Study H-858 December 10, 2012

Third Supplement to Memorandum 2012-48

Common Interest Development Law: Commercial and Industrial Subdivisions (Comments on Tentative Recommendation)

The Commission has received another letter commenting on its tentative recommendation on *Nonresidential Subdivisions* (Aug. 2012). That letter, from Art Bullock, is attached as an Exhibit.

In his letter, Mr. Bullock strongly criticizes the tentative recommendation on both its substance and the process by which it was developed (comparing the Commission's work on this topic to *Dred Scott v. Sandford*, 60 U.S. 393; 15 L. Ed. 691 (1857)).

Mr. Bullock urges the Commission to defer any final decision on the proposed law at this time, in order to avoid unintended consequences, needless litigation, and the loss of important protections that CID property owners presently enjoy.

Many of Mr. Bullock's legal arguments seem to be embedded in a dispute about whether R-Ranch (described in the First Supplement to Memorandum 2012-48) is a "common interest development" that is governed by the Davis-Stirling Act. In order to avoid being drawn into that dispute, the staff will not discuss or offer an opinion on the contentions in Mr. Bullock's letter that may be at issue in the dispute.

There are two substantive issues in Mr. Bullock's letter that the staff will explore in more detail below.

Effect of the Proposed Law on Residential Developments

One of the key principles in this study is that the proposal to broaden the scope of existing exemptions to the Davis-Stirling Act and the Subdivided Lands Act would have no effect on a development that permits *any* residential use whatsoever. Thus, if a CID has even a single residential owner, it would not fall

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.

within the exemptions and would be fully covered by the Davis-Stirling Act and Subdivided Lands Act.

Mr. Bullock believes that the Commission is mistaken about the effect of the tentative recommendation, and that it would have significant effects on residential CIDs.

His argument seems to be that the structure of the proposed definition of "residential" would create a presumption that all CIDs are nonresidential, unless proven otherwise. This could place a burden on residential property owners to produce evidence that the recorded declaration permits residential use. That may not always be possible, depending on the phrasing and content of a declaration.

Fortunately, the structural revisions proposed in the First and Second Supplements to Memorandum 2012-48 would seem to address Mr. Bullock's concern. The revised language would define the meaning of "nonresidential" directly. A nonresidential CID would be one in which residential use is *prohibited*, by law or a recorded declaration. See Second Supplement to Memorandum 2012-48, pp. 7-8. There would be no requirement for homeowners to prove that residential use is permitted. Instead, those who wish to characterize a CID as nonresidential would need to prove the existence of a prohibition.

Definition of "Residential" Use

Mr. Bullock believes that the term "residential use" should be defined, in order to avoid litigation (and unanticipated substantive consequences) that might arise if differing meanings are assigned to the term. See Exhibit pp. 10-12.

The common understanding of the term seems fairly clear. In its first listed meaning, the Merriam-Webster Online Dictionary defines the adjective "residential" to mean "used as a residence." The first listed definition of the noun "residence" is:

> a: the act or fact of dwelling in a place for some time
> b: the act or fact of living or regularly staying at or in some place for the discharge of a duty or the enjoyment of a benefit

Id. There are no stated limitations on the nature of the act or its duration. Taken together, those definitions seem to encompass the Commission's intended meaning. (There was no intention that residential use be limited to a person's legal domicile).

However, Merriam-Webster's third definition of the noun "residence" is "a *building* used as a *home*." *Id*. (emphasis added). That could imply a more formal and permanent occupation.

It would be best that the proposed law be unambiguous as to its meaning, to avoid unnecessary and costly litigation, which could lead to unintended results. If the Commission agrees, it could add a definition of the term "residential use." For example, the proposed law might provide that: "'Residential use' means use as a dwelling place, for any period of time." Alternatively, the substance of the short-term use exception could be integrated into the definition, thus: "'Residential use' means use as a dwelling place, for more than 60 days per year.'

If the Commission wishes to define "residential use" for purposes of the proposed law, it would probably make sense to discuss the matter further at the next meeting, before approving a final recommendation. That would provide time to solicit public input on the appropriate wording.

Another Option

Even if the Commission decides to slow down or set aside its attempt to expand the scope of the existing "commercial or industrial" development exemptions, to encompass all "nonresidential" developments, there would still be value in making a narrower reform: clarify the meaning of "commercial" use.

Specifically, it would probably be independently helpful to make clear that "commercial" use includes:

> The rental of apartments in a separate interest that contains three or more apartment units or the operation of any other type of commercial facility that provides residential space for its clients, including, but not limited to, a hotel, skilled nursing facility, or assisted living facility.

That piece of the proposal could be severed and advanced separately.

The staff is not recommending that approach at this time, but is simply pointing out the possibility, should it later become advantageous.

Respectfully submitted,

Brian Hebert
Executive Director

A Public Comment Response To MM12-48s1

Dear Brian Hebert, Steve Cohen, CLRC staff, and CLRC Commission,

Thank you much for the work that you do year after year to improve legislation. It is much appreciated.

This is a public comment response to MM12-48s1, issued last week for a decision next week.

In his 2012Sep12 letter, Ed Weber timely and accurately described for you some fundamental problems with proposed law H-858 for the Davis-Stirling Act (DS). The 2012Nov27 Supplement (MM12-48s1) belatedly and briefly considered his suggested changes to recommendations now in MM12-48. MM12-48s1 addresses part of the problems that Ed Weber raised, though not the fundamental aspects of the problems.

After careful study of your supplemental response, the final recommendation, and the prior supporting public record documents, it appears you have misunderstood his issues, necessitating this explanation.

A major problem with H-858 is that after stating its intent to not alter Davis-Stirling scope, the law's text does so. As we know, under California's statutory construction principles, Courts must ignore intent outside the law if the words of the law clearly state otherwise. The explanation herein focuses on the actual words.

MM12-48s1 only begins to reflect the reality that there are many different and innovative forms of common interest developments (CIDs), some created decades before Davis-Stirling, to which DS applies. To prevent unintended scope restrictions, H-858 should accommodate the full range of DS CIDs.

An important criteria for proposed legislation is to avoid unintended consequences. Because of the misunderstanding and resulting lack of responsiveness, H-858 has major unintended consequences. H-858 will provoke needless lawsuits because the law's words do not match scope, intent, and explanations.

This letter articulates the unintended consequences by explaining more thoroughly the fundamental issues in the wording, and suggests specific fixes. The suggestions would stop the unintended impact while having no impact on special cases that factually need relief from DS regulations, which is the stated scope of H-858.

This extended analysis concludes that H-858 and its record has been flawed to the point that proceeding as currently framed would detract from CLRC's well-deserved reputation for integrity in democratic lawmaking.

The best alternative now is that articulated by Brian Hebert's last paragraph in last week's supplement (MM12-48s1) "to postpone approving a recommendation, in order to provide more time to consider the issues raised above (and any new issues that might surface in future public comment and deliberations)."

H-858 is not ready for prime time. It would be unwise to proceed with review until remedial work is done.

Unless stated otherwise, section (§) references herein are to the Civil Code, using pre-2012Aug numbers (§1350-§1378) and new section numbers (§4000-§6150) scheduled to go into effect in 2014.

1. The core problem is that H-858 introduces a new frame of reference inconsistent with existing law and adds new jurisdictional requirements for all Davis-Stirling developments.

Of several objections raised by Ed Weber, his core objection seems to be H-858's new §4203(a) and (c).

> **§4203(a).** For the purposes of this section, "residential common interest development" means a common interest development in which residential use is permitted by both law and by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the common interest development is located.
>
> **§4203(c).** For the purposes of Section 4202, "nonresidential common interest development" means any common interest development that is not a residential common interest development.

The gist of the combination of (a) and (c) is that for the first time, to get all DS protections, and avoid being excepted under §4202, all CIDs must now prove that 'residential use', undefined, is specifically permitted by 'law' and is also specifically permitted by CC&Rs.

If I understand his position correctly, as expressed in the public record and forwarded email trail of informal communication, Ed Weber makes 2 key points about this unusual combination. First, it removes DS protections from CIDs that H-858 memoranda claim to be outside the scope of the legislation.

Second, the inherent ambiguity in the wording of the new combination will lead aggressive attorneys to launch more lawsuits to remove Davis-Stirling protections, using Owner assessment money to sue Owners to remove Owner rights that are inconvenient to the corporation though critical to Property Owners.

2. The 2008 *Golden Rain Foundation* case clarifies several key points.

To fully understand these 2 points, your attention is invited to the recent Court of Appeal case, *Golden Rain Foundation v. Franz* (2008) 163 Cal.App.4th 1141 (modified and rehearing denied, review denied) *(GRF)*.

