Study H-855 July 1, 2005

Memorandum 2005-25

Statutory Clarification and Simplification of CID Law (Discussion of Issues)

The Commission is working on the reorganization and simplification of common interest development law. This memorandum presents the first installment of a staff draft of the proposed law. As the project progresses, additional material will be added to the staff draft until it is complete and ready for approval and circulation.

Noteworthy issues relating to the material in the attached draft are discussed in this memorandum. Decisions on these issues will be incorporated in future iterations of the staff draft.

We have received the following letters commenting on the reorganization and simplification project. They are attached in the Exhibit as follows:

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

GENERAL COMMENTS

Mr. Roberts, a CID homeowner, is supportive of our planned approach for this project, as described in Memorandum 2005-18 (available at www.clrc.ca.gov). See Exhibit p. 18.

Mr. Osterberg, a CID homeowner, is skeptical about the merits of proceeding with this project while significant substantive problems go unaddressed. See Exhibit pp. 19-20. Note, however, that the third problem he lists in his letter would be resolved by SB 853 (Kehoe), which has been approved by the Legislature and is awaiting the Governor's signature. SB 853 would implement the Commission recommendation on *Preemption of CID Architectural Restriction*, 34 Cal. L. Revision Comm'n Reports 117 (2004). The other three problems

described involve enforcement issues, rather than substantive defects in the law. The Commission has recommended the creation of a state CID Ombudsperson to assist with such problems. See *CID Ombudsperson Pilot Project* (March 2005).

MATERIAL INCLUDED IN STAFF DRAFT

The attached staff draft presents two chapters of the proposed law. The first is "Chapter 1. General Provisions." This chapter includes preliminary provisions and definitions.

Some new definitions have been added for drafting convenience. Some of the existing definitions have been restated for greater clarity and uniformity. These revisions are intended to be entirely technical. CID experts are invited to examine these changes carefully to ensure that no substantive changes in the law would result.

The second part of the staff draft is "Chapter 5. Governing Documents." The staff chose to jump ahead to that chapter for two reasons: (1) some of the former definition provisions should be relocated to that chapter, and (2) the governing documents material should be relatively noncontroversial; it provides an opportunity to explore our methodology without contending with divisive political issues.

SCOPE OF REORGANIZATION

One overarching question that must be decided is the scope of material that is to be included in the reorganization and simplification project. Two of the letters that we received comment on that issue.

The obvious starting point is the Davis Stirling Common Interest Development Act (Civ. Code §§ 1350-1378), which specifically regulates many aspects of CID governance. The Davis Stirling Act is the source of law that is most familiar to CID homeowners. It is the base on which we will build.

There are three other general sources of relevant law: (1) the Corporations Code, which regulates operation of the homeowner association as a nonprofit mutual benefit corporation or unincorporated association, (2) other miscellaneous code provisions, and (3) Department of Real Estate regulations. The manner in which these sources of law should be addressed in the proposed law is discussed below.

Corporations Code

Memorandum 2005-18, p. 7 (available at www.clrc.ca.gov) recommended that the application of the Corporations Code to a homeowner association be clarified in two ways:

> (1) A section should be added providing that, to the extent of any conflict between the Davis-Stirling Act and the Corporations Code, the Davis-Stirling Act prevails. This would provide a default rule that could be used when analyzing a conflict between the two sources of law.
>
> (2) It may be appropriate to duplicate some elements of corporations law in the Davis-Stirling Act. This would make the Davis-Stirling Act a more comprehensive source for CID law. It would also help to educate CID homeowners about rights arising under the Corporations Code that may not be well known. Furthermore, it could provide greater uniformity in the law by moving a provision that currently does not apply to an unincorporated homeowner association to the Davis-Stirling Act, where it would apply to all homeowner associations.

The Commission approved that general approach. Minutes (May 2005), p. 9 (available at www.clrc.ca.gov)

Curtis Sproul is concerned that integration of Corporations Code provisions into the Davis Stirling Act might not make the law clearer (see Exhibit at 5-6):

> If past experience is a guide, then rather than bringing greater consistency to the laws governing common interest developments and their associations of property owners, the result could be further confusion, even if further changes include a default rule stating that in the event of a conflict between the Corporations Code and the Davis-Stirling Act, the Act's provisions prevail. For example, Civil Code 1363.05 (the Open Meeting Act) contains notice provisions that are inconsistent with the Corporations Code provisions relating to the issuance of notices of board meetings (both as to timing and method of delivery) and Civil Code section 1365.2 (relating to inspection rights) is largely repetitive of the Corporations Code member inspection rules (Corporations Code section 8333), but uses different terminology, thereby creating confusion.

Mr. Sproul makes a good point. The basic source of complexity and potential confusion is that the Davis Stirling Act and the Corporations Code must be read side by side in order to determine which source of law has provisions on a particular topic. That problem exists under current law. The proposed law would

help to address it by making clear which source controls in the event of a conflict, but it would not eliminate the problem entirely.

One approach that could eliminate the problem would be to remove homeowner associations from the application of the Corporations Code entirely. Relevant provisions of the Corporations Code would be duplicated within the Davis Stirling Act and a provision would be added making clear that a homeowner association is not subject to the Corporations Code. This approach would eliminate the need to consult the Corporations Code for law governing a CID.

However, that approach could create a number of problems:

(1) It would clutter the Davis Stirling Act with provisions that function perfectly well in their current locations and that would be of little day-to-day interest to most CID homeowners. See, e.g., Corp. Code §§ 7910-7913 (sale of corporate assets), 8010-8022 (merger), 8510-8724 (dissolution).

(2) It would create a significant risk of inadvertent substantive change. Corporations law is complex and technical and the process of duplicating relevant Corporations Code provisions might result in the omission or distortion of some essential rule.

(3) Future changes to the Corporations Code might not be made in the Davis Stirling Act, denying homeowners the benefit of innovations in corporations law. As Mr. Sproul notes (at Exhibit p. 6):

> My other concern with any proposal to repeat Corporations Code rules in the Davis-Stirling Act is that the risk of future inconsistencies between the two sets of statutes is increased. The constituencies that are most active in proposing and monitoring legislation impacting the Corporations Code (such as the Nonprofit and Unincorporated Associations Committee of the Business Law Section of the State Bar) and those that are most active in proposing and monitoring legislation impacting the Davis-Stirling Act (including your Law Revision Commission, CLAC and CACM), rarely, if ever, communicate, one to the other. As a result, changes are often made to one Code without corresponding changes being made to the other.

At least for now, the staff intends to follow the approach described in Memorandum 2005-18. The Davis Stirling Act would supplement and supersede the Corporations Code in selected areas only. The true test of that approach will come when we turn our attention to areas where there is a great deal of overlap

and inconsistency between the Davis Stirling Act and the Corporations Code (e.g., in the rules governing inspection of records).

Other Miscellaneous Codes

Mr. Dolnick favors consolidation of all relevant statutes into a single body of law. That would make it easier for association directors to research applicable law. See Exhibit pp. 3-4. However, he disagrees with the staff's statement, in Memorandum 2005-18, p. 1, that there are a "handful of CID-related statutes located elsewhere in the Codes." He points to a privately published CID statutory compilation (Epsten, Grinnell & Howell, *Community Association Law Resource Book* (2005)) and notes that it includes over 400 statute and regulation sections that are outside of the Davis Stirling Act and the Nonprofit Mutual Benefit Corporation Law. See Exhibit pp. 1-2.

The staff has reviewed the statutes listed in the *Community Association Law Resource Book* and finds that most are statutes of general application that apply to CIDs in the same way that they would apply to any other person. See, e.g., Sections 51-54 (Unruh Civil Rights Act), 3479-3481 (nuisance); Code Civ. Proc. § 116.220 (jurisdiction of small claims court); Veh. Code § 21234 (motorized scooter restrictions). Although those laws may be of interest to a CID director or homeowner from time to time, the staff would not characterize them as "CID-related" and would not recommend that we incorporate them into the Davis Stirling Act. Those laws would be left unchanged and would continue to apply to a CID, just as they apply to any other person.

There are a few statutes in other codes that relate to a CID *as a CID*. For example, Vehicle Code Section 22658.2 regulates the removal of a vehicle from a CID for a parking violation. With a section of that type, we will need to analyze whether it would make sense to incorporate the section into the Davis Stirling Act or leave it where it is (perhaps with a cross-reference in the Davis Stirling Act).

As this study progresses, the staff will search for relevant CID-related statutes in other codes and will consider how they should be treated.

Department of Real Estate Regulations

As part of the process for approval of a new CID by the Department of Real Estate ("DRE"), Business and Professions Code Section 11018.5 requires that the Real Estate Commissioner issue a public report finding, among other things, that:

> (e) Reasonable arrangements have been or will be made as to the interest of each of the purchasers of lots, apartments, or condominiums in the subdivision with respect to the management, maintenance, preservation, operation, use, right of resale, and control of their lots, apartments, or condominiums, and such other areas or interests, whether or not within, or pertaining to, areas within the boundaries of the subdivision, as have been or will be made subject to the plan of control proposed by the owner and subdivider, and which are included in the offering.

DRE has adopted regulations that specify, on a number of topics, what arrangements it would find reasonable. See, e.g., 10 Cal. Code. Reg. § 2792.17 (reasonable arrangements for conduct of member meetings). Because these regulations act as a safe harbor for a developer, most modern CIDs will have governing document provisions that are identical or very similar to the rules set out in the DRE regulations.

However, there is nothing that requires strict adherence to the "reasonable arrangements" modeled in the DRE regulations. Other arrangements may also be found reasonable. Also, an older CID may have been created before enactment of the DRE regulations or under different versions of the regulations, in which case its governing documents may differ significantly from the current model rules. Furthermore, once the developer controls less than 25% of the votes in a CID, the period of DRE jurisdiction over the governing documents ends, and the CID is free to amend its governing documents in ways that are contrary to DRE regulations. See Bus. & Prof. Code § 11018.7.

In reorganizing CID law, we are not bound by the DRE regulations. A regulation must be consistent with a governing statutory provision; it is subordinate to statutory law. See Gov't Code § 11349. If we recommend changes to the Davis Stirling Act that conflict with DRE regulations, and those changes are enacted, DRE would need to amend its regulations accordingly. However, the staff will look to the DRE regulations as evidence of common practice in most CIDs.

CROSS-REFERENCES

Changes to existing section numbers will require that conforming revisions be made in sections that refer to the renumbered provisions.

In some cases, a provision in the staff draft will refer to a section that has not yet been reorganized and assigned a new section number. Those references

cannot be corrected at this time. Those unresolved references are set out in brackets in the staff draft, to flag the fact that they will require correction in the future. A staff note at the beginning of the proposed law draws attention to this practice.

Many sections outside of the Davis-Stirling Act include references to provisions of the Davis-Stirling Act. Once the proposed law is complete, the staff will prepare a set of conforming revisions to correct the cross-references.

COMMENT LANGUAGE

As discussed in Memorandum 2005-18, the staff intends to include plain language explanatory provisions in the Commission Comments, to the extent feasible. That has not been done in the attached staff draft, for lack of time. The staff will do so in a later phase of this study.

PRELIMINARY PROVISIONS

The "Preliminary Provisions" chapter includes various provisions relating to the construction and application of the proposed law. Most of the changes in this area are technical and should not be controversial. However, some of the changes merit explanation and discussion.

