligated to maintain"
- Proposed Section 4178: "repair, replace, or restore those major components"
- Proposed Section 4275(b)(3): "maintenance, repair, or replacement of roofs or other building components"
- Proposed Section 4775(a): "repairing, replacing, or maintaining the common area"
- Proposed Section 4775(a): "maintaining that separate interest"
- Proposed Section 4775(b): "repair and maintenance of the areas"
- Proposed Section 4780(a): "repair and maintenance of the common area"

- Proposed Section 4780(b): "repair and maintenance of that separate interest"
- Proposed Section 4810(c) & (d): "maintain or repair"
- Proposed Section 5300(a)(4): "repairs or replacement of any major component"
- Proposed Section 5300(a)(5): "repair, replace, or restore any major component"
- Proposed Section 5300(a)(6): "repair or replace"
- Proposed Section 5300(a)(7): "repair, replacement, or additions to those major components that the association is obligated to maintain"
- Proposed Section 5510(b): "repair, restoration, replacement, or maintenance of, major components that the association is obligated to repair, restore, replace, or maintain"
- Proposed Section 5550(a) & (b): "major components that the association is obligated to repair, replace, restore, or maintain"
- Proposed Section 5565(b): "repair, replace, restore, or maintain the major components"
- Proposed Section 5570(a)(3): "repair, replace, or restore those major components"
- Proposed Section 5570(a)(7): "major component repair and replacement"
- Proposed Section 5570(b)(4): "replacement or repair"
- Proposed Section 5610(b) & (c): "repair or maintain the common interest development"
- Proposed Section 6100(a): "maintain or repair"
- Proposed Section 6150(a): "maintain or repair"

As a general matter, it would be good to impose greater uniformity on that language, to the extent it can be done without changing any substantive meaning. That could probably be easily done where differences are just the product of word ordering or grammatical syntax (e.g., "repair and maintenance" versus "maintain or repair").

This task would be more difficult where different terms are used. It is not entirely clear that all of the words used are synonyms. In other words, could all of the provisions above refer to maintenance, repair, replacement, restoration, and additions, without causing any problematic change in meaning?

Given the uncertainty about whether the language could be standardized without changing meaning, the staff is hesitant to do so. **Nonetheless,**

suggestions on how to standardize the language without causing any problems are invited.

Communication Wiring

Proposed Section 4790 would continue an existing provision guaranteeing member access necessary to maintain telephone wiring in the common area, but would broaden the provision to include all communication wiring (not just telephone wiring).

As discussed in a prior memorandum, the staff recommends that the original scope of the provision (i.e., telephone wiring) be restored. See Memorandum 2010-47, p. 16.

In addition, the RPLS Working Group suggests relocating proposed Section 4790 to the article containing provisions that limit the governing documents' ability to restrict member property use. See Memorandum 2010-36, Exhibit p. 147.

There is a reasonable argument for making the suggested change. The principle effect of proposed Section 4790 is to guarantee a particular use of the common area (access to the telephone wiring). However, there is also a good argument for preserving the current location of proposed Section 4790, with other provisions relating to maintenance.

The staff does not believe that there is a clear enough benefit to moving the provision to justify making the change.

Respectfully submitted,

Brian Hebert
Executive Secretary