This instructive case concerned a stock cooperative CID. Court of Appeal described Leisure World as "a prominent senior citizen community". Golden Rain Foundation (GRF) "is a California nonprofit corporation formed in 1961" (24 years before DS was enacted in 1985). GRF has "9,000" "members". For many years, Leisure World explicitly operated under DS jurisdiction. For example, it sent annual letters, stating that it was required to send them by Davis-Stirling. The letters required that any member contemplating legal action against the corporation must follow DS Alternative Dispute Resolution requirements.

At some point, Leisure World members realized they were not getting basic information. They requested the relevant records under Davis-Stirling. The corporation refused to provide the records. Individuals filed in small claims court to get the records. They won judgments for the documents and money damages for their trouble. The Corporation then sued the individual members in Superior Court. It claimed the corporation was not subject to DS jurisdiction and thus had no responsibility to provide the requested documents.

As Defendants, members had to spend their time and money to hire attorneys to protect their Davis-Stirling rights. They found themselves opposed by more than GRF. They were also opposed by a series of corporations involved in the development, who later filed separate amicus briefs to support GRF.

Superior Court ordered GRF to produce the documents. The corporation did so. And kept suing.

In the lawsuit, the corporation took an 'everything-but-the-kitchen-sink' approach. It raised multiple arguments why DS did not apply. Superior Court tediously, and expensively, reviewed the long list of arguments. It concluded that Leisure World was a stock cooperative under DS, and that its 9,000 senior citizens/members had DS rights. Corporation appealed. Court of Appeal tediously, and expensively, reviewed the long list of arguments. It affirmed the Superior Court decisions. It too found that Leisure World satisfied all DS criteria for a stock cooperative. Thus Davis-Stirling applied.

Court of Appeal's description of the legal dynamics is relevant to Ed Weber's explanation.

> "GRF and its amici curiae offer a multitude of arguments why the declaration of trust cannot be a declaration pursuant to section 1353. None are convincing." *GRF, supra,* 1152.
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> "GRF exalts form over substance." *GRF, supra,* 1149.
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> "GRF unpersuasively contends it does not manage Leisure World{.}" *GRF, supra,* 1149.
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> "GRF...relies upon a host of practice guides, treatises, and regulations suggesting that declarations typically contain CC&R's. That may be so. But the plain language of section 1353 does not require pre-1986 declarations to contain CC&R's." *GRF, supra,* 1153.
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> "Next, GRF contends that reading section 1353 as permitting pre-1986 declarations to lack CC&R's will wreak havoc by suddenly transforming property across the state into common interest developments. Not so." *GRF, supra,* 1154.
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> "GRF contends the declaration...was recorded to satisfy...FHA and other lenders, not with the intention of creating a common interest development. ... Davis-Stirling...conditions {CID} status on the recording of a declaration, not the subjective intention behind the recordation." *GRF, supra,* 1154.
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> "GRF and its amici curiae contend the declaration...conflicts with...Davis-Stirling provisions{.} ... The amici curiae also claim the Davis-Stirling Act allows {CID} members to amend their declaration, whereas Leisure World residents...have no amendment rights{.} ... There is no conflict." *GRF, supra,* 1154.

Notice the pattern of legal dynamics.

After years of DS operations, members wanted basic records and won a small claims judgment to get them.

After the corporation released the records per court order, it continued to sue, using members' money to sue the members who got the records.

Owners were paying both sides of a lawsuit whose focus was to remove their Davis-Stirling rights.

Let's keep this case and discussion in context.

The Davis-Stirling Act is social justice legislation to protect property rights.

It exists because of major property rights abuses and injustices to Homeowners and Property Owners.

Davis-Stirling was designed to correct those abuses and injustices.

Since enactment in 1985, DS has repeatedly been expanded to specify basic requirements like open meetings, records transparency, insurance, reserves, fair elections, annual budgets in advance, notices, etc.

Those who financially benefit from reducing those rights have repeatedly argued to reduce DS scope.

Now more than triple its original size, DS continues to articulate fundamental protections for the roughly 25% of the California population protected by it.

For *GRF,* does any Commissioner or staff member think the majority of the 9,000 senior citizens/members directed their board to use Owner money to sue Owners to remove Owners' property rights under DS?

For this case and many others, Ed Weber has correctly described the dynamics involved in the corporation's aggressive legal pursuit to remove individuals' long-established Davis-Stirling rights.

How do those dynamics and this case affect proposed §4203? Let's connect the dots.

§4203(a) requires that <u>every</u> DS CID prove that its CC&Rs specifically allow residential use. Else, that CID is reclassified as a nonresidential CID and is automatically exempt from key provisions in 31 DS sections.

How can the 9,000 Leisure World senior citizens/members meet that burden of proof? They have no CC&Rs.

In Court, GRF argued it was not subject to DS because there were no CC&Rs. Court of Appeal read the law, and held the obvious--DS does not require CC&Rs. **"{§}1353 does not require a pre-1986 declaration to contain CC&R's or much of anything else, as already shown."** *GRF, supra,* 1152. (emphasis added).

GRF and its amici curiae partners will probably be delighted with the proposed §4203(a). Having lost its attempt to remove DS rights because DS does not require CC&Rs in pre-1986 developments, GRF would now have a DS law requiring CC&Rs for all CIDs, or else 31 key DS provisions no longer apply.

DS applies to developments formed before the law was enacted. *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361. Some of these developments were formed decades before DS. Some have no CC&Rs. Under H-858, all these developments would instantly lose DS protection, and be reclassified as 'nonresidential development'--even if they have been a residential development for 100 years.

Current H-858 should not be pursued because among other things, it requires CC&Rs in pre-1986 CIDs.

3. Where did this dramatic word change originate?

Those who know DS cases in the appellate courts may find the H-858 record out of touch with those cases.

Unlike the appellate cases, the record for H-858 and the closely related H-856 are dominated by the perspective and claims of those who would legally and financially benefit by removing DS protections.

Noticeably absent in the record is the voice of the tens of thousands of people who would lose Davis-Stirling rights under H-858's new jurisdictional requirements--with one exception, Ed Weber.

The silence is apparently because staff descriptions of H-856 and H-858 have repeatedly--and incorrectly--claimed the revisions do not apply to residential CIDs.

H-856's scope memorandum MM08-63, released 2008Dec2, in the only first-page sentence in bold type, stated that **"The study will not propose any revision to any aspect of CID law affecting residential CIDs."**

The final recommendation of H-858, issued 2 weeks ago on 2012Nov20, reported the same on pg 1-2.

"The Commission has not received any public comment in response to the tentative recommendation. This is not too surprising, as...many of the groups that have actively participated in the Commission's

prior study of common interest development law are primarily interested in the effect of that law on residential Property Owners. **This study would have no effect on any subdivision that contains a residence, and so is likely to be of little concern to residential stakeholders.**" (emphasis added).

Seven days after Final Recommendation MM12-48, CLRC corrected itself and acknowledged that it had received a timely submission from Ed Weber. Though Ed Weber's public comments were submitted almost 2 months before the close of the public comment period, they fell through the cracks and had not been responded to. The possibly rushed MM12-48s1 response did not reflect an understanding of Ed Weber's points and did not change any proposed wording to accommodate Ed Weber's warnings and constructive suggestions. MM12-48s1 did propose other changes noticed in the process of responding to Ed Weber.

Issues raised by Ed Weber were larger than MM12-48s1 acknowledged, and deserved a more complete response. Ed Weber wrote with extensive experience on the legal issues involved and the corporate attorney vs. property owner dynamic that he sees as driving H-858 and its discussion. The MM12-48s1 response inaccurately concluded the new law does not affect recreation developments, so no change was warranted.

Possibly staff discounted Ed Weber's position as extreme. He seems to see the new ambiguity in H-858 as a 'Full Employment For Corporate Attorneys Act'. He expects the expense to be borne by unsuspecting Property Owners. He expects attorneys to seize new wording to file and provoke unnecessary lawsuits, and deprive Property Owners of well-established and cherished DS property rights. He sees H-858's wording as driven by a fundamental conflict between the financial interests of corporate attorneys and Property Owners. He expects H-858 to injure the people DS was designed to protect. In making his points, he voiced the passion of countless Property Owners who ardently protect their rights and their land.

If this description of his position is correct, the evidence supports his view, for several reasons.

4. As exception legislation, H-858 is improperly structured.

Exceptions to broad social legislation are narrowly drawn, to prevent opening a wide crack where those disliking the law can escape its requirements.