Comment on Terminology

To the extent practicable, Commission Comments use standardized terminology to describe a proposed section's origin and relation to existing law. In some large statutory recodification projects, the Commission includes a Comment that discusses the terminology used in the Comments. The staff draft includes such a Comment, following proposed Section 4010.

Procedural Shorthand

The Corporations Code defines certain common procedures and then invokes them by reference. For example, Corporations Code Section 7150(b) provides in part: "Bylaws may be adopted, amended, or repealed by approval of the members (Section 5034)…" Section 5034 provides the rule for what is required in order for an action to be approved by the members. This simplifies drafting and establishes standardized procedures for common actions.

The proposed law takes a similar approach. It includes general provisions that define standard procedures for delivery of a notice or approval of an action.

See proposed Sections 4035 (delivered to the board), 4040 (individual notice), 4045 (general notice), 4050 (approved by board), 4055 (approved by majority of all members), 4060 (approved by a quorum of a majority of the members). Those procedures are then incorporated by reference. For example:

> **§ 6045. Approval of amendment**
>
> 6045. (a) If the governing documents provide a procedure for approval of an amendment of the declaration, an amendment may be approved by that procedure.
>
> (b) If the governing documents do not provide a procedure for approval of an amendment of the declaration, an amendment may be approved by a majority of all members (Section 4055).
>
> (c) The board shall provide individual notice (Section 4040) to all members of an amendment approved under this section.
>
> **Comment**. Section 6045 is comparable to the provisions of former Section 1355 that relate to approval of an amendment of the declaration. See Sections 4040 (individual notice), 4055 (approved by all members).
>
> See also Sections 4085 ("board"), 4125 ("declaration"), 4140 ("governing documents"), 4150 ("member").

Definition of "Common Interest Development"

Existing Section 1351(c) defines the term "common interest development" by reference to the four specific types of CID:

> "Common Interest development" means any of the following:
> (1) A community apartment project.
> (2) A condominium project.
> (3) A planned development.
> (4) A stock cooperative.

That definition facilitates drafting, but isn't very informative. A person who wants a general understanding of what is meant by "common interest development" would need to compare the definitions of the four specific types of CID, in order to determine what they have in common. See Section 1351(d) ("community apartment project"), (f) ("condominium project"), (k) ("planned development"), (m) ("stock cooperative").

In addition, a person would need to consider Section 1352. Although that section operates as a limit on the application of the Davis-Stirling Act, rather than as a formal definition, it does effectively define what is a "common interest development" for the purposes of the act. It provides:

1352. This title applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided, all of the following are recorded:

(a) A declaration.

(b) A condominium plan, if any exists.

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

It would be helpful to provide a general definition that harmonizes all of the existing provisions that collectively define "common interest development." To that end, proposed Section 4095 provides:

§ 4095. "Common interest development"

4095. (a) "Common Interest development" means a real property development in which a separate interest is coupled with either of the following:

(1) An undivided interest in all or part of the common area.

(2) Membership in an association that owns all or part of the common area.

(b) In a development where there is no common area other than that established by mutual or reciprocal easement rights appurtenant to the separate interests, "common interest development" means a development in which a separate interest is coupled with membership in an association with the power to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of common area by means of an assessment that may become a lien upon the separate interest.

(c) "Common interest development" includes all of the following types of developments:

(1) A community apartment project.

(2) A condominium project.

(3) A planned development.

(4) A stock cooperative.

Comment. Section 4095 restates the definition of "common interest development" to improve its clarity, without substantive change. See former Sections 1351(c), (d), (f), (k), (m); 1352. See also Sections 4080 ("association"), 4090 ("common area"), 4115 ("condominium project"), 4165 ("planned development"), 4175 ("separate interest"), 4180 ("stock cooperative").

It is unfortunate that subdivision (b) is so complex, but that complexity is necessary to describe existing law. See "Planned Development," below.

Subdivision (c) is redundant, but informative.

CID Types

The four types of CID are distinguished primarily by the nature of the homeowner's interest in the common area and the homeowner's separate interest:

- In a condominium project, at least *part* of the common area must be owned by the homeowners in undivided interests. The remainder may be owned by the association. The separate interest is a separately owned unit.
- In a planned development, the common area can be owned by the homeowners in undivided interests *or* it can be owned by the association. The separate interest is a separately owned unit.
- In a community apartment project, the owners collectively own the *entire* development, including both the common area and the separate apartments. The separate interest is a right of exclusive use of a unit.
- In a stock cooperative, a corporation owns the *entire* development, including both the common area and the separate units. Owners are shareholders of the corporation. The separate interest is a right of exclusive use of a unit.

The preceding information is represented graphically in the chart below:

	Common Area Owned by Homeowners	**Common Area Owned by Separate Entity**
Separate Interest Owned by Homeowner	• Condominium Project • Planned Development	• Planned Development
Separate Interest is Right of Exclusive Use	• Community Apartment Project	• Stock Cooperative

As indicated in the chart, a CID in which the owners have an undivided interest in the common area coupled with direct ownership of a separate interest can be *either* a condominium project or a planned development. In that case, the form is chosen by the developer.

Revised Definitions

The proposed law restates the definitions of the four types of CID in order to use more uniform language and construction, and to emphasize the fundamental distinctions between the types. The proposed changes to the definitions of "community apartment project" and "stock cooperative" are fairly minor and should be noncontroversial:

§ 4100. "Community apartment project"

4100. "Community apartment project" means a real property development in which a right of exclusive occupancy of a specified part of the development is coupled with an undivided interest in the development as a whole.

Comment. Section 4100 continues former Section 1351(d) without substantive change.

§ 4180. "Stock cooperative"

4180. (a) "Stock cooperative" means a real property development in which a right of exclusive occupancy of a specified part of the development is coupled with an ownership interest in a corporation that is formed or availed of primarily for the purpose of holding title to the development as a whole.

(b) An owner's interest in the corporation, whether evidenced by a share of stock, a certificate of membership, or otherwise, shall be deemed to be an interest in a common interest development and a real estate development for purposes of subdivision (f) of Section 25100 of the Corporations Code.

(c) It is not necessary that all shareholders of the corporation receive a right of exclusive occupancy of a specified part of the development.

(d) A "stock cooperative" includes a limited equity housing cooperative that meets the criteria of Section 33007.5 of the Health and Safety Code.

Comment. Section 4180 continues former Section 1351(m) without substantive change, except that language providing that the corporation's ownership of the development may be "either in fee simple or for a term of years" is continued in Section ____. See also Section 4095 ("common interest development")

☞ **Staff Note.** Existing language providing that the corporation's ownership of the development may be "either in fee simple or for a term of years" is substantive and is not required as part of the definition of the term. It will be located with other provisions that relate to the form of title in a CID. See, e.g., Civ. Code § 1362.

The proposed changes to the definitions of "condominium project" and "planned development" are more significant and are discussed separately below.

Condominium Project

Section 1351(f) defines a "condominium project" (and a "condominium") as follows:

> A "condominium project" means a development consisting of condominiums. A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are

> described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof. The area within these boundaries may be filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support. The description of the unit may refer to (1) boundaries described in the recorded final map, parcel map, or condominium plan, (2) physical boundaries, either in existence, or to be constructed, such as walls, floors, and ceilings of a structure or any portion thereof, (3) an entire structure containing one or more units, or (4) any combination thereof. The portion or portions of the real property held in undivided interest may be all of the real property, except for the separate interests, or may include a particular three-dimensional portion thereof, the boundaries of which are described on a recorded final map, parcel map, or condominium plan. The area within these boundaries may be filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support. An individual condominium within a condominium project may include, in addition, a separate interest in other portions of the real property.

The substantive complexity of that definition reflects the variety of forms that a condominium project can take and is largely unavoidable.

For example, a condominium project may be designed to be "dirtless." The owner in a dirtless condominium has a separate interest in the airspace within a unit as well as an undivided interest in the building in which the unit is contained. But the ground underneath and surrounding the building is owned by the association (with easements reserved for support and unit owner ingress, egress, and access). See generally, J. Hanna & D. Van Atta, Cal. Comm. Int. Dev. L. & Prac. § 3:41 (2004). These sorts of complex arrangements explain the provisions in the definition that permit part of the common area to be owned by the association and specifically allow for separate interest units that are defined as a three dimensional space within the air.

Although the complexity of existing practices limits the extent to which the definition can be simplified, it is possible to make some improvements. The proposed law would make the following changes:

(1) The definitions of "condominium project" and "condominium" would be separated.
(2) The definition of "condominium project" would be restated to use language parallel to that used in the other sections defining CID types, including use of the defined terms "common area" and

"separate interest." For example, "common area" can be used in place of the phrase "all of the real property, except for the separate interests."

(3) Subdivisions would be added to separate the basic definition from the special provisions describing the nature of an owner's separate interest and interest in the common area.

The proposed definitions of "condominium" and "condominium project" are set out below.

§ 4105. "Condominium"

4105. "Condominium" means a separate interest in a condominium project, coupled with an undivided interest in all or part of the common area of the condominium project.

Comment. Section 4105 restates the definition of "condominium" in former Section 1351(f), without substantive change. See also Sections 4090 ("common area"), 4115 ("condominium project"), 4175 ("separate interest").

§ 4115. "Condominium project"

4115. (a) "Condominium project" means a real property development in which separate ownership of a specified part of the development is coupled with an undivided interest in all or part of the common area.

(b) The undivided interest in the common area and the separate interest may be a specified three-dimensional space filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support.

(c) The boundaries of the undivided interest in the common area shall be described on a recorded final map, parcel map, or condominium plan.

(d) The boundaries of a separate interest shall be described on a recorded final map, parcel map, or condominium plan. A description of a separate interest may refer to (1) boundaries described in the recorded final map, parcel map, or condominium plan, (2) physical boundaries, either in existence, or to be constructed, such as walls, floors, and ceilings of a structure or any portion thereof, (3) an entire structure containing one or more separate interests, or (4) any combination thereof.

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

Comment. Section 4115 restates former Section 1351(f), without substantive change, except that the definition of "condominium" has been relocated to Section 4105. See also Sections 4090

("common area"), 4105 ("condominium"), 4110 ("condominium plan"), 4175 ("separate interest").

☞ **Staff Notes.** (1) Proposed Section 4115 restates existing Section 1351(f) in order to parallel the language and construction used in proposed Sections 4100 ("community apartment project"), 4165 ("planned development"), and 4180 ("stock cooperative"). The section also eliminates duplicative language and makes fuller use of defined terms. These changes are intended to improve clarity and are not intended to affect the substance of the existing definition of "condominium project." The Commission requests public input on whether any of the drafting changes would have a substantive effect.

(2) The content of subdivision (d) has been left unchanged because its purpose is unclear. Does the provision merely reflect the fact that a separate interest may include noncontiguous parcels of land (e.g., a residential unit and a boat slip)? If so, is it necessary? Does its presence in this section imply that a separate interest in one of the other types of CIDs must be a single contiguous parcel?

Planned Development

Section 1351(k) provides:

> "Planned development" means a development (other than a community apartment project, a condominium project, or a stock cooperative) having either or both of the following features:
>
> (1) The common area is owned either by an association or in common by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of the common area.
>
> (2) A power exists in the association to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment which may become a lien upon the separate interests in accordance with Section 1367 or 1367.1.