H-858's history and predecessors started that way, then morphed into its opposite.

At first the DS exception was for shopping centers and property zoned industrial. MM11-29 pg 20.

Then the exception was expanded to include property zoned commercial.

Then the exception was expanded to include property limited to commercial and industrial uses by CC&Rs.

Current §1373/§4202 occurred at that point. It follows the normal exception-legislation pattern, is narrowly drawn, and restricts exceptions to CIDs restricted by zoning or CC&Rs to commercial or industrial uses.

H-856's scope memorandum used a phrase, 'nonresidential developments', which does not exist in current DS. This new phrase was merely "a shorthand for the more detailed language of {§}1373(a)" MM08-63, pg 7.

Thus the phrase 'nonresidential developments' at first meant nothing more than the current narrowly-drawn exception conditions for zoning/CC&R limitations to industrial or commercial uses.

H-858 was launched in 2011 when the "Commercial Stakeholder Group" claimed 3 more types of CIDs needed relief, though they did not satisfy the narrowly-drawn exceptions. MM11-29, pg 2.

(1) A "parking condominium" where parking spaces were the separate lots or interests.
(2) A "storage condominium" where storage spaces were the separate lots or interests.
(3) A marina where boat slips were the separate lots or interests.

At that point, staff began using another new phrase, "nonresidential personal use subdivisions" (emphasis added) to describe these 3 special cases, which were not Commercial & Industrial (C&I) developments.

Thus at the time of H-858's scope memorandum MM11-29, H-858 was still dedicated to narrowly drawn exceptions--C&I CIDs, plus 3 special cases– parking/storage condominiums, and marinas.

After that, under the false assurance that the new language does not affect residential CIDs, the record pattern of narrowly-drawn exceptions totally shifted frame and morphed into its opposite.

Instead of narrowly defining the exceptions, the new frame narrowed the main body of law, and threw everything else into a catch-all exception category of 'all-other'. This is the language of §4203(a) and (c).

This problem was compounded by defining 'residential CIDs' with circular logic, an ambiguous tautology.

Not content with more narrowly conceived 'residential developments', proponents then added more jurisdictional requirements never before required by DS CIDs--CC&Rs and the 'law' (not just zoning laws) must specifically permit 'residential use'. That requirement was also undefined.

Not content with even that increased narrowness of DS jurisdiction and expanded exceptions, H-858 language added 3 more narrowing conditions that limited DS jurisdiction even more, under §4203(b).

5. H-858 approach changed from scope to proposal.

Note the total change of approach from scope to proposal. The object being narrowed shifted from exceptions needing relief to narrowing the main body of DS jurisdiction, and throwing everything else into a suddenly greatly expanded exception category.

This is strange. Some would say such a shift was unethical. It certainly was outside the committed scope.

Ed Weber, who apparently read past the cover letter, called 'foul', and properly so.

This change of approach is a disturbing and unjustified shift . It would be unwise for the Commission to proceed with H-858's improperly-drawn exception language. Its approach, and unjustified shift from "narrow exceptions" to "narrowed DS jurisdiction with everything else excepted", would be a dangerous precedent.

6. H-858 may be the most insidious example of scope creep ever placed before CLRC.

Significant scope creep occurred in 5 areas of H-858, as detailed herein: (1) subject matter, (2) the number of CIDs affected, (3) the laws needed to establish exceptions, (4) expanding definitions for a new category of 'nonresidential' (see above), and (5) justifications used for exceptions.

Scope creep in subject matter. H-858's original scope was to determine if 3 more special-case CID types should be exempted from DS restrictions as costly and unnecessary for the special cases. MM11-29, pg 22.

The final recommendation's cover sheet (MM12-48) incorrectly stated "In a nutshell, the Commission provisionally recommended that the existing exemptions be broadened slightly, to apply to all "nonresidential" subdivisions." (emphasis added) The law as written was not 'broadened slightly'. Because it shifted from narrowly-drawn exceptions to narrowed DS jurisdiction, exception scope broadened dramatically.

Dramatic scope creep occurred despite a separate study of DS scope, which H-858 prematurely pre-empts.

Scope creep in number of CIDs affected. Reflecting 'all-other' vagueness, nowhere in the record is there any estimate of how many CIDs would for the first time be excepted from DS requirements. Nothing in the record provides the public and Commission a reasonable estimate of how much broader the scope creep affects, though it is clearly much more than parking/storage condominiums and marinas. How many CIDs would be newly excepted? 3? 10? 100? 1,000? 10,000? The order of magnitude is not shown.

Scope creep in laws involved in the exceptions. Similar scope creep occurred in the laws involved in justifying the exception outside governing documents. Currently only zoning laws can produce the exception.

H-858 then expanded to any law limiting use to industrial or commercial. Then it morphed into its opposite, shifting the burden to prove that residential use is permitted by 'law' and CC&Rs, else the CID automatically becomes nonresidential and all exemptions apply--even for housing developments.

What started as a narrow justification for exceptions (zoning laws) became a requirement that unless a CID met a new burden of proof that residential use (undefined) was permitted by (all) law, it was nonresidential.

Scope creep in justifications. Scope creep also occurred in justifications for exceptions. The statutory justification for §1373(b)/§4202(b) is that certain specified regulations were an unnecessary cost burden. Advocates of exceptions claimed that 90% of the purchasers of C&I CIDs were well-resourced, sophisticated corporations with accountants and attorneys, who did not need protections. MM08-63, pg 06.

As the word 'nonresidential' was redefined and enlarged, the justification for excepted CIDs expanded. The

original H-858 scope was to consider exceptions to 3 new special cases for the following reason. "A parking space, storage unit, or boat slip is unlikely to be a person's largest financial investment, deserving of special regulatory protection. Nor is it likely to be the person's home, requiring regulation to ensure fair and participatory self-governance and informal dispute resolution opportunities." MM11-29, p24.

Now the broad list of 'all-other' exceptions is justified based on claims that the original DS was intended only for housing developments, so everything else should be excepted. MM12-48, pg 8-11.

Current H-858 should not be pursued because its scope creep was unjustified.

7. What started--and is still advertised--as a slight broadening of exceptions for marinas and parking/storage condominiums morphed into a major assault on DS jurisdiction.

Let's be clear.

What started--and is still advertised--as a slight broadening of exceptions for parking/storage condominiums and marinas is now a major assault on the jurisdictional basis of Davis-Stirling.

The assault was not made as a direct attack on DS scope in a study so labeled.

It was done as a Chancellorsville flanking maneuver, with damaged constituencies falsely assured that the scope and results of the proposed legislation would not affect them.

As a matter of legislative history, just after DS was enacted in 1985, courts interpreted the obvious DS language as applying to any CID that met explicit statutory criteria, without regard to residential status. Commercial and industrial CIDs immediately tried to get their CIDs entirely removed from DS. That effort failed when members who needed the protections and received the rights opposed losing them.

Now, outside transparent debate of DS scope, those who financially benefit by removing DS rights have dramatically expanded exceptions, and shifted the legal burden to prove that the exceptions do NOT apply.

H-858 would make DS another example where *the large print giveth, and the small print taketh away*. The start of DS would grant jurisdiction, while the bottom would exempt a long list of 31 key sections.

Similarly, the cover sheet assures, "This study would have no effect on any subdivision that contains a residence". Yet the law itself has a major effect, and adds new jurisdictional hurdles required to AVOID the exception. The fundamental reframe to residential vs. nonresidential added new, unacknowledged requirements even for residential developments (not just subdivisions).

Reframing a law from justifying an exception to justifying that you're <u>not</u> excepted shifts the burden of proof.

When you add an adjective like 'residential', it does much more than modify. It increases the restrictions, increases the burden of proof, and potentially doubles the costs and frequency of lawsuits.

Current H-858 should not be pursued because it is an unacknowledged assault on DS jurisdiction.

8. The H-858 frame changed from 'developments' to 'subdivisions'.

It is important to note the change of frames from 'developments' to 'subdivisions'. Text switching between these 2 non-synonyms creates incorrect and misleading messages in the law and accompanying text.

The Business & Professional Code "Subdivided Lands Act" is based on subdivisions. Davis-Stirling is not.

Subdivisions require 5 or more plots of land (the subdivided land). Davis-Stirling does not.

DS requires a common interest development with a separate interest for 1 of 4 types of CIDs. Some DS CIDs are subdivisions. Some are not. DS jurisdiction does not require separate plots or parcels. It only requires a separate interest. Only 1 of the 4 types of DS developments requires subdivided land.

H-858's title and frame are 'Nonresidential Subdivisions'. Both words--and the incorrect frame behind them--should be removed as inapplicable to DS.

9. Under DS, a separate interest need not be a plot of land.

Note the wording of the Final Recommendation in §4203(b), before MM12-48s1 suggestions: "located on

but not permanently affixed to a separate interest". Those of us who have spent hundreds of hours to explain and litigate DS wording may find that phrase incomprehensible. Separate interests are legal rights, not physical locations. Separate interests are not a place for a vehicle to be located on or affixed to. This wording perpetuates the legal confusion that DS requires a subdivision with separate plots of land. It does not. Only 1 of 4 types of DS CIDs requires a separate plot. A second type requires ownership of a separate condo unit, though not a parcel. A third type does not require ownership of either, only the right to lease an apartment. A fourth type, stock cooperative, requires even less. It only requires the separate interest to be the right to occupy some space somewhere on the property. The latter 3 do not require a subdivision.

H-858 was written as if DS required a separate interest to be a parcel of land that you can put a vehicle on. Such a frame only fits 1 (if that) of the 4 statutory types of DS developments.

H-858 should not proceed in its current form because it is based improperly on only 1 of 4 DS CID types.

10. The H-858 frame changed from special case exceptions to residential vs. nonresidential.

Also note the frame change from special case exceptions to residential vs. nonresidential.

Davis-Stirling does not require any of its 4 types of covered developments to be residential.

No DS CID has ever been required to show it was for 'residential' use to qualify for DS protections.

H-858 unnecessarily introduces new requirements and legal hurdles for all DS CIDs to prove residential use, yet the requirements are buried in an ostensibly irrelevant proposal to extend exceptions for storage units, parking lots, and boat slips. Affected Owners are apparently unaware of how H-858 would affect them.

DS jurisdiction does not require a CID to be either a 'residential development' or a 'Commercial & Industrial Development'. Nor is there an assumption that these 2 types comprise the DS CID universe.

Introduction of this new and improper frame of residential vs. nonresidential frame led to further confusion between 'residential use' and 'transitory residential use': "The point of that provision {§4203(b)(3)} is to make clear that short-term residential use does not make a CID residential." MM12-48s1 pg 3.

The residential vs. nonresidential frame then led to further confusion in requiring governing documents and the 'law' to show rights for residential use. This is new, broad, and destructive to some DS CIDs. Because 'residential' use is ambiguous, such a legal proof, which has never been required, would be fraught with unrecognized and unintended legal problems, as explained herein.

The best practical way to solve the 'residential' quagmire is to never enter it. Note that this is exactly what the current DS does. DS defines 4 types of developments that it covers, and defines all 4 without ever using the words 'residence' or 'residential' or 'nonresidential'.

H-858 jumps with both feet into the quagmire by requiring that a CID be for 'residential use' and disallows certain 'residential occupation'. These are new restrictions, outside the current law, and totally unnecessary. As with tax laws and zoning restrictions, it will lead to countless unnecessary lawsuits over the new phrase.

The solution to this unneeded quagmire is similar to MM12-48s21's recommended §4203(b) revision, shown on page 3 though not on pg 6-7, to change occupancy of a 'boat/trailer/vehicle' to 'space within the development'. This change is closer to DS wording in §1351(l), which specifies that the separate interest in a stock cooperative is the right to "occupancy in a portion of the real property".

Note the lack of restrictions in 1351(l). There is no requirement that your occupancy be on a separate lot or parcel. There is no requirement that your occupancy be in a boat/trailer/vehicle. There is no requirement that the occupancy be year-round. It is precisely this flexibility that allows dramatic economies of scale in vacation and recreational developments. You share the golf course, swimming pool, fishing rivers, hunting forests, tennis courts, horseback riding trails, and scenic views, with the right to temporary exclusive occupancy of some space like a lodge room, RV, or ranch bunkhouse, somewhere in the development. The exclusive occupancy is a place to sleep and call 'your own'. The length of time is irrelevant.

Current H-858 needs to be reworked to accommodate all DS CIDs, and not exclude stock cooperatives.

H-858 introduces a new category of developments foreign to existing law without adequate reason to do so. By promulgating the myth that DS need only apply to residential developments, H-858 would remove DS

protections for thousands of people in DS CIDs that fit neither of the 2 new awkward and vague definitions.

Further, H-858 explanatory text does not acknowledge the existence and importance of the huge block of DS CIDs such as vacation developments, recreation developments, 'second-home' developments, and mixed use developments. In some developments, Owners share the common areas and stay on the property, often for months, though NOT as a time-share. Nor does the text properly acknowledge the Ed Weber example, where Property Owners have had the right to use the property 365 days per year, eat all their meals there year-round, recreate there every day of the year, and sleep overnight up to 335 nights per year. Yet they are not allowed to establish this recreation property as a domicile or as their permanent residence.

Consider vacation developments. By sharing common areas for part of the year, beautiful rural property can be developed and made available at affordable prices to those who would like a beautiful vacation spot. Do they live there? Not in the legal sense of 'domicile'. They register to vote 'at home'. They return to their 'residence' after vacation. Are they covered by current DS? Yes. Would they be covered by H-858? Attorneys and stakeholders benefiting from the removal would argue no, because H-858 requires 'residential use' without defining it. Given they have a 'residence' elsewhere, this is vacation property, thus not 'residential'.

Tens of thousands of people will be justifiably irate when they discover their existing DS protections were removed by a statute scoped and advertised as only applying to marinas and parking/storage condominiums.

Current H-858 should not be pursued because its reframe of all DS CIDs as residential vs. nonresidential is outside the current law, incongruent with it, unnecessary to providing relief to parking/storage condominiums and marinas, and removes DS protections in many existing DS CIDs not represented in the discussion.

11. The repetitive discussion of original intent is incorrect, misplaced, and hides the underlying dynamic--lobbying for policy change to reduce DS scope.

Memoranda seem to justify scope creep by claiming CLRC is attempting to bring DS into line with original intent. Memoranda seem to take the position that DS was never intended to apply to anything other than housing developments, so all other CIDs should be excepted from the law, even now, 27 years after the law was enacted and adjudicated to apply outside housing developments.

Staff based their conclusion on a handful of writings from the enacting period, which claimed that DS was intended to only apply to residential subdivisions.

None of the writings, however, are from legislators named Davis or Stirling.

This same discussion has occurred for decades, and ends with the same result--**it was not the legislature's original intent to limit Davis-Stirling to residential developments.**

Statutory construction principles require that legislative intent must be determined from the words of the law itself. If the words are clear, the analysis stops there. If there is an ambiguity, with an unclear or double meaning, interpreters consider legislative discussion to determine what was meant, with the analysis narrowly limited to that necessary to resolve the particular ambiguity found in the law's words.

There is no H-858 argument that any DS jurisdictional word is ambiguous. So the repetitive revisiting of claimed 'original intent' is unwarranted, and simply becomes a lobbying mantra to reduce DS protections.

Consideration of 'legislative intent' is not for discussions of 'what we wanted and didn't get', or 'what some legislator thought they were getting and didn't', or 'what our stakeholder group lost and want back'.

Repetitive discussion of this failed claim of legislative intent is in fact a lobbying effort to reduce DS scope.

The actual debate is not a debate over original legislative intent. That debate was settled years ago.

The actual debate is a current public policy discussion of expansion or reduction of DS protections.

That debate should not circumvented through the backdoor of exception legislation.

It should be on the front porch, with openness and transparency, with all parties invited for tea.

12. H-858 words and music do not match.

As described herein, the law and its description are frequently at odds in the record for H-858 and H-856.

MM12-48s1, released last week continues this mismatch. Page 6 states "The proposed law defines "nonresidential" indirectly, by first defining "residential" and then providing that anything that is not "residential" is "nonresidential"." This sentence is untrue. H-858 does not define 'residential' or 'nonresidential', directly or indirectly. In fact, H-858 suffers greatly because it does not do so.

Because H-858 does not define 'residential', its meaning would be the everyday meaning (and/or legal meaning) of 'reside' and its inflected forms, 'residents', 'residence', 'residential', etc.. That spells lawsuits.

Predictably §4202 will provoke litigation because it does not do what that sentence claimed. After asserting this sentence, staff concluded that "While that approach works, it is somewhat convoluted." (pg 6).

§4203(a) only 'defines' 'residential CID', and does so improperly, as a tautology, using the words of the phrase to 'define' the phrase, creating an almost useless circular 'definition': ""Residential common interest development" means a common interest development in which residential use is permitted..."