Subdivision (k)(1) sets out the basic definition of a planned development. As noted earlier, this definition includes a development that is substantively indistinguishable from a condominium project. In such a development, the form of CID would be determined by the developer. That overlap is the reason for the provision stating that a planned development is a development "other than … a condominium project….").

Subdivision (k)(2) states a test that would be satisfied by *any* CID (the Davis-Stirling Act authorizes an association to impose an assessment and provides that an assessment can be enforced by lien; see Sections 1366-1367.1). The all-encompassing nature of that test explains the need for the language excluding the other types of CID from the definition of "planned development."

So what is the purpose of subdivision (k)(2)? It would only seem to have relevance where subdivision (k)(1) does not apply, i.e., where there is no

common area owned by the association or by the homeowners in undivided shares. When would an association have common area that is not owned by the association itself or by the homeowners in undivided shares? Section 1351(b) provides the answer, in a special provision that applies only to subdivision (k)(2):

> [The] common area for a planned development specified in paragraph (2) of subdivision (k) may consist of mutual or reciprocal easement rights appurtenant to the separate interests.

For example, a development is comprised of the homes fronting on a private road. The homeowners do not own the road as tenants in common, nor is the road owned by an association. Instead, each homeowner's separate interest includes the part of the road fronting his or her lot, out to the centerline of the road. Appurtenant to each homeowner's separate interest is an easement allowing passage over the portions of the road owned by the other homeowners. Under Section 1351(b) those easements constitute "common area."

Under existing law, such a development is a planned development if there is an association that has the power to impose an assessment that may be enforced by a lien on a separate interest, for the purpose of enforcing an obligation relating to the common area (e.g., to enforce a mutual road maintenance obligation).

The definition of "planned development" could be stated more directly, by separating the varieties of planned development and by combining the related parts of 1351(b) and (k)(2). Thus:

> **§ 4165. "Planned development"**
>
> 4165. "Planned development" means a real property development of any of the following types:
>
> (a) A development, other than a condominium project, in which separate ownership of a specified part of the development is coupled with an undivided interest in the common area.
>
> (b) A development in which separate ownership of a specified part of the development is coupled with: (1) membership in an association that owns the common area, and (2) an appurtenant right to the beneficial use and enjoyment of the common area.
>
> (c) If the common area consists entirely of mutual or reciprocal easement rights appurtenant to the separate interests, a development in which separate ownership of a specified part of the development is coupled with membership in an association that has the power to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment that may become a lien

upon the separate interests in accordance with [Section 1367 or 1367.1].

Comment. Section 4165 continues former Section 1351(k) without substantive change. Subdivision (b) incorporates a related provision from former Section 1351(b). See also Sections 4080 ("association"), 4090 ("common area"), 4115 ("condominium project"), 4175 ("separate interest").

Subdivision (c) is still a mouthful, but it is self-contained, making it easier to understand the special case that it describes.

"Member" v. "Owner"

The Davis-Stirling Act appears to use the terms "member" and "owner" interchangeably, with about the same frequency ("owner" is used 189 times; "member" is used 163 times). Neither term is defined in the Act. In the interest of simplicity, it would be better to use a single term exclusively. Note that the term "homeowner" has some appeal, but it should probably not be used because some CID units are businesses rather than homes.

Conceptually, "member" is a better fit when addressing association governance; "owner" is more apt when addressing property-related matters. On balance, the Davis Stirling Act is slightly more concerned with governance than with property issues (though it is not always easy to separate the two). That argues slightly in favor of using the term "member."

In addition, the Nonprofit Mutual Benefit Corporation Law uses "member" exclusively. The need to coordinate with that law also weighs in favor of "member."

The term can be used without losing the connotation of ownership, by defining it as follows:

§ 4140. "Member"

4140. "Member" means an owner of a separate interest in a common interest development.

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

That is the term used in the proposed law.

Creation of CID

Part of existing Section 1352 defines when a common interest development is created for the purpose of the Davis Stirling Act. Because the date of creation is keyed to the recording of specified governing documents, the provision has been moved to the governing documents chapter. See proposed Section 6000.

Hierarchy of Document Authority

Existing law provides that an association's bylaws must be consistent with its articles of incorporation. Corp. Code § 7151(c). In addition, existing Section 1357.110 provides that an operating rule must be consistent with the declaration, articles, and bylaws of the association. These provisions establish a partial hierarchy of authority within the governing documents. That hierarchy is consistent with the staff's general sense that the declaration is the foundational document of a CID. The articles are next in dignity (being superior to the bylaws and the operating rules. Then come the bylaws, and finally the operating rules. That hierarchy also parallels the procedural burden involved in amendment, thus:

- The declaration may only be amended with the approval of a majority of the entire membership and must be recorded.
- With a few narrow exceptions, an amendment of the articles must be approved by both the board and a majority of a quorum of the members, and must be filed with the Secretary of State.
- Most bylaw amendments may be approved by the board acting alone, but some require the approval of a majority of quorum of the members. The amendment need not be recorded or filed with the Secretary of State.
- Operating rules may be amended by the board, acting alone. The amendment need not be recorded or filed with the Secretary of State.

Proposed Section 6005 establishes a formal hierarchy of authority between the document types, along the lines described above. It should help to resolve any inconsistency that might exist between an association's different governing documents.

Declaration Contents

A recorded declaration is required for every CID. See Section 1352. The declaration describes the property and sets out any property use restrictions that

are to be enforceable as equitable servitudes. Section 1353. The declaration is the foundational governing document.

Provisions governing the contents of the declaration are continued without substantive change in proposed Sections 6025-6035.

When Declaration May be Amended

Existing Section 1355(b) includes the following sentence:

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

Proposed Section 6040(a) restates the rule in simpler terms, with a note that raises two questions about the provision:

> **§ 6040. Amendment authorized**
>
> 6040. (a) A declaration may be amended at any time, notwithstanding any contrary provision of the declaration.
>
> (b) Any provision of a declaration may be amended, unless the declaration expressly prohibits amendment of that provision.
>
> …
>
> **Comment**. Subdivisions (a)-(b) of Section 6040 restate the first sentence of former Section 1355(b) without substantive change.
>
> …
>
> ☞ **Staff Notes.** (1) The Commission invites comment on whether the proposed restatement of the first sentence of Section 1355(b) would cause any substantive change in the law.
>
> (2) Existing law acknowledges that a declaration may be drafted so as to limit or prohibit its amendment. That could result in permanent restrictions that become inappropriate over time, due to changed circumstances or the changed desires of the property owners. The common law recognizes a defense to the enforcement of an equitable servitude where "the original purpose for the restrictions has become obsolete and continued enforcement of the restrictions would be oppressive and inequitable." H. Miller & M. Starr, California Real Estate § 24:20 (3d ed. 2004). As a matter of policy, should there be a procedure for amendment of a declaration by the members of a homeowner association, even if the declaration prohibits its own amendment?

Amendment Procedure

Existing law provides a complex set of rules for amendment of the declaration. The basic scheme seems to be as follows:

- If the governing documents provide a procedure for amendment of a declaration, then the declaration may be amended either by using that procedure (as supplemented by certain statutory

certification and recording requirements) or by using a purely statutory procedure (which requires the approval of a majority of all members and compliance with specified notice and recordation requirements). Section 1355.

- If the governing documents do not provide a procedure for amendment of the declaration, then the declaration may be amended using the statutory procedure. Section 1355(b).
- In addition, there are special optional procedures that may be used to delete an unlawful restrictive covenant (Section 1352.5), delete a developer's construction or marketing provision (Section 1355.5), extend the termination date of a declaration that includes a termination date (Section 1357), and to petition the court to allow an amendment to be approved by a simple majority, despite the fact that the governing documents require a supermajority (Section 1356).

The amendment procedures are restated in proposed Sections 6045-6055 without substantive change, with the exception of Sections 1356 (judicial approval of amendment) and 1357 (extension of termination date). Those provisions are discussed below.

Court Modification of Threshold for Approval of Declaration Amendment

Section 1356 authorizes the superior court to lower the percentage of votes required for approval of an amendment of the declaration. The probable purpose of that provision is to facilitate necessary amendments where member apathy makes it impossible to obtain the required percentage of affirmative votes for approval.

On the petition of a director or member, the court may review the procedures used and, if it finds the amendment "reasonable" it can "reduce the percentage of affirmative votes" required for approval of the amendment, thereby approving the amendment.

Section 1356 is comparable to Corporations Code Section 7515, which authorizes a director or member to petition the superior court for an order:

> [Dispensing] with any requirement relating to the holding of and voting at meetings or obtaining of votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws, or this part.

In effect, Section 1356 is a specific expression of the general rule provided in Corporations Code Section 7515.

The staff feels that it would be better to have a single section that addresses judicial approval of actions that fail to obtain the required member approval (based on Corporations Code Section 7515). The issue will be addressed as part of the general reorganization of member voting and election provisions, in a later phase of this study. Section 1356 is not continued in the proposed law.

Extension of Termination Date

Section 1357 authorizes an amendment of the declaration to extend a termination date, regardless of whether the governing documents provide authority to do so. That is an exception to the general rule that a declaration may prohibit or limit its own amendment.

The authority granted by Section 1357 is limited by Section 1357(d):

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

These principles are restated (along with the legislative justification for overriding the declaration) in proposed Section 6040(c)-(d):

> 6040. …
>
> (c) The Legislature finds that there are common interest developments that have been created with deed restrictions that do not provide a means for the property owners to extend the term of the declaration. The Legislature further finds that covenants and restrictions, contained in the declaration, are an appropriate method for protecting the common plan of developments and to provide for a mechanism for financial support for the upkeep of common areas including, but not limited to, roofs, roads, heating systems, and recreational facilities. If declarations terminate prematurely, common interest developments may deteriorate and the housing supply of affordable units could be impacted adversely. The Legislature further finds and declares that it is in the public interest to provide a vehicle for extending the term of the declaration if owners having more than 50 percent of the votes in the association choose to do so.
>
> (d) A declaration may be amended to extend the termination date of the declaration, notwithstanding any contrary provision of the declaration. No single extension of the term of the declaration made pursuant to this subdivision shall exceed the initial term of the declaration or 20 years, whichever is less. However, more than one extension may be made pursuant to this subdivision.
>
> **Comment**. …

Subdivisions (c)-(d) restate Section 1357 without substantive change except that the procedure for approving an amendment of a declaration to extend its termination date is not continued. An amendment under this subdivision would be approved pursuant to Section 6045. See also Sections 4080 ("association"), 4095 ("common interest development"), 4125 ("declaration").

Articles of Incorporation

Existing Section 1363.5 requires that certain information be included in the articles of incorporation of a homeowner association that is incorporated. Those requirements are continued in proposed Section 6060.

Condominium Plan

Existing provisions governing the content of the condominium plan and providing a procedure for amendment of the plan are continued without substantive change in proposed Sections 6075-6080.

Operating Rules

Existing law permits the board to adopt "operating rules" to implement authority conferred by the law or by the other governing documents. Commission-recommended law provides a notice and comment procedure for adopting some types of operating rules (those deemed most likely to directly affect members). See Sections 1357.110-1357.150.