Current DS does not require any proof of residential use or residential rights. If Ed Weber's warnings are correct, attorneys pushing to remove DS rights would seize that wording to initiate new lawsuits, claiming that the new word "non-residential" requires such a proof, then litigating what exactly 'residential' means.

H-858 should be redone to continue to protect all DS CIDs, residential or not, where Property Owners have a common interest and a separate interest as required by 1 of 4 types of CIDs.

13. H-858's 'residential' insert has an unusual and informative origin.

To resolve the puzzlement why such a well-known, previously-avoided problem word like 'residential' was unnecessarily introduced as a jurisdictional DS requirement, prior memoranda were reviewed.

MM11-35 clarified that insertion of 'residential' in §4203(b) was a 'minor clarifying revision' 'informally suggested' by Duncan McPherson. It is neither clarifying nor minor. This 'minor clarification' is actually a 'major confusion' predictably leading to a series of court cases to clarify the obvious obfuscation.

It is important to note that the approach to the phrase 'residential occupation' was as a temporary residence. MM12-33 stated that "The point of the revision is to make clear that "occupation" does not refer to the mere presence of a boat, trailer, or other vehicle on subdivision property. Rather, "occupation" refers to the use of the vehicle as a temporary residence." MM12-33, pg 5. The operating definition of a temporary residence is a place where you sleep overnight. Because it relies on a simple fact without unnecessary legal complications, 'where you sleep at night' is in fact the legal definition of 'residence' in some courts for some laws, irrespective of whether that residence is temporary, permanent, or semi-permanent.

CLRC apparently means intends this common everyday meaning. "{W}hen defining short-term residential use, there seems to be no reason to distinguish between sleeping in a tent, a tent-trailer, a cabin, or a lodge." MM12-48sa, pg 3. Often, 'reside' reduces to where you sleep overnight. CLRC adopts that meaning implicitly on page 2, last paragraph, where residential use is defined based on overnight stays rather than the legal complexities of domicile, place of voting, place you return to, zoning laws, multiple residences, etc. If 'residential use' is simply the right to sleep overnight, as in many legal definitions, H-858 would be clearer if it simply said that, and avoided the unnecessary lawsuits to define 'residential'.

To avoid unnecessary lawsuits, H-858 should replace 'residential' with 'overnight sleeping', 'overnight stays', or similar phrase defined by facts rather than conclusions of law requiring court adjudication.

14. H-858 improperly relies on extrapolation from 2 of 4 types of DS CIDs.

H-858 relies in large part on MM08-63s2, Exh1, pg 1. "Commercial CIDs are either planned developments, condominium projects, or some combination of these two types of CIDs." This means that Commercial CIDs are only 2 of the 4 types of DS CIDs. Planned developments, require "a separately owned parcel, lot, area or space". §1351(l)(3)/§4185(a)(3). Condo projects require "a separately owned unit". §1351(l)(2)/§4185(a)(2).

H-858 and its record reflect the view that DS requires a separately own parcel, lot, or unit. It does not. The

2 types of Commercial CIDs do. Looking beyond Commercial CIDs to the other 2 types of DS developments, the error becomes apparent. Apartment CIDs only require "the exclusive right to occupy an apartment" without any requirement to own a parcel, lot, or unit. §1351(l)(1)/§4185(a)(1). Stock cooperatives require only "the exclusive right to occupy a portion of the real property" §1351(l)(4)/§4185(a)(4). In stock cooperatives the "portion" may be part of the shared common area. Current DS allows innovative CIDs to invoke DS protections if members have the right to temporarily occupy shared areas like a lodge room or RV space.

Note that none of the 4 types mention any residential requirement. You could own a vacant lot too small to build on. Or use the condo or apartment as storage space with no requirement or even right to use it as a 'residence'. Stock cooperatives, the most flexible type, only require a right to occupy a portion of the property, and that occupancy can be temporary.

H-858's redo should include analysis of CIDs that do not fit the limitations of commercial CIDs.

15. What exactly is 'residential use'? What is the legal definition of 'residential'?

To understand why Ed Weber expected more lawsuits to remove DS protections through the undefined phrase 'residential use', consider the DS case, *Aharoni v. Malibou Lake Mountain Club, Ltd* (2007). This case is very instructive for CLRC to anticipate H-858's unintended consequences.

Aharoni addressed the meaning of "substantially all" in the DS §1351(m) stock cooperative requirement. Plaintiffs asserting DS protection showed that 75% of the Owners had separate interest licenses that satisfied DS requirements. They cited several cases, and a federal case interpreting "substantially all", as supporting their conclusion that 75% satisfied the DS phrase "substantially all". Court of Appeal found those cases were "not helpful". Instead, it relied on IRS code mentioning 85%, and references in state Finance Code and Penal Code. They relied in part on Revenue and Taxation Code §6010.3, which defined "substantially all" in the sale of art to be 80%. After this extensive consideration, Court of Appeal declined to specify what percentage satisfied the DS phrase "substantially all". It only held that 75% did not.

Thus, after all the court work, the ambiguity in the original wording remained. The best that could be taken from the years of litigation was that 'substantially all' must be some percentage greater than 75%.

Then, the Court designated the case as unpublished. This means the case cannot be used in court outside limited exceptions. Thus, even the limited "75% is not substantially all" holding is not governing law.

After hundreds of thousands of dollars of litigation and opportunity costs, and high social costs to taxpayers to adjudicate this unnecessarily ambiguous statutory phrase, the many thousands of people it applies to are left with the same conclusion--"We don't know what 'substantially all' means."

Does any Commissioner or staff think that a development required DS protection if they had 80% Owners with a right to occupancy, and a development with 75% did not?

For years, CLRC has worked hard to prevent the situation where Davis-Stirling must be interpreted based on the Corporations Code. Would you prefer the Revenue and Taxation Code?

Does any Commissioner or staff member think that it benefits DS-protected Owners to have a DS phrase interpreted based on an obscure provision in the Revenue and Taxation Code for the sale of art?

All those costs and confusion could be eliminated with a fact-based replacement (%) for 'substantially all'.

The proposed new requirement of 'residential' and 'residential use' is an order of magnitude worse than 'substantially all'. 'Reside' and inflected forms like 'residents', 'residence', and 'residential' have no single established legal definition. Under California statutory construction principles, the interpreting court must use the ordinary, everyday (dictionary) definition unless a legal definition is indicated. The proposed legislation repeats the 'substantially all' scenario by not defining 'residential' in any fact-based way. Nor does it refer to any legal definition in any other location to guide Owners, their board of directors, and the interpreting court.

There is no established English dictionary definition. There are several, which in application are inconsistent.

There is no established law dictionary definition. There are several, which in application are inconsistent.

There is no established California Code definition. There are several, which in application are inconsistent.

The 'law' of §4203(a) encompasses all these inconsistencies.

In some jurisdictions, Voter Registration Laws, designed to encourage more voting, allow a definition of 'residence' to include the street address of the utility grate upon which a homeless person sleeps for warmth. This is a 'residence', even if that unmarked 'address' is not a mailing address or property address, and even if the 'residential use' of that address is illegal per zoning law, health law, and municipal code.

Election candidate laws, covering the same elections with a different purpose, use a different legal standard to establish a potential candidate's residence. Federal and state laws governing the same election use different legal authorities to decide who can vote where based on 'residence'.

Taxation laws, designed to maximize government revenue, use a different legal authority and frame of reference. Zoning laws use a different standard and legal authority for 'residential zones'. Environmental laws limits how close a 'residence' can be to a hazardous-material contaminated border zone. FHA uses its own definitions to regulate home loans. Laws for home offices use another. Ditto for housing discrimination laws. Ditto for disability laws to ensure accessible housing. Ditto for professional license codes.

Courts trying to define words like 'residence' find a bewildering array of complications like 'tax home', the place you return to, the place you register to vote, the place you get mail (including a post office box), the place you pay utilities, a place that satisfies housing laws, a place that satisfies zoning laws for a 'residential zone', the place where you sleep overnight, the address you use on legal documents, or simply a statement of where you 'reside'. The analysis is further complicated by the legal reality that you can have multiple residences, and are not limited to only one--except for voting laws. Courts have reached an broader array of results on the words 'reside', 'residents', 'residence', and 'residential' than they have for 'substantially all'.

To determine for yourself whether the Memorandum's position that inserting the word 'residential' is a 'minor clarification', do the following experiment. Ask 20 attorneys who represent CIDs what legal authority they expect Court of Appeal to use to interpret 'residential'. Don't be surprised if you get 20 different answers--all of which they are prepared to litigate.

If Ed Weber's position is that inserting the new word 'residential' invokes jurisdiction of the Full Employment For Attorneys Act, the evidence would support his view.