The existing operating rule provisions are continued in proposed Sections 6100-6125. A few nonsubstantive changes have been made, mostly to make use of new definitions.

Restrictive Covenants

Existing Section 1352.5 requires that illegal discriminatory covenants be deleted from the governing documents, and provides an expedited procedure for doing so. That section is restated in proposed Section 6150, which adds a requirement that an amended declaration be recorded and that amended articles of incorporation be filed with the Secretary of State. That minor improvement should be noncontroversial.

Construction of Documents

Existing Sections 1370-1371 provide rules of construction for the interpretation of governing documents. Those sections are continued without substantive change, in proposed Sections 6175-6180.

CONCLUSION

The attached staff draft is a work in progress. The staff is still exploring the extent to which existing law should be changed as it is reorganized. The provisions on articles of incorporation and bylaws illustrate one approach that we can follow in attempting to address the overlapping authority of the Davis Stirling Act and the Corporations Code. The staff invites comments on the merits of that effort.

After making any changes to the staff draft decided on by the Commission, the staff will next work on the material relating to the rights and duties of members, as follows:

CHAPTER 2. RIGHTS AND DUTIES OF MEMBERS
- Article 1. Bill of Rights [Reserved]
- Article 2. Property Use
- Article 3. Inspection of Records
- Article 4. Actions Requiring Member Approval
- Article 5. Member Duties

That material should be substantively and politically more challenging.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

SAMUEL L. DOLNICK
5706-348 Baltimore Drive
La Mesa, CA 91942-1654
Phone/Fax 619-697-4854

May 14, 2005
Mr. Brian Hebert
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

File:_____
Via e-mail: bhebert@clrc.ca.gov
4 pages
Hard copy + *Book* to follow

Re: Study H-855 Memorandum 2005-18
Statutory Clarification and Simplification of CID Law (Discussion of Issues)

Dear Mr. Hebert:

The California Law Revision Commission (CLRC) is to be commended for examining methods for the consolidation of the body of law as it relates to CIDs. Consolidation is long overdue. The following comments refer to the California Codes and to CIDs consisting of 2-150 units. The consolidation is especially necessary for those CIDs in which volunteer board of directors manage the association.

California Codes

In the first paragraph of the Memorandum it is noted that CIDs are subject to the Davis-Stirling Common Interest Development Act (D-S Act), the Corporations Code and "[t]here are also a handful of CID-related statutes located elsewhere in the Codes."

An analysis of the Epsten, Grinnell & Howell *Community Association Law 2005 Resource Book* [a copy is being sent under separate cover] indicates that there are more than a "handful of CID-related statutes located elsewhere in the Codes." In the Preface the following statement appears.

> "This book represents a compilation of California statutory law. It contains the statutes the publishers believe will most likely assist community association managers and board members in the performance of their duties. **It is not intended to include every statute which could possibly affect a community association, but rather those which are most frequently encountered."** [Emphasis not in original]

As can be seen, this *Resource Book* is an attempt to do what the CLRC is proposing. The Table of Contents of the *Resource Book* indicates that there are more than "...a handful of CID-related statutes located elsewhere in the codes" as the Memorandum suggests. Following are the names of the related codes and a count of the number of sections within these codes.

	Code Name	No. of Sections
1.	Business and Professions Code	7
2.	Civil Code – Davis-Stirling	82
	Other than Davis-Stirling	78
3.	Code of Civil Procedure	20
4.	Corporations Code	137
5.	Government Code	5
6.	Health & Safety Code	57
7.	Insurance Code	2
8.	Labor Code	1
9.	Vehicle Code	5
10.	Welfare & Institutions Code	1
11.	Code of Regulations – Building Code	11
12.	Code of Regulations – Environmental Health	1
		407

There are 12 different California Codes with 407 different sections. The D-S Act comprises 82 sections or 20% and the Corporations Code has 137 sections or 34%. Both of these total 54% of the statutes. Since 46% of the indicated statutes affecting CIDs are outside of the D-S Act or the Corporations Code, these outside statutes cannot be considered a "handful." A close examination of other codes will most likely uncover other statutes affecting CIDs.

CIDs from 2-150 units

As noted in the Memorandum "CID law must be understood and applied by directors in over 36,000 homeowner associations statewide." There are many homeowner associations that have from 2 to150 units. These units are for the most part self-managed by volunteer boards of directors and do not have an attorney on retainer. Thus, they are in most cases unaware of the statutes and how they are affected by them.

The Secretary of State requires that each common interest association, whether incorporated or unincorporated, file a biennial statement. However, since there is nothing in place to trace where these associations are, the Secretary of State is woefully deficient in having information about all 36,000 CIDs in its files. If it had the information it would be possible to ascertain the exact number of CIDs in the 2-150 unit category that are self-managed by the volunteer board of directors.

Even though it is difficult to get up-to-date figures, studies made in 1987, 1996 and 1999 may provide some clues and trends on the percent of units that are self-managed by their volunteer boards of directors.

1987 "Common Interest Homeowners' Associations Management Study" by Stephen E. Barton, Ph.D. and Carol J. Silverman, Ph.D., Prepared for the California Department of Real Estate. Table L, page 17.

"As shown in Table L small associations are more likely to be self-managing." Units that are self-managed: under 17 units—72%; 17 to 42 units—59%; 43 to 99 units—27%; and 18% for units of 100 or more.

1996 "Inside Look at Community Association Homeownership—Facts, Perceptions" by Doreen Heisler, Ph.D. and Warren Klein, Ph.D., Published by CAI, page 7.

27% of CAI membership lived in 3 to 50 units and 33% lived in 51 to 150 units. Thus a total of 60% of CAI's membership lived in associations that most likely were self-managed by volunteers.

1999 "Community Association Fact Book" by Clifford J. Treese, CPCU, ARM, Edited by Frank H. Spink. Published by CAI, page 12.

27% of CAI membership were self-managed by volunteers.

1999 "National Survey of Homeowner Satisfaction" conducted by The Gallup Organization for CAI, page 53.

1 to 49 units—14%; 50 to 99 units—16%; 100 to 149 units—10% or a total of 40% of the associations were self-managed by volunteers.

From the above data it can be safely interpolated that approximately 30% of the CIDs in California are self-managed by their boards or other volunteers. If there are actually 36,000 association in the state, 30% means that there are 10,800 associations that have no clue or very little information on the statutes that affect CIDs.

Therefore, consolidation of all the codes into one compact area is not only necessary for this 30 % but also for all associations, as the directors are volunteer lay people for the most part and they should have access to the codes all in one place. They should not always have to rely upon what the professionals advise, as professionals do not always

agree on the issue presented. The directors have the to responsibility to do some research on their own and as the situation is now this is almost impossible.

Thank you for your consideration of the above material

Sincerely,

Sam Dolnick

Sam Dolnick
Condo Homeowner

June 2, 2005

MERITAS LAW FIRMS WORLDWIDE
Curtis C. Sproul
916.558.6037 DIRECT
csproul@weintraub.com

Sent via email: bhebert@clrc.ca.gov

Mr. Brian Hebert
Assistant Executive Secretary
California Law Revision Commission
3200 Fifth Avenue
Sacramento, CA 95817

Re: CLRC Memorandum 2005-18; Project to Clarify and Simplify the Laws Relating to Common Interest Developments

Dear Brian:

Thank you for sending me a copy of the California Law Revision Commission's Memorandum concerning the project to simplify the laws relating to common interest developments. I welcomed the Commission's last proposal adding chapter and article headings to the Davis-Stirling Common Interest Development Act, but I share the CLRC staff's view that further improvements could be made. As often as I have occasion to consult the Act, I still find myself searching for particular provisions that do not seem to be located in the most appropriate Chapter of the Act.

Before offering some specific recommendations, I want to comment on the staff's suggestion that it might be appropriate to duplicate some elements of the corporations law (I assume you are referring primarily to the Mutual Benefit Corporation Law) in the Davis-Stirling Act. If past experience is a guide, then rather than bringing greater consistency to the laws governing common interest developments and their associations of property owners, the result could be further confusion, even if further changes include a default rule stating that in the event of a conflict between the Corporations Code and the Davis-Stirling Act, the Act's provisions prevail. For example, Civil Code 1363.05 (the Open Meeting Act) contains notice provisions that are inconsistent with the Corporations Code provisions relating to the issuance of notices of board meetings (both as to timing and method of delivery) and Civil Code section 1365.2 (relating to inspection rights) is largely repetitive of

the Corporations Code member inspection rules (Corporations Code section 8333), but uses different terminology, thereby creating confusion. Accompanying this letter as an attachment is a summary I prepared for my clients to inform them of Civil Code section 1365.2 when it first became law. The summary identifies some of the overlap problems vis-à-vis the Mutual Benefit Corporation Law.

My other concern with any proposal to repeat Corporations Code rules in the Davis-Stirling Act is that the risk of future inconsistencies between the two sets of statutes is increased. The constituencies that are most active in proposing and monitoring legislation impacting the Corporations Code (such as the Nonprofit and Unincorporated Associations Committee of the Business Law Section of the State Bar) and those that are most active in proposing and monitoring legislation impacting the Davis-Stirling Act (including your Law Revision Commission, CLAC and CACM), rarely, if ever, communicate, one to the other. As a result, changes are often made to one Code without corresponding changes being made to the other.

Finally I am including in my list of recommendations some comments regarding inconsistencies between the Davis-Stirling Act, the Mutual Benefit Corporation Law and Regulations of the California Department of Real Estate that dictate the content of common interest governing documents prepared by developers. While the Law Revision Commission does not make recommendations for regulatory amendments, in my experience the Department endeavors to conform its Regulations to existing law as those laws evolve and change.

Enforcement:

Enforcement is currently a subject that is addressed in Article 2 of Chapter 2 ("Governing Documents"), Article 1 of Chapter 4 ("Governance"), Article 5, of Chapter 4 ("Governance"), and Article 2 of Chapter 7 ("Civil Actions and Liens"). The Chapter 2 discussion is limited to a now much edited Civil Code section 1354 (most of the former section 1354 is now found in Chapter 4, Article 5 and Chapter 7, Article 2), the two Chapter 4 provisions both pertain to internal dispute resolution procedural requirements (Civil Code sections 1363(h) and 1363.810-1363.850, and Chapter 7 presents pre-

litigation alternative dispute resolution procedures that are similar to old Civil Code section 1354. Ideally, all of these sections should be presented in one Article that presents a clear progression from one level of conflict resolution to another. Perhaps the easiest improvement would be to delete Civil Code section 1363(h) entirely and simply include that section's basic notice and hearing requirements as elements of the minimum "fair, reasonable and expeditious dispute resolution procedures" required by Civil Code section 1363.830. As things now stand, the Act is not clear with respect to whether the procedures outlined in Civil Code sections 1363.810 through 1363.840 (which call for "maximum reasonable use of available local dispute resolution programs") are intended as a step up the dispute resolution ladder, following notice and a hearing before the Board.

Chapter 7 of the Davis-Stirling Act; "Civil Actions and Liens".