Alternately answer the question yourself with a few minutes. Search California's 27 codes to find which ones invoke or define 'reside', 'resident', residence', or 'residential'. You'll be amazed at the breadth of legislative standards and frames of reference. Then search California's cases, and if you dare, federal cases and other states' cases on CIDs, to determine the appropriate legal authority for this particular context. You'll find thousands of cases. Even after reviewing them all, you have at best a small probability of guessing in advance which authority Court of Appeal would use. This is because H-858 does not define the word, reference another law that does, or provide enough context to guide impartial and predictable interpretation.

Ask yourself: Did any, or would any, attorney that you know predict that when faced with the need to interpret the ambiguous Davis-Stirling phrase 'substantially all', Court of Appeal would reject as 'not helpful' the federal case interpreting that specific phrase, and instead rely as legal authority on an obscure and unrelated section of the Revenue & Taxation Code for the sale of art?

Now, into this environment, insert H-858.

Imagine you are standing in front of a room of upset Property Owners demanding to know exactly what the new jurisdictional requirement of 'residential use' in 'law' and CC&Rs means, and "Will this new law take away our property rights?" Other than empty assurances to calm the angry masses, what would your legal answer be? And what are the odds that Court of Appeal would use your answer as their preferred legal authority?

Laws like H-858 prevent proper advice from attorneys to CIDs because in the final analysis, the real answer is "We don't know.". Boards are immobilized. Although they've succesfully relied on DS protections for 27 years to move their community ahead, they suddenly don't know if the new law dropped them.

- We're a vacation property where snowbirds can vacation most of the year--are we 'residential use'?
- We're a second-home property--can you have 2 residences?
- We're a recreation development where people can live here up to 11 months in a year though they

maintain a 'residence' somewhere else--would an opposing attorney argue that we're not 'residential'?

- We're mixed use--which use controls?
- If a law says you can only be a resident after living here for x months, does DS does not apply until then?
- Our development is mostly empty lots where you can't live until a house is built. In this economic climate, nobody expects the houses to ever be built--would an attorney argue that we're not residential by 'law'?
- We're a new development where nobody lives (yet) and we have the right to live here only after we jump through a bunch of hoops like building permits and environmental approvals. Does H-858 mean we aren't residential because the 'law' doesn't allow us to live here--yet? If the 'law' says we're residential if X or after Y, does that mean we don't have DS protections unless X is done and only after Y is done?
- Our development is mostly empty lots. With new environmental restrictions, most of our empty lots "don't perc" and will never be buildable as a residences--would an aggressive attorney argue we aren't a DS CID?

H-858 should not proceed until this urgently needed analysis is in the law and accompanying documents.

16. H-858 fails CLRC's articulated standard to be as simple and direct as is legally feasible.

H-858 should not proceed because it fails to satisfy CLRC's standard for simplicity and directness.

{T}hose suggestions run counter to another broad theme..., that the proposed law should not be made too complex for easy use by nonlawyers. If a non-lawyer needs to read {DS} to determine whether electronic notice delivery is permitted, the answer should be as simple and direct as legally feasible. MM10-29s1.

17. H-858 fails CLRC's articulated standard for a bright-line test for exceptions.

Other than to provoke lawsuits, why would any drafter of high-integrity legislation choose to introduce previously-avoided, litigation-prone words like 'residential' to be a new undefined jurisdictional requirement?

Add to this confusion the double-meaning of 'residential'. 'Residential' is the adjective form of 2 homonyms, 'residents' and 'residence'. 'Residents' is people. 'Residence' is place. Ed Weber might expect attorneys eager to remove DS protection to seize this double-meaning homonym to argue that 'residential use' is not allowed by law for illegal immigrants, foreigners wanting California vacation property, etc.

Strangely, the obviously ambiguous, lawsuit-prone word 'residential' was added after setting the explicit standard that <u>any</u> exception requirement be a "bright-line test". H-858's scope memorandum MM11-29 required that "For the reasons stated above, it is important that the exemption language provide a bright line standard. Any ambiguity could lead to costly errors, litigation, and even potential criminal liability."

H-858 <u>removes</u> the current bright-line test of §1373/§4201, which has no asserted ambiguity and is narrow, and replaces it with a broad, fuzzy test so ambiguous different Courts of Appeal could use different authorities. It might take years before anyone could be sure what the controlling legal test was for 'residential use'.

All these complications are totally unnecessary for H-858's scope--to determine potential exception language for parking/storage condominiums and marinas.

How far we have come from the stated scope of exception language for 3 special cases.

H-858 should not proceed because it failed its own requirement to only use a bright-line test for exceptions.

18. What Davis-Stirling rights would be lost under H-858?

How many DS provisions do not apply to excepted CIDs? 28 full sections and 3 partial sections.

Are there important rights in those 31 sections? Yes.

What rights and protections would people lose under H-858? Here's a partial list.

1. The right to assessments that are no more than the costs necessary to defray the costs. §5600.
2. The right to no assessment increase unless the board complied with financial statement laws. §5605.
3. The right to not have a 20% increase in regular assessments without members' majority vote. §5605.
4. The right to not have a special assessment >5% of the expenses without majority vote. §5605.

5. The right to 30-day notice of a rule change, and the association's responsibility to provide it. §4360.
6. The right to require rule changes to be reasonable, in writing, consistent with governing documents, adopted in good faith, and within the board's authority to pass. §4350.
7. The right for 5% of the Owners to call a special vote to reverse an unwanted rule change. §4365.
8. The association's responsibility to disclose specified real estate documents and information. §4530.
9. 'Grandfathering' of the right to lease a separate interest if bought before the right was removed. §4740.
10. The right to receive from the association 30-90 days before the end of the fiscal year the annual budget, the statement of the financial reserve, the board's reserve funding plan, a statement of any loans longer than 1 year, a summary of insurance coverage, a statement of the association policies, etc. §5300.
11. The right to receive year-end financial statements, prepared by a Board Of Accountancy licensee, and the association's responsibility to provide it within 120 days of the close of the fiscal year. §5300.
12. The responsibility for the association to review quarterly the income and expense statement, revenues and expenses compared to budget, recent financial statements, and reserve accounts. §5500.
13. The requirement for designated signatures of 2 directors, or director plus an officer, to withdraw money from the reserve. §5510.
14. The right to a notice of any reserve funds transfer. §5520.
15. The right to a reserve study every 3 years of the need and costs to repair or replace assets. §5550.
16. The right to petition court to intervene in special situations to amend a governing document. §4275.
17. And much more.

19. Do record facts support the conclusion?

A hallmark of sound legislation is that it is based on facts, rather than special interest politics.

Commendably, CLRC proposals begin with a fact-finding study to determine if the factual need for legislation justifies the social costs to draft it, pass it, and adjudicate it.

Proposed H-858 is exception legislation.

It extends exemptions to DS regulations to more CIDs.

Record evidence should contain facts from injured parties requesting relief from undue hardship.

Example 1: "I'm John Doe, from XYZ development. We waste $x,000 each year to satisfy Civ. §13xx, and yet those DS 'protections' mean nothing in our special case--except added costs. It doesn't benefit our members, only attorneys, accountants, and the post office. Please provide relief for special cases like us."

Example 2: "I'm Jane Doe, from ABC Association. We're forced to satisfy Civ. §13xx, even though it costs $x,000 each year and makes no sense in our special situation because __. I'm part of an email group of 5 similar associations with our same special circumstances, and we all have the same problem. This legislation isn't helping us, and the bureaucratic paperwork costs us big $$$. We're drowning in red tape. HELP!"

How many letters are in the record showing facts that request or justify regulatory relief? 0.

How many facts are in the record showing that current DS provisions are a burden to the special cases? 0.

Is there any record evidence from any individual under DS that it does not benefit them? No.

Is there any record evidence from any DS association that it does not benefit their members? No.

Is there any record evidence from any DS association that DS is an undue hardship or financial burden? No.

Is there any record evidence from any DS association of the actual costs for any of the 31 exempted sections for which relief would be warranted? No.

Is there any record evidence from any marina association or member that they need regulatory relief? No.

Is there any record evidence from any parking association or member that they need regulatory relief? No.

Is there any record evidence from any storage association or member that they need regulatory relief? No.

Is there any record evidence that any of the 31 sections are inapplicable to the 3 special cases? No.

Is there any record evidence, for example, that it is unreasonable for marinas, for example, to have required insurance to protect members from catastrophes like storms, earthquakes, and tsunamis? No.

Is there any record evidence that it is unreasonable for members of a "parking condominium" to be protected by the 2-signature requirement to withdraw money from the reserve account, to reduce the risk of a criminal manager or director stealing the money and skipping town? No.

Is there any record evidence that it is unreasonable for a "storage condominium" association to disclose real estate documents, annual reserves, and quarterly financial statements? No.

Is there any record evidence that it is unreasonable for members of any special case to have the right to reverse unwanted rules by majority vote of the members? No.

Is there any record evidence that it is unreasonable for associations to have a reserve fund to replace roofs and repair depreciable property? No.

Is there any record evidence that any of the 31 exempted sections are anything more than sound business practices that every association member should be entitled to as a matter of law? No.

Is there any record evidence, even from the '90% well-resourced and sophisticated corporations' for whom exceptions were previously granted, that the 31 exempted sections were anything other sound business practices that a sophisticated corporate member would require? No.

Strangely, there are no facts in the record that any of the special cases existed, in what numbers, and why, if they existed, they need relief from the basic, sound business practice provisions of DS.

Instead, this record shows only self-serving conclusory statements of need without any evidence whatsoever to support its conclusion to increase exceptions. There is no evidence--or even request--for relief.

Equally strangely, there are no facts that the special cases satisfied requirements used to justify the prior exceptions--CID members that were well-resourced and sophisticated corporations needing so DS 'help'.

In fact, the record supports the opposite conclusion.

Staff termed the 3 special cases 'nonresidential personal use developments'. Are 90% of the parking spaces, storage units, and boat slips owned by sophisticated corporations who need no DS 'help'? Probably not. In fact, the same members of DS housing CIDs would likely own those boat slips, storage units, and parking spaces, and need the same DS requirements for sound business practices.

Thus the 'fact-finding' record fails the test to justify adding any of these 3 newly-claimed 'special cases'.

In short, the fact-finding record does not support expanding the exceptions at all.

If this legislation were based on facts, it would have been shelved long ago as lacking factual support.

If Ed Weber's position is that these 3 'special cases' were used as an excuse to reframe DS law and remove current Davis-Stirling protections from those who need it, the record would support his position.

20. Record facts for the only CID actually addressed showed harm from H-858, not benefit.

To illustrate his points, Ed Weber described his DS CID, R-Ranch in Hombrook. R-Ranch is a 5,000+ acre recreation development in northern California, in Siskiyou County, just below the Oregon border. Ed Weber argued that H-858 would lead to more lawsuits to remove DS protections by the same firm, Neumiller & Beardslee, whose attorney Duncan McPherson has most actively pushed the legislation in the H-858 record.

Key background for Ed Weber's points in MM12-48s1 is the prior MM10-37s1 for the closely related H-856.

The staff received an email from Duncan McPherson (attached), commenting on Memorandum 2010-37.

In {MM10-37}, the staff raised the issue of whether the word "nonresidential" is the best adjective to use in describing a common interest development ("CID") that would be governed by the proposed law (i.e., a CID that is limited to commercial or industrial uses).

That issue was prompted by a letter from an owner of an interest in "R- Ranch," a property development used solely for recreational purposes. Such a development would appear to be "nonresidential," despite the fact that it is not limited to commercial or industrial uses.

Mr. McPherson writes to explain that R-Ranch is not a CID at all. Ownership of the entire development is held in undivided shares. No owner has a separate interest. See Exhibit.

This new information does not change the theoretical problem described in Memorandum 2010-37. There could be CIDs that are "nonresidential," but are also not industrial or commercial. For example, if the owners of R-Ranch each owned a separate interest lot in the development, with the remainder owned as common area, it would be a CID.

However, Mr. McPherson's comment does seem to dispose of the only known example of this problem.

The attached letter exhibit claimed that R-Ranch "is not a CID..., since the owners have no designated separate lot or space within the project." As occurred throughout the record, this view reflects only 1 type of DS CID, and is improperly extrapolated. It is also incorrect.

MM10-37s1 seems to have originally concluded that R-Ranch is not a CID, and apparently discounted Ed Weber's suggestions accordingly: "Mr. McPherson's comment does seem to dispose of the only known example of this problem." It does not. An unanimous string of Superior Court cases over 20 years has affirmed, without exception, that R-Ranch is subject to Davis-Stirling. It is not necessary for CLRC to decide whether DS applies to R-Ranch (MM12-48s1, pg 1). Court of Appeal has already done so. After the corporation sued a member, Court of Appeal ruled in *R-Ranch POA v. Lemke* that R-Ranch is subject to Davis-Stirling. Duncan McPherson did the record a major disservice when he inserted his personal opinion without clarifying that it was contrary to years of Superior Court orders and Court of Appeal. Ed Weber expects that H-858 would generate more lawsuits by such firms to aggressively remove DS protections, even where Court of Appeal has settled the issue. Ed Weber asked CLRC to rewrite H-858 to be clear enough to avoid more lawsuits.

After belatedly and briefly considering Ed Weber's explanation, MM12-48s1 concluded "As a consequence, the proposed law should not have any effect on R-Ranch (or any recreational development that permits residential stays of more than 60 days per year)." Some corporate attorneys would disagree with that assessment in court, though possibly not in this record. Indeed, H-858 affects many DS CIDs, not just R-Ranch.

MM10-37s1 apparently concluded that R-Ranch was the only known example of this problem. It is not. As McPherson admitted in the exhibit, pg 2, other recreation ranches have similar documentation. This means the 'theoretical problem' described still needs to be resolved. MM12-48s1 only begins to address it.

H-858 should not proceed until this improperly 'disposed of' example, and others like it, are integrated.

H-858 should not proceed until the Commission can be clear, with facts, on what developments, and how many, would fall between the cracks of the false dichotomy 'residential' vs. 'nonresidential'.

21. Taken as a whole, H-858 has troubling parallels with *Dred Scott.*

H-858 and its record parallel in several troubling respects the *Dred Scott* decision and dynamics.

In *Dred Scott*, the U.S. Supreme Court was presented a limited question of law, whether a slave taken into a free state became free under that state's residence laws even though his master took him back to a slave state. Supreme Court used that limited question to introduce an entirely new frame. It held that blacks had no constitutional rights, and that the laws of the slave state governed Dred Scott even when he resided in a free state, because he never became free. *Dred Scott* declared that blacks have no constitutional protections (even though the Constitution used slave counts to add more white representatives in Congress). *Dred Scott* declared antislavery laws to be unconstitutional and instantly made slavery legal in all U.S. territories.

When *Dred Scott* was announced, there was much partying and rejoicing by the stakeholder group who financially benefited by denying basic rights to black Americans. This stakeholder group had hoped for a victory on a limited legal question, to support re-slavery of freed black Americans who reentered slave states. Instead, they got a fundamental reframing of Constitutional law removing all constitutional rights for all black Americans, who according to the lead opinion, had "no rights which any white man was bound to respect".

If the proposed H-858 legislation passes as currently proposed, there will be much partying and rejoicing by those with a financial interest in removing Davis-Stirling rights. There will be toasts to the cleverness of reframing the entire Act through an unnoticed side study on Commercial & Industrial Developments. There will be 3 cheers for deft maneuvering of claims in public documents that the law did not affect developments with a residence. Glasses will be raised to celebrate the sly circumvention of the backlash that occurred last time, when the removal of C&I CID rights was opposed and stopped by those who would lose the rights. There will be accolades, bonuses, and backslapping for those who found a way to slip §4202(a) and (c)

below the radar by reframing exceptions and shifting the burden to prove that exceptions do not apply.

After *Dred Scott*, outside the celebrating stakeholder group, a doom and despair of foreboding swept over the land. One 19th century attorney explained that *Dred Scott* destroyed his confidence in the American legal system. Before *Dred Scott*, he viewed the American legal system as the pinnacle of civilization. It was THE place where every person was equal under the law. Where rationality prevailed over politics. Where the rights of one individual were as important as the rights of the powerful. Where social change could be achieved morally through the rule of law rather than through death and destruction. *Dred Scott* fundamentally and permanently changed this attorney's view of the American justice system.

Years later, the Supreme Court Chief Justice who penned the lead *Dred Scott* decision swore-in this forever-changed attorney as the commander-in-chief who had to correct the decision. After leading the country to reverse the injustice, he was killed.

It took a generation, a civil war, a scarred country, an assassination, and 3 constitutional amendments to remedy the Court's error. 600,000 Americans died to overturn that court decision.

H-858 is your *Dred Scott*.

Like *Dred Scott*, H-858 has taken a limited question of law as an opportunity to reframe the underlying law.

Like *Dred Scott*, H-858 began with a special case analysis and ended with a changed jurisdiction that had nothing to do with the special case that initiated it.