The only "lien" topic that is addressed in Chapter 7 ("Civil actions and Liens") is Civil Code section 1369 relating to liens for labor and materials. As the Law Revision Commission well knows, in the universe of day-to-day common interest life, the lien issue that is of paramount importance is the authority conferred on community associations to collect delinquent assessments through the use of lien and foreclosure remedies (Civil Code section 1367, which is part of Chapter 5 ("Operations"). Unfortunately, the issues addressed in Civil Code section 1369 do not fit neatly in any other Chapter of the Act and yet 99% of the readers who are looking for the Act's rules about liens and foreclosure remedies will not find those topics addressed in the only Chapter with a title that includes the word "Liens".

Member Inspection Rights.

See the attached summary for a discussion of some of the issues/problems I see with the current statutes.

Davis-Stirling Act Assessment Provisions:

Article 2 of Chapter 5 of the Act ("Fiscal Matters") includes Civil Code section

1365.1 which deals with certain annual notices that must be provided to the members regarding assessments and foreclosure remedies. However, Article 4 of the same Chapter ("Assessments") sets forth most of the Act's provisions dealing with the imposition and collection of assessments. Accordingly, Civil Code section 1365.1 would be better organized if it was included in Article 4 o Chapter 5 of the Act.

I have the same recommendation for the relocation of Civil Code section 1363(g) (which is part of Chapter 4, Article 1) and Civil Code section 1368(c) (which is part of Chapter 6) should be relocated in Article 4 of Chapter 5 of the Act, with the heading for Article 4 being expanded to read: "ASSESSMENTS, FEES AND PENALTIES". If that organizational change was made, I would also include Civil Code section 1365.3 (which requires certain reports to be made by community service organizations) to be included in the expanded Article 4 to immediately follow what is currently Civil Code section 1368(c). If I had a free rein in this reorganization and simplification process I would also revise the current text of section 1368(c) to more clearly define what organizations are included in the definition of "community service organizations" and what organizations are not (and are therefore eligible to the receipt of real estate transfer fees).

Davis-Stirling Act Provisions Mandating or Prohibiting Particular Use Restrictions:

A number of provisions of the Davis-Stirling Act either require that recorded Declarations of CC&Rs include certain provisions or the Act prohibits particular provisions from being included in recorded CC&Rs. Those provisions ought to be presented in one Chapter/Article of the Act (my preference is Chapter 2, Article 1 where most of the provisions are found). Those provisions are as follows:

- Civil Code section 1352.5 (Part of Chapter 2, Article 1 of the Act) which prohibits racially discriminatory covenants in violation of Government Code section 12955.

- Civil Code section 1353 (Part of Chapter 2, Article 1 of the Act) which mandates the inclusion of certain provisions in recorded declarations of CC&Rs.

- Civil Code section 1353.5 (Part of Chapter 2, Article 1 of the Act) which prohibits restrictions on the display of the flag of the United States.

- Civil Code section 1353.6 (Part of Chapter 2, Article 1 of the Act) which places limitations on the ability of declarations of CC&Rs to regulate the posting of non-commercial signs.

- Civil Code section 1353.7 (Part of Chapter 2, Article 1 of the Act) which requires CC&Rs for developments in very high fire severity zones to authorize the use of at least one type of fire retardant roof covering and which prohibits any covenants requiring an homeowner to install or repair a root in a manner that is in violation of Health and Safety Code section 13132.7.

- Civil Code section 1360.5 (Part of Chapter 3 of the Act) prohibits governing documents containing provisions that preclude the maintenance of at least one pet (as defined in the section).

- Civil Code section 1363.5 (Part of Chapter 4, Article 4 of the Act) requires the articles of incorporation of community associations to include certain specified information.

Scope, Meaning and Intent of the Davis-Stirling Act:

This subject is currently addressed in the negative in Civil Code section 1350.5 which provides that the Act's various divisions, parts, titles, chapters, and section headings [of Title 6] do not in any manner affect the scope, meaning or intent of Title 6 (i.e., the Davis-Stirling Act). The Act would be improved by expanding section 1350.5 into several subsections that address the current content of that section as well as subjects in other subsections, found much later in the Act, that clearly define the scope of the Act. I am referring specifically to Civil Code section 1373 which excludes commercial and industrial common interest developments from a number of provisions of the Act and section 1374 of the Act which states that developments with no common areas are not covered by the Act.

Notice Conflicts.

Section 1365.1 of the Civil Code prescribes a particular form and content for an annual notice, printed in twelve point type and issued within 60 days prior to the beginning of the fiscal year, regarding the consequences of an owner's failure to pay assessments and foreclosure remedies. Civil Code section 1365(d) requires a statement of the association's policies and practices in imposing liens and collecting assessments to be given not less than 30 or more than 90 days prior to the beginning of the fiscal year. Won't the two notices be quite similar to each other?

Civil Code section 1363(h) requires the Board to give notice to a member who is the subject of possible discipline at least ten day prior to the date of the Board meeting at which the proposed discipline will be discussed and/or action taken. Civil Code sections 1363.810 through 1363.840 impose other procedural and due process requirements for the internal resolution of association/owner disputes. Do the two procedures overlap (i.e., if the association follows fair procedures in accordance with the second set of statutes, can the association dispense with separate compliance with Civil Code section 1363(h)?).

The Corporations Code (section 7211(a)) states that special meetings of the Board of Directors may be held on four day's notice by first-class mail or 48 hours' notice delivered personally or by telephone, including electronic transmission. The Davis-Stirling Act (Civil Code section 1363.05(g)) on the other hand says that all members of an association are to receive at least four days prior notice of director meetings unless the meeting is called as an emergency meeting. An emergency meeting is authorized when the Civil Code prior notice requirements cannot be met due to events that "could not have been reasonably foreseen which require immediate association attention and possible Board action. The Department of Real Estate Regulations (Regulation section 2792.20) say that directors must receive at least four days prior notice of board meetings . Nothing is expressly stated in the Regulations about emergency board meetings, although the same Regulation says that "regular and special meetings of the Board shall be governed by the provisions of section 1363.05 of the Civil Code." In the very next provision of that Regulation the board is authorized to take action by unanimous written consent – a form of

action that is not sanctioned by 1363.05 of the Civil Code.

Cumulative Voting:

Department of Real Estate Regulation section 2792.19(b)(1) requires common interest governing documents to provide for cumulative voting "for all elections in which more than two positions on the governing body are to be filled". Corporations Code section 7615, on the other hand, permits mutual benefit corporate Articles or Bylaws to authorize cumulative voting in any election involving more than a single director.

Very truly yours,

weintraub genshlea chediak sproul
a law corporation

Curtis C. Sproul

SUMMARY OF COMMUNITY ASSOCIATION MEMBER AND DIRECTOR INSPECTION RIGHTS

Member Inspection Rights. AB 104 was signed into law, effective January 1, 2004. The Bill adds Section 1365.2 to the Civil Code to clarify and, in some respects, expand member inspection rights in the context of community associations that are subject to the Davis-Stirling Common Interest Development Act (Cal. Civil Cd §1350 et seq.). Unfortunately, the statute is less than clear in identifying what it is really adding to existing corporate law rules governing member inspection rights.

Existing Inspection Rights under the Corporations Code. Most community associations in California are organized under the Nonprofit Mutual Benefit Corporation Law (Cal. Corp. Cd. §7110 et seq.). Chapter 13 of that law sets forth the record keeping, reporting and member and director inspection rights of mutual benefit corporations. Among other things, the Mutual Benefit Corporation Law:

- Requires nonprofit mutual benefit corporations to maintain adequate and correct books and records of account; minutes of the proceedings of its members, board and committees of the board; and a record of the names and addresses, and membership classes of its members (i.e., a "membership list"). Corp. Cd. §8320.

- Obligates nonprofit mutual benefit corporations, on an annual basis, to notify their members of their right to receive a financial report. That financial report must be prepared and available on written request within 120 days following the close of the fiscal year. Corp. Cd. §8321.

- Requires that mutual benefit corporations furnish information to any of their members who request the information, during the 60 day period following any election or other vote of the members, regarding the results of the voting, including the number of memberships voting for or against the measure, the number of memberships abstaining or withheld from voting, and in the context of director elections, the number of votes cast for each nominee. Corp. Cd. §8325.

• Subject to certain limitations, members have the right to inspect and copy the corporation's membership list so long as a purpose is stated that is reasonably related to the member's interests in the corporation. Upon receipt of such a demand, the corporation has 10 days to take any one of three possible actions: (i) give the member access to the list; (ii) offer a reasonable alternative to actual tender of the list (such as offering to conduct a mailing on behalf of the requesting member); or (iii) petition the court to set aside the demand if the corporation believes that the list is being sought for an improper purpose. Corp. Cd. §§8330 and 8331.

• The Mutual Benefit Corporation Law also grants members the right to inspect and copy the accounting books and records and minutes of proceedings of the members, the board and committees of the board so long as the member tenders a written demand which states a purpose for the inspection that is reasonably related to the member's interests in the organization. Corp. Cd. §8333. This inspection may be conducted by the member, personally, or by an agent or attorney designated by the member. Corp. Cd. §8331.

• Chapter 13 of the Mutual Benefit Corporation Law also contains provisions imposing various sanctions and penalties for wrongful denial of member or director inspection rights, including empowering the courts to postpone meetings of the members, appoint inspectors or accountants to audit the financial statements of the corporation and to investigate the property, funds and affairs of the corporation, and to award attorneys fees and costs incurred to enforce inspection rights. Corp. Cd. §§8335-8337.

• Finally, the Mutual Benefit Corporation Law identifies the membership list of a mutual benefit corporation as a corporate asset that cannot be used, without the consent of the Board of Directors, to solicit money, to further a commercial purpose, to sell the list to other persons, or to be used for a purpose that the user does not reasonably and in good faith believe will benefit the corporation. Corp. Code §8338.

Existing Davis-Stirling Inspection and Member Disclosure Provisions (pre-2004). In addition to these Corporations Code member disclosure and inspection rights, prior to

passage of AB 104, the Davis-Stirling Act required community associations to:

- Provide their members with access to association records in accordance with Article 3, Chapter 13 of the Mutual Benefit Corporation Law. Civil Code §1363(f).

- Prepare minutes of board meetings in final or draft form within 30 days following the meeting and to advise the members of their right to receive a copy of those minutes upon request. Civil Code §1363.05(d).

- Prepare and distribute, within prescribed time periods, annual budgets (containing detailed information required by the Code) and to provide all members with a review of the association's financial statements within 120 days following the close of the fiscal year. Civil Code §1365(a) & (b).

- Prepare and distribute, on an annual basis, within 60 days prior to the beginning of the fiscal year, a summary of the nature and extent of the insurance that the association is maintaining on its assets and with respect to separate interests in the development.

- Prepare and distribute, on an annual basis, within 60 days prior to the beginning of the fiscal year, a notice regarding the obligation of owners to pay assessments to the association and the rights of members who wish to dispute the validity of an imposed assessment. Civil Code §1365.1.

- Prepare and distribute copies of the association's governing documents, budgets and financial statements, and information concerning assessments, fines and penalties and construction defect suits within (10) ten days following receipt from an owner of a request for that information. The association receiving the request is entitled to charge a fee for providing the documents that does not exceed the reasonable cost of compiling and sending the information. Civil Code §1368.

New Davis-Stirling Inspection Provisions (2004): Against this backdrop of existing member reporting, disclosure and inspection rights under the Mutual Benefit Corporation Law and pre-existing provisions of the Davis-Stirling Act, AB 104 now adds the following

new inspection rules to the Davis-Stirling Act by the addition of Civil Code §1365.2:

• The new section reaffirms the Mutual Benefit Corporation Law rule granting members the right to inspect the accounting books and records and the minutes of proceedings of the association. Civil Cd. §1365.2(a)(1). This new requirement adds nothing to existing Civil Code §1363(f) which states that members of community associations have the right to access association records in accordance with Article 3 (commencing with Section 8330 of the Corporations Code). A later provision of this new section also repeats the Corporations Code rule that the demand be for a purpose that is reasonably related to the member's interest in the association. Civil Cd. §1365.2(d)(1). The accounting books and records and the minutes must be available at the association's office within the development, unless the association has no office within the development, in which case the inspection must take place at a mutually agreeable location. Civil Cd. §1365.2(b)(1) & (2). These requirements regarding the site of the inspection are not mirrored in the Corporations Code.

• The new section reaffirms the Corporations Code rule granting members the right to conduct inspections of corporate records by use of an agent. However the new statute adds the requirement (not found in the Corporations Code) that the member designate the agent in writing. Civil Cd. §1365.2(a) (2).

• The new section provides that if the association and the requesting member cannot agree on a site for the inspection or if a member simply asks for copies, of accessible documents, the association can satisfy its obligations by making the accounting books and records and the minutes of proceedings available for inspection and copying by mailing copies of the requested records to the member by first-class mail within 10 days following receipt of the member's request. Civil Cd. §1365.2(b)(3). Like Civil Code §1368, this section permits the association to bill the requesting member for its actual, reasonable costs of copying and mailing the requested documents so long as the association has informed the member, in advance of mailing, what the copying and mailing costs will be. In contrast, under the Mutual Benefit Corporation Law, members must be given the right to make copies of requested documents that are within their

authorized inspection purview, but the corporation has no obligation to provide copying services.

• Civil Code §1365.2(c) specifically authorizes community associations to exclude or redact information from the accounting books and records or the minutes of proceedings if (i) release of the information is reasonably likely to lead to identity theft (defined as unauthorized use of a person's personal identifying information to obtain credit, goods, services, money or property); (ii) release of the information is reasonably likely to lead to fraud in connection with the association; or (iii) the omitted information is privileged under law.

• Prior to enactment of Civil Code §1365.2, many practitioners contended that member inspection rights in a corporate context did not include the right to inspect information that is specific to individual employees and their compensation because such information was protected from disclosure (beyond the scope require by the employer/employee relationship) by Constitutional rights of privacy. This new statute seems to affirm that principle, in that it states that unless the attorney client privilege applies, associations may not withhold or redact information concerning the compensation paid to employees, vendors, or contractors. However compensation information for individual employees can only be set forth by job classification or title, not by the employee's name, social security number or other personal information. Civil Code §1365.2(c)(2). The new Civil Code provision does not specifically express an intent to alter section 8332 of the Mutual Benefit Corporation Law which gives the superior court, on petition of a mutual benefit corporation, the right to limit or restrict member inspection rights with respect to access to the corporation's membership list if necessary to protect the rights of any member under the Constitution of the United States or the California State Constitution.

• Subparagraph (d)(1) of Civil Code §1365.2 repeats the Corporations Code rule (Corp. Cd. §8338) that membership lists are not to be used for commercial purposes. The section sanctions actions by an association for injunctive relief and damages against any person who violates the limitations imposed by the section. Corporations Code § 8338(b) provides a similar remedy, but adds that the action can also seek recovery of any profit

derived as a result of a violation on the proscription against commercial use of the membership list and the Corporations Code section specifically empowers the count, in its discretion, to award exemplary damages for fraudulent or malicious violation of the section. Again, there is no indication that the new Civil Code section is intended to reduce or eliminate that range of judicial discretion currently conferred under the Corporations Code to respond to a misuse of membership lists of nonprofit corporations or community associations.

That principle would seem, at first blush, to be confirmed in subparagraph (d) (2) of Civil Code §1365.2 which states that the section is not intended to limit the right of an association to seek damages for misuse of information obtained from the accounting books and records and the minutes of proceedings pursuant o this section or to limit the right of an association to injunctive relief to stop the misuse of this information. However, it should be noted that Civil Code section 1365.2(d)(2) makes no mention of member abuse of inspection rights with respect to membership lists.

- That "disconnect" between the Civil Code inspection provisions and those found in the Corporations Code also exists with respect to the sanctioning of an award of attorneys fees and costs in favor of the association. Such an award is expressly sanctioned by Civil Code §1365.2(d)(3) with respect to any successful action to enforce the association's rights under section 1365.2, whereas under Chapter 13 of the Mutual Benefit Corporation Law, most of the attorneys' fees award provisions run in favor of the members (see Corp. Code §§8323, 8331(h), 8331(i), and 8337), with only one specific mention of an award of attorneys fees in favor of the corporation in a successful defense of a claim of wrongful use of the membership list (Corp. Code §8338(d)).

Civil Code §1365.2(e) empowers members of community associations to bring an action to enforce their inspection and copying rights with respect to the accounting books and records and the minutes of proceedings of the association (note, no mention of rights to access the membership list), and to receive an award of attorneys' fees if successful. In addition the section authorizes the court to levy a civil penalty of up to $500.00 against the association for each violation. Although the civil penalty provision is new, this section of the Civil Code parallels Corporations Code §8337.

FRANK H. ROBERTS
555 BYRON STREET, UNIT 403
PALO ALTO, CA 94301

June 2, 2005

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Nat:

I write simply to say that I think Memorandum 2005-18 is superb.

I hope our paths will cross soon.

Sincerely,

Frank H. Roberts

Bruce Osterberg
1809 Wintergreen Glen
Escondido, CA 92026-4938

760.741-1940
mw1809wg@sbcglobal.net

124, τβπ. printed on: 6/23/2005

Brian Hebert, Asst. Exec. Sec.
California Law Revision Comm.
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

When neither their property
nor their honor is touched,
the majority of men live content.
Machiavelli, 1469-1527

Re: Memorandum 2005-18

...

Mr. Hebert, Jun 21, 2005

Your Memorandum 2005-18 outlines a project to reorganize and simplify current CID law. Although that is overdue, it will not deter the abuse and malfeasance that is now so prevalent in CIDs.

The main reason for the current abuse and malfeasance is homeowner apathy. That apathy exists because society has evolved but CID law has not. The homeowners have realized that they – individually, or even in small groups – are essentially powerless.

And the Managers and Board Members, untrained and unqualified, have become emboldened and take whatever actions they are inclined to, without fear of repercussion. Even in the event of civil action, they are indemnified with an insurance policy paid for by the homeowners!

When Board Members are subject to re-election, homeowner apathy allows the Manager to determine who is elected. Hence it is very difficult for a small group of homeowners to remove an abusive Board with its cooperative Manager.

Reorganizing and simplifying CID laws is a waste of time unless they provide a solution for the following documented examples of CID abuse and malfeasance:

1. The Board is spending its Reserve Funds to enhance the common area for short term property value gain. Current law requires Reserve Studies, et cetera, but the Board simply ignores those laws. The homeowners are mostly apathetic and unaware. By the time the homeowners become aware of the impending Special Assessment the "spending" Board Members have sold their homes.

2. A homeowner, wishing to alert neighbors to harmful Board action, requests the names and addresses of the other homeowners. The Manager refuses.
3. A homeowner's roof is destroyed by fire. Local ordinances were passed that prohibit using the same replacement material. But the HOA's Architectural Committee refused to permit use of a different material.
4. An HOA Architectural Committee, obsessed with imagined importance, uses personal interpretations of the Association's governing documents to demonstrate their power and importance. <u>This example is widespread and is the primary reason for homeowner apathy.</u>

There is no selection process for the Board members, so frequently they are unqualified. When they also have a personality disorder then there is abuse!

CIDs are very beneficial to the city in which they are located. At their own cost they provide many services that the city would otherwise have to provide. Essentially, CID homeowners are double taxed!

Activity on the Internet reflects is just one manifestation of the widespread anger and frustration with CIDs. Frequently the first question a potential homebuyer asks these days is: "Is there an HOA with this property?". A yes answer is a negative.

Many homeowners had transferred their anger at their CID's governance to the previous Governor, who was perceived as responsible for the abuse and malfeasance (via the Davis-Sterling Act). Anger at CIDs governance contributed to his removal.

CIDs are good for this State! Why does the State continue to allow abuse and malfeasance within them? If it is not unconstitutional it certainly is immoral.

Bruce Osterberg

CONTENTS

PROPOSED LEGISLATION

☞ **Staff Note.** This is a work in progress. The proposed organizational structure and section numbering may change. Additional material will be added. Accordingly, some cross-references have not yet been updated. These references appear within [brackets] or as underscored spaces: ____.

Civ. Code §§ 4000-____ (added). Common Interest Developments

SEC. ___. Part 5 (commencing with Section 4000) is added to Division 4 of the Civil Code, to read:

PART 5. COMMON INTEREST DEVELOPMENTS

CHAPTER 1. PRELIMINARY PROVISIONS

Article 1. General Provisions

§ 4000. Short title

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

Comment. Section 4000 continues former Section 1350 without change.

§ 4005. Effect of headings

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

Comment. Section 4005 continues former Section 1350.5 without substantive change. It is a standard provision found in many codes. See, e.g., Evid. Code § 5; Fam. Code § 5; Prob. Code § 4.

§ 4010. Continuation of prior law

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

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

A number of terms and phrases are used in the Comments to the sections of this part to indicate the sources of the sections and to describe how they compare with prior law. The following

discussion is intended to provide guidance in interpreting the terminology most commonly used in the Comments.

(1) *Continues without change*. A new provision "continues" a former provision "without change" if the two provisions are identical or nearly so. In some cases, there may be insignificant technical differences, such as where punctuation is changed without a change in meaning. Some Comments may describe the relationship by simply stating that the Family Code provision "continues" or is "the same as" a former provision, or is "the same as" a provision of a uniform act.

(2) *Continues without substantive change*. A new provision "continues" a former provision "without substantive change" if the substantive law remains the same, but the language differs to an insignificant degree.

(3) *Restates without substantive change*. A new provision "restates" a former provision "without substantive change" if the substantive law remains the same but the language differs to a significant degree. Some Comments may describe the new provision as being the "same in substance."

(4) *Exceptions, additions, omissions*. If part of a former provision is "continued" or "restated," the Comment may say that the former provision is continued or restated, but also note the specific differences as "exceptions to," "additions to," or "omissions from" the former provision.

(5) *Generalizes, broadens, restates in general terms*. A new provision may be described as "generalizing," "broadening," or "restating in general terms" a provision of prior law. This description means that a limited rule has been expanded to cover a broader class of cases.

(6) *Supersedes, replaces*. A provision "supersedes" or "replaces" a former provision if the new provision deals with the same subject as the former provision, but treats it in a significantly different manner.

(7) *New*. A provision is described as "new" where it has no direct source in prior statutes.

(8) *Drawn from, similar to, consistent with*. A variety of terms are used to indicate a source for a new provision, typically a source other than California statutes. For example, a provision may be "drawn from" a uniform act, model code, or the statutes of another state. In these cases, it may be useful to consult any available commentary or interpretation of the source from which the new provision is drawn for background information.