Like *Dred Scott*, the reframe removes existing rights for thousands who were not party to the discussion.

Like *Dred Scott*, the proposal is not based on record facts.

Like *Dred Scott*, the record is an unbalanced echo of the frame of those who benefit from removing rights.

Like *Dred Scott*, the H-858 record is a triumph of narrow special interests over balanced public interests.

Like *Dred Scott*, thousands will be justifiably irate when they discover existing rights were removed by a statute that claimed it did not apply to them.

Like *Dred Scott*, the reframe is unnecessary, unwise, counterproductive, divisive, and inflammatory.

Like *Dred Scott*, the H-858 reframe is blamed on original intent. Without pointing to any words in the law to justify the position, *Dred Scott* held that the framers of the U.S. Constitution could not have intended for Constitutional rights to apply to black Americans. Without pointing to anything in the law to justify the position, H-858 claims the Davis-Stirling Act was not intended for anyone outside housing developments.

Like *Dred Scott*, H-858 has significant unintended consequences, and is an embarrassment.

Unlike *Dred Scott*, it is not too late to remedy the error.

22. How should the Commission approach H-858?

Like the 19th century attorney agonizing over *Dred Scott*, most Americans have lost confidence in the law-making process.

Modern Americans envision laws emerging from smoke-filled back room deals, with horse-trading of votes, backslapping agreements that "I'll vote for your bad bill if you'll vote for my bad bill", legislation for sale at corruption prices, public interests being traded off to benefit special interests, majority interests overcome by a powerful few, and special laws for those who donate heavily to campaigns.

As a result Americans rate Congress and legislators as the second lowest in trust among all occupational groups in the United States. Only car dealers rate more distrust.

Americans have lost trust in the legislative process because repeatedly, legislation of x,000 pages passes without legislators ever reading or understanding what they voted in, with the vote 'mostly along party lines'.

Americans equate the making of laws with the making of sausage, and joke that if you were a fly of the wall watching how either was actually made, you would never partake thereafter.

In such an environment, CLRC is a lighthouse beacon.

Like the U.S. Supreme Court before *Dred Scott*, CLRC embodies many ideals of the civilized and sovereign rule of law in an orderly and free society. You pursue a process of writing laws based on openness and transparency. The process is readily and freely accessible to all, not just the select and powerful few. Commission meetings are in public, not behind closed doors. There is no cigar smoke to cloud judgment and hide faces. The process is built on rationality, following a study and fact-finding, publicly reported. Each law has to stand on its own merits, without the horse-trading of votes for 2 bad bills. Unlike the perfunctory hearing process after the real decision is made, CLRC's process is iterative, with conversations and comment-response-comment-response chains that progressively produce better wording and laws. Marked copies online show this progress without charge. CLRC has a demonstrated track record of being responsive and balanced. Even when working through the convoluted combination of the Corporations Code and Davis-Stirling, Commission and staff work hard to make the law as simple and as direct as legally feasible, so that nonlawyers can understand how the law works for them.

As a result, the Commission and staff have earned a well-deserved reputation for more closely approximating the ideals of democratic lawmaking than the legislature itself.

This reputation, and the ideals that enabled it, need to be protected in processing H-858.

23. Summary.

H-858 and its supporting memoranda are not up to par with your normal high standards.

It is an embarrassment to CLRC and the ideals it embodies.

H-858 may be the most insidious legislation ever brought before the Commission.

It is not ready for prime time, for several reasons.

H-858 was not drafted to apply to the narrow exceptions that were the basis of its original scope.

The scope of the proposed legislation morphed dramatically from exceptions to Davis-Stirling regulations for 3 narrow special cases to a subtle, unacknowledged, and expansive reframing of DS jurisdiction.

What started as a 'slight broadening' of 3 exceptions beyond Commercial & Industrial CIDs, ended with new jurisdictional requirements for residential developments, while claiming it did not affect them.

The record has no facts to support the contention that there are any Davis-Stirling CIDs not already covered by the exceptions in the current law for which even a slightly-expanded exception is needed.

H-858 relies on a false dichotomy of residential vs. nonresidential, defined only by tautology.

The burden of proof shifted from proving that one of the limited exceptions applies, to proving, under new, unnecessary, vague, harder, lawsuit-prone requirements, that the exceptions do NOT apply.

H-858 would remove existing DS protections in many CIDs without a clear statement that it was doing so.

The normally accurate and informative cover sheets and supporting memoranda misrepresent the scope and impact of the proposed law as only slightly expanding the scope beyond C&I CIDs, and incorrectly claim (MM12-48s1) that "This study would have no effect on any subdivision that contains a residence".

The public process failed because key constituencies who normally weigh-in on CID law did not understand, thanks to misleading cover sheets, that this 'side study' of Commercial & Industrial Developments exceptions would fundamentally reframe all Davis-Stirling CIDs, increase jurisdictional requirements, and provoke lawsuits against the people that the law is designed to protect.

The public process failed because the one voice who passionately and accurately represented the views of those covered by Davis-Stirling, Ed Weber, was misunderstood and discounted by inaccurate statements in the record. The follow-up memorandum to the Public Comment Period (MM12-48s1) did not adequately represent or respond to Ed Weber's important and legally correct warnings and suggestions.

24. Conclusions.

The closer CLRC approximates the ideals underlying its success, the greater the integrity and respect CLRC earns in this most public and carefully documented democratic process of legislation to benefit all.

The wording of proposed H-858, even with MM12-48s1 adjustments, differs greatly from the statement of intent, the accompanying explanations, the public process behind it, normal legal standards, and the need.

Key factors generating legislation that produces more justice and fewer lawsuits have been sacrificed.

H-858 has unnecessarily traded off balance, responsiveness, integration of all points of view, intention-law congruence, explanation-law congruence, simplicity and directness, interpretability by nonlawyers, bright-line tests for exceptions, avoidance of lawsuits, and avoidance of unintended consequences.

You would be wise to tap 'RESET'.

H-858 should be withdrawn from the 2012Dec13 agenda as having failed the required public process, fact-finding, balanced legal analysis, intended scope, normal legal standards, and CLRC standards.

If it is considered, the Commission should return the proposal to staff with the following instructions.

1. Redo H-858 so that it does not directly or indirectly alter the scope of Davis-Stirling.
2. Do not use narrow exceptions as an opportunity to reframe DS as residential vs. nonresidential.
3. Do not use narrow exceptions as an opportunity to raise jurisdictional requirements for all CIDs.
4. As in the current Davis-Stirling, maintain the standard legal design that exception legislation be narrowly drawn, rather than reframing the general body of law more narrowly, and making exceptions an undefined catch-all category of 'everything else'.
5. Use the narrowest possible language to give needed relief to those who have factually shown they are a special case where members receive no DS benefit and/or the costs are an undue hardship.
6. To justify relief, use the standard set in background text though not the law--CID membership that is corporate, sophisticated, and well-resourced with attorneys and accountants, who do not need protection.
7. If you find factually find CIDs injured by DS regulations, provide some estimate of the number affected so the public, Commission, and legislature do not have to rely on self-serving conclusory statements claiming a need for exemptions from basic DS requirements for sound business practices.
8. Remove all wording for the false dichotomy of 'residential' vs. 'nonresidential' developments, none of which exists in any current jurisdictional definition of Davis-Stirling CIDs.
9. Remove all references to 'residential use', 'residential occupancy', etc. to prevent lawsuits.
10. Remove all new requirements for CC&Rs to exist and include certain components.
11. Remove any new requirement that governing documents or laws allow or limit 'residential' use.
12. Reverse the scope creep from Commercial & Industrial Developments to 'Nonresidential Subdivisions' by limiting the study to the 3 special cases addressed in the scope memorandum.
13. Remove the word and frame of 'subdivision' and stick with the current and legally correct Davis-Stirling words of 'development' and 'common interest development'. Acknowledge that not all Davis-Stirling developments are subdivisions and that Davis-Stirling does not require subdivided land.
14. Include vacation CIDs, recreational CIDs, innovative CIDs, pre-1986 CIDs, and mixed-use CIDs that do not fit either 'residential' or 'nonresidential' label, yet still need the entire panoply of DS protections.
15. Accommodate the full range of DS CIDs, and explicitly address stock cooperatives where Owners have interests to occupy a portion of the property without owning separate parcels or units.
16. Do not use words in a phrase to 'define' the phrase, since the result is circular and lawsuit-prone.
17. Above all, maintain a public process and balanced legal analysis deserving of the moral authority to govern California.

Mr. Lincoln would have us do no less.

Respectfully Submitted,

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