(9) *Codifies*. A Comment may state that a new provision "codifies" a case-law rule that has not previously been enacted into statutory law.

(10) *Makes clear, clarifies*. A new provision may be described as "making clear" a particular rule or "clarifying" a rule as a way of emphasizing the rule, particularly if the situation under prior law was doubtful or contradictory.

(11) *Statement in Comment that section is "comparable" to another section*. A Comment may state that a provision is "comparable" to another provision. If the Comment to a section notes that another section is "comparable," that does not mean that the other section is the same or substantially the same. The statement is included in the Comment so that the statute user is alerted to the other section and can review the cases under that section for possible use in interpreting the section containing the statement in the Comment.

§ 4015. Application of part

4015. (a) This part applies to a common interest development.

(b) Nothing in this part may be construed to apply to a development wherein there does not exist a common area.

Comment. Subdivision (a) of Section 4015 continues part of the substance of former Section 1352. The part of former Section 1352 that is not continued in this section is continued in Section 6000 (creation of common interest development).

Subdivision (b) continues the substance of former Section 1374 without substantive change.

See also Section 4090 ("common area"), 4095 ("common interest development").

☞ **Staff Notes.** (1) The language in subdivision (b) is consistent with Senate Bill 853 (Kehoe), which would amend Section 1374 to remove unnecessary language.

(2) Is subdivision (b) necessary, given that the definition of "common interest development" requires the existence of common area? See proposed Section 4095.

§ 4020. Nonresidential development

4020. (a) The following provisions do not apply to a common interest development that is limited to industrial or commercial uses by zoning or by a declaration of covenants, conditions, and restrictions that is recorded in the official records of each county in which the common interest development is located:

(1) [Section 1356.]

(2) Article 5 (commencing with Section 6100) of Chapter 5.

(3) [Subdivision (b) of Section 1363.]

(4) [Section 1365.]

(5) [Section 1365.5.]

(6) [Subdivision (b) of Section 1366.]

(7) [Section 1366.1.]

(8) [Section 1368.]

(9) [Section 1378.]

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

Comment. Section 4020 continues former Section 1373 without substantive change.

See also Section 4095 ("common interest development").

§ 4025. Application of Corporations Code

4025. (a) An association that is incorporated is governed by this part and by the Corporations Code.

(b) An association that is not incorporated is governed by this part and by any provision of the Corporations Code that is applicable pursuant to this part.

(c) If a provision of this part conflicts with a provision of the Corporations Code, the provision of this part prevails to the extent of the inconsistency.

Comment. Section 4025 is new.

See also Section 4080 ("association").

§ 4030. Construction of zoning ordinance

4030. Unless a contrary intent is clearly expressed, a local zoning ordinance shall be construed to treat like structures, lots, parcels, areas, or spaces in like manner regardless of whether the common interest development is a community apartment project, condominium project, planned development, or stock cooperative.

Comment. Section 4030 continues former Section 1372 without substantive change.

See also Sections 4095 ("common interest development"), 4115 ("condominium project"), 4165 ("planned development"), 4180 ("stock cooperative").

§ 4035. "Delivered to the board"

4035. (a) Where a provision of this part requires that a document be "delivered to the board" the document shall be delivered by first-class mail, postage prepaid, to the person designated in the annual statement (Section ___) to receive documents on behalf of the association. If no person has been designated to receive documents, the document shall be delivered to the president of the association. Delivery is deemed to be complete on deposit into the United States mail.

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

See also Sections 4080 ("association"), 4085 ("board"), 4160 ("person").

☞ **Staff Note.** The staff intends, in a future installment of the proposed law, to add a provision consolidating all of the various annual reporting requirements. See, e.g., existing Sections 1365 (financial statement), 1369.590 (ADR requirements), 1378(c) (architectural review requirements). The incomplete reference in Section 4035 will be completed at that time.

§ 4040. "Individual notice"

4040. (a) Where a provision of this part requires "individual notice," the notice shall be delivered by one of the following methods:

(1) Personal delivery.

(2) First-class mail, postage prepaid, addressed to a member at the address last shown on the books of the association or otherwise provided by the member. Delivery is deemed to be complete on deposit into the United States mail.

(3) E-mail, facsimile, or other electronic means, if the recipient has agreed to that method of delivery. If a document is delivered by electronic means, delivery is complete at the time of transmission.

(4) Any other method of delivery that is reasonably calculated to provide actual notice to the recipient.

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

Comment. Section 4045 is new.

See also Sections 4080 ("association"), 4140 ("governing documents"), 4150 ("member").

§ 4045. "General notice"

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

(1) Personal delivery.

(2) First-class mail, postage prepaid, addressed to a member at the address last shown on the books of the association or otherwise provided by the member. Delivery is deemed to be complete on deposit into the United States mail.

(3) E-mail, facsimile, or other electronic means, if the recipient has agreed to that method of delivery. If a document is delivered by electronic means, delivery is complete at the time of transmission.

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

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

(6) Any other method of delivery, provided that the recipient has agreed to that method of delivery.

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

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

Comment. Section 4045 restates former Section 1350.7.

See also Sections 4080 ("association"), 4140 ("governing documents"), 4150 ("member").

§ 4050. Approved by the board

4050. Where a provision of this part requires that an action be approved by the board, the action shall be approved or ratified by the vote of the board or by the vote of a committee authorized to exercise the powers of the board, at a meeting that is open to the members and at which members may comment on the proposed amendment.

Comment. Section 4050 is comparable to Corporations Code Section 5032. It is added for drafting convenience.

See also Sections 4085 ("board"), 4150 ("member").

☞ **Staff Note.** Consistent with existing open meeting requirements, Section 4050 requires that an action be approved by the board or a committee at an open meeting. As new material is added to the proposed law, the staff will consider whether any circumstances exist in which board approval should occur in executive session.

§ 4055. Approved by a majority of all members

4055. Where a provision of this part requires that an action be approved by a majority of all members, the action shall be approved or ratified by an affirmative vote of members representing more than 50 percent of the total voting power of the association, or if the governing documents of an association divide the members into two or more classes for the purposes of voting, by an affirmative vote of members representing more than 50 percent of the voting power in each class that is required to approve the action.

Comment. Section 4055 is comparable to Corporations Code Section 5033. It is added for drafting convenience.

See also Sections 4080 ("association"), 4140 ("governing documents"), 4150 ("member").

§ 4060. Approved by a majority of a quorum of the members

4060. Where a provision of this part requires that an action be approved by a majority of a quorum of the members, the action shall be approved or ratified by an affirmative vote of members representing more than 50 percent of the votes cast in an election at which a quorum is achieved, or if the governing documents of an association divide the members into two or more classes for the purposes of voting, by an affirmative vote of members representing more than 50 percent of the votes cast in an election at which a quorum is achieved, in each class that is required to approve the action.

Comment. Section 4060 is comparable to Corporations Code Section 5034. It is added for drafting convenience.

See also Sections 4080 ("association"), 4140 ("governing documents"), 4150 ("member").

Article 2. Definitions

§ 4075. Application of definitions

4075. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this part.

Comment. Section 4075 continues the introductory clause of former Section 1351 without substantive change.

§ 4080. "Association"

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

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

See also Section 4095 ("common interest development").

§ 4085. "Board"

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

Comment. Section 4085 is new. It is added for drafting convenience.

See also Section 4080 ("association").

§ 4090. "Common area"

4090. (a) "Common area" means the entire common interest development except the separate interests therein.

(b) In a development in which the entire development is comprised of separate interests, common area may consist of mutual or reciprocal easement rights appurtenant to the separate interests.

Comment. Section 4090 continues former Section 1351(b) without substantive change, except that language providing that "[the] estate in the common area may be a fee, a life estate, an estate for years, or any combination of the foregoing" is continued in Section ____.

See also Sections 4095 ("common interest development"), 4175 ("separate interest").

☞ **Staff Note.** The language providing that "[the] estate in the common area may be a fee, a life estate, an estate for years, or any combination of the foregoing" is substantive and is not required

as part of the definition of the term. It will be located with other provisions that relate to the form of title in a CID. See, e.g., Civ. Code § 1362.

§ 4095. "Common interest development"

4095. (a) "Common Interest development" means a real property development in which a separate interest is coupled with either of the following:

(1) An undivided interest in all or part of the common area.

(2) Membership in an association that owns all or part of the common area.

(b) In a development where there is no common area other than that established by mutual or reciprocal easement rights appurtenant to the separate interests, "common interest development" means a development in which a separate interest is coupled with membership in an association with the power to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of common area by means of an assessment that may become a lien upon the separate interest.

(c) "Common interest development" includes all of the following types of developments:

(1) A community apartment project.

(2) A condominium project.

(3) A planned development.

(4) A stock cooperative.

Comment. Section 4095 restates the definition of "common interest development" to improve its clarity, without substantive change. See former Sections 1351(c), (d), (f), (k), (m); 1352.

See also Sections 4080 ("association"), 4090 ("common area"), 4115 ("condominium project"), 4165 ("planned development"), 4175 ("separate interest"), 4180 ("stock cooperative").

§ 4100. "Community apartment project"

4100. "Community apartment project" means a real property development in which a right of exclusive occupancy of a specified part of the development is coupled with an undivided interest in the development as a whole.

Comment. Section 4100 continues former Section 1351(d) without substantive change.

§ 4105. "Condominium"

4105. "Condominium" means a separate interest in a condominium project, coupled with an undivided interest in all or part of the common area of the condominium project.

Comment. Section 4105 restates the definition of "condominium" in former Section 1351(f), without substantive change.

See also Sections 4090 ("common area"), 4115 ("condominium project"), 4175 ("separate interest").

§ 4110. "Condominium plan"

4110. "Condominium plan" means a plan of the type described in Section 6075.

Comment. Section 4110 is new. It is added for drafting convenience.

§ 4115. "Condominium project"

4115. (a) "Condominium project" means a real property development in which separate ownership of a specified part of the development is coupled with an undivided interest in all or part of the common area.

(b) The undivided interest in the common area and the separate interest may be a specified three-dimensional space filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support.

(c) The boundaries of the undivided interest in the common area shall be described on a recorded final map, parcel map, or condominium plan.

(d) The boundaries of a separate interest shall be described on a recorded final map, parcel map, or condominium plan. A description of a separate interest may refer to (1) boundaries described in the recorded final map, parcel map, or condominium plan, (2) physical boundaries, either in existence, or to be constructed, such as walls, floors, and ceilings of a structure or any portion thereof, (3) an entire structure containing one or more separate interests, or (4) any combination thereof.

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

Comment. Section 4115 restates former Section 1351(f), without substantive change, except that the definition of "condominium" has been relocated to Section 4105.

See also Sections 4090 ("common area"), 4105 ("condominium"), 4110 ("condominium plan"), 4175 ("separate interest").

☞ **Staff Notes.** (1) Proposed Section 4115 restates existing Section 1351(f) in order to parallel the language and construction used in proposed Sections 4100 ("community apartment project"), 4165 ("planned development"), and 4180 ("stock cooperative"). The section also eliminates duplicative language and makes fuller use of defined terms. These changes are intended to improve clarity and are not intended to affect the substance of the existing definition of "condominium project." The Commission requests public input on whether any of the drafting changes would have a substantive effect.

(2) The content of subdivision (d) has been left unchanged because its purpose is unclear. Does the provision merely reflect the fact that a separate interest may include noncontiguous parcels of land (e.g., a residential unit and a boat slip)? If so, is it necessary? Does its presence in this section imply that a separate interest in one of the other types of CIDs must be a single contiguous parcel?

§ 4120. "Declarant"

4120. "Declarant" means the person or group of persons designated in the declaration as declarant, or if no declarant is designated, the person or group of persons who sign the original declaration or who succeed to special rights, preferences, or privileges designated in the declaration as belonging to the person who signed the original declaration.

Comment. Section 4120 continues former Section 1351(g) without substantive change.

See also Section 4125 ("declaration"), 4160 ("person").

§ 4125. "Declaration"

4125. "Declaration" means the document, however denominated, that contains information that is substantially equivalent to the information required by Section 6025.

Comment. Section 4125 continues former Section 1351(h) without substantive change except that exact equivalence with the requirements of Section 6025 is not required. A declaration recorded prior to January 1, 1986 may not contain all of the information required by Section 6025.

☞ **Staff Note.** The staff invites comment on whether the proposed change to Section 1351(h) would cause any problems.

§ 4130. "Director"

4130. "Director" means a natural person elected, designated, or selected to serve on the board.

Comment. Section 4130 is new. It is added for drafting convenience. See Corp. Code §§ 7220, 7224-7225, 7520-7527 (election or selection of director).

See also Section 4085 ("board").

§ 4135. "Exclusive use common area"

4135. (a) "Exclusive use common area" means a part of the common area designated by the declaration to be used exclusively by one or more, but fewer than all, of the members. The right of exclusive use is appurtenant to the separate interests of those members.

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

(c) Notwithstanding the provisions of the declaration, internal and external wiring designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common areas allocated exclusively to that separate interest.

Comment. Section 4135 restates former Section 1351(i) without substantive change, except that the reference in subdivision (c) to "telephone" wiring is generalized.

See also Sections 4090 ("common area"), 4125 ("declaration"), 4150 ("member"), 4175 ("separate interest").

☞ **Staff Note.** The reference to "telephone" wiring is technologically obsolete. It has been generalized so that it would include other types of wiring (e.g., Internet connection wiring, television cable, etc.). Would that change create any problems? Note that this provision does not authorize the installation of such wiring, it merely classifies the wiring as exclusive use common area.

§ 4140. "Governing documents"

4140. "Governing documents" means the declaration, bylaws, articles of incorporation or association, and any other document that governs the operation of the common interest development or its association.

Comment. Section 4140 continues former Section 1351(j) without substantive change.

See also Sections 4080 ("association"), 4095 ("common interest development"), 4125 ("declaration").

§ 4145. "Managing agent"

4145. (a) "Managing agent" means a person who, for compensation or in expectation of compensation, exercises control over the assets of a common interest development.

(b) "Managing agent" does not include either of the following:

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

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

Comment. Section 4145 generalizes former Section 1363.1(b).

See also Sections 4080 ("association"), 4095 ("common interest development"), 4160 ("person").

§ 4150. "Member"

4150. "Member" means an owner of a separate interest in a common interest development.

Comment. Section 4150 is new. It is added for drafting convenience.

See also Section 4095 ("common interest development"), 4175 ("separate interest").

§ 4155. "Operating rule

4155. "Operating rule" means a regulation adopted by the board that applies generally to the management and operation of the common interest development or the conduct of the business and affairs of the association.

Comment. Section 4155 generalizes former Section 1357.100(a) without substantive change.

See also Sections 4080 ("association"), 4085 ("board"), 4095 ("common interest development").

§ 4160. "Person"

4160. "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity.

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

§ 4165. "Planned development"

4165. "Planned development" means a real property development of any of the following types:

(a) A development, other than a condominium project, in which separate ownership of a specified part of the development is coupled with an undivided interest in the common area.

(b) A development in which separate ownership of a specified part of the development is coupled with: (1) membership in an association that owns the common area, and (2) an appurtenant right to the beneficial use and enjoyment of the common area.

(c) If the common area consists entirely of mutual or reciprocal easement rights appurtenant to the separate interests, a development in which separate ownership of a specified part of the development is coupled with membership in an association that has the power to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment that may become a lien upon the separate interests in accordance with [Section 1367 or 1367.1].

Comment. Section 4165 continues former Section 1351(k) without substantive change. Subdivision (b) incorporates a related provision from former Section 1351(b).

See also Sections 4080 ("association"), 4090 ("common area"), 4115 ("condominium project"), 4175 ("separate interest").

§ 4170. "Rule change"

4170. "Rule change" means the adoption, amendment, or repeal of an operating rule by the board.

Comment. Section 4170 generalizes former Section 1357.100(b).

See also Sections 4085 ("board"), 4155 ("operating rule).

§ 4175. "Separate interest"

4175. (a) In a community apartment project or stock cooperative, "separate interest" means the exclusive right to occupy an apartment or unit.

(b) In a condominium project or planned development, "separate interest" means a separately owned lot, parcel, area, space, or unit.

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

Comment. Section 4175 restates former Section 1351(*l*) without substantive change, except that language providing that "[the] estate in a separate interest may be a fee, a life estate, an estate for years, or any combination of the foregoing" is continued in Section ____.

See also Sections 4090 ("common area"), 4110 ("condominium plan"), 4115 ("condominium project"), 4125 ("declaration"), 4165 ("planned development"), 4180 ("stock cooperative").

☞ **Staff Note.** Existing language providing that "[the] estate in a separate interest may be a fee, a life estate, an estate for years, or any combination of the foregoing" is substantive and is not required as part of the definition of the term. It will be located with other provisions that relate to the form of title in a CID. See, e.g., Civ. Code § 1362.

§ 4180. "Stock cooperative"

4180. (a) "Stock cooperative" means a real property development in which a right of exclusive occupancy of a specified part of the development is coupled with an ownership interest in a corporation that is formed or availed of primarily for the purpose of holding title to the development as a whole.

(b) An owner's interest in the corporation, whether evidenced by a share of stock, a certificate of membership, or otherwise, shall be deemed to be an interest in a common interest development and a real estate development for purposes of subdivision (f) of Section 25100 of the Corporations Code.

(c) It is not necessary that all shareholders of the corporation receive a right of exclusive occupancy of a specified part of the development.

(d) A "stock cooperative" includes a limited equity housing cooperative that meets the criteria of Section 33007.5 of the Health and Safety Code.

Comment. Section 4180 continues former Section 1351(m) without substantive change, except that language providing that the corporation's ownership of the development may be "either in fee simple or for a term of years" is continued in Section ____.

See also Section 4095 ("common interest development")

☞ **Staff Note.** Existing language providing that the corporation's ownership of the development may be "either in fee simple or for a term of years" is substantive and is not required as part of the definition of the term. It will be located with other provisions that relate to the form of title in a CID. See, e.g., Civ. Code § 1362.

CHAPTER 2. MEMBER RIGHTS AND DUTIES [RESERVED]

CHAPTER 3. COMMUNITY ASSOCIATION [RESERVED]

CHAPTER 4. FINANCES AND MAINTENANCE [RESERVED]

CHAPTER 5. GOVERNING DOCUMENTS

Article 1. General Provisions

§ 6000. Creation of common interest development

6000. For the purposes of this part, a common interest development is created when a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided that all of the following are recorded:

(a) A declaration.

(b) A condominium plan, if any exists.

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

Comment. Section 6000 continues part of the substance of former Section 1352. It governs the application of this part and is not intended to govern the date of creation of a common interest development for other purposes. See City of West Hollywood v. Beverly Towers, Inc. 52 Cal. 3d 1184, 278 Cal. Rptr. 375, 805 P.2d 329 (1991) (failure to convey a unit not determinative of whether condominium project exists for purposes of local planning law).

See also Sections 4080 ("association"), 4090 ("common area"), 4095 ("common interest development"), 4110 ("condominium plan"), 4125 ("declaration"), 4175 ("separate interest").

§ 6005. Document authority

6005. (a) The articles of incorporation shall not include a provision that is inconsistent with the declaration. To the extent of any inconsistency between the articles of incorporation and the declaration, the declaration controls.

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

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

Comment. Section 6005 is new. Subdivision (b) is consistent with Corporations Code Section 7151(c) providing that the bylaws shall be consistent with the articles of incorporation. Subdivision (c) is consistent with Section 6100(c) providing that an operating rule shall not be inconsistent with the declaration, articles of incorporation, or bylaws of the association.

See also Sections 4080 ("association"), 4125 ("declaration"), 4155 ("operating rule).

Article 2. Declaration

§ 6025. Content of declaration

6025. A declaration, recorded on or after January 1, 1986, shall contain all of the following:

(a) A legal description of the common interest development.

(b) A statement that the common interest development is a community apartment project, condominium project, planned development, stock cooperative, or combination thereof.

(c) The name of the association.

(d) Any restriction on the use or enjoyment of any portion of the common interest development that is intended to be an enforceable equitable servitude.

(e) Any other matter that the declarant or the members consider appropriate.

Comment. Section 6025 continues part of former Sections 1353(a)(1) and (b) without substantive change. The remainder of former Section 1353(a)(1) is continued without substantive change in Section 6030.

See also Sections 4080 ("association"), 4095 ("common interest development"), 4115 ("condominium project"), 4125 ("declaration"), 4150 ("member"), 4165 ("planned development"), 4180 ("stock cooperative").

☞ **Staff Note.** The defined term "declarant" is substituted for the existing phrase "original signator of the declaration" in proposed 6025(e). The Commission invites comment on whether this would cause any problem.

§ 6030. Disclosure of airport in vicinity

6030. (a) If a common interest development is located within an airport influence area and its declaration is recorded after January 1, 2004, the declaration shall contain the following statement:

"NOTICE OF AIRPORT IN VICINITY

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

(b) For purposes of this section, an "airport influence area," also known as an "airport referral area," is the area in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses or necessitate restrictions on those uses as determined by an airport land use commission.

(c) A statement in a declaration acknowledging that a property is located in an airport influence area is not a title defect, lien, or encumbrance.

Comment. Section 6030 continues part of former Sections 1353(a)(1)-(2), (4) without substantive change. The remainder of former Section 1351(a)(1) is continued without substantive change in Section 6025. See Bus. & Prof. Code § 11010 (disclosure of property within airport influence area); Pub. Util Code § 21675 (designation of "airport influence area" by county airport land use commission).

See also Sections 4095 ("common interest development"), 4125 ("declaration").

§ 6035. Disclosure of BCDC jurisdiction

6035. (a) If a common interest development is within the jurisdiction of the San Francisco Bay Conservation and Development Commission, as described in Section 66610 of the Government Code, and its declaration is recorded on or after January 1, 2006, the declaration shall contain the following notice:

"NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION

This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to

investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction."

(b) A statement in a declaration acknowledging that a property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission is not a title defect, lien, or encumbrance.

Comment. Section 6035 continues former Section 1353(a)(3)-(4) without substantive change. See also Section 4095 ("common interest development"), 4125 ("declaration").

§ 6040. Amendment authorized

6040. (a) A declaration may be amended at any time, notwithstanding any contrary provision of the declaration.

(b) Any provision of a declaration may be amended, unless the declaration expressly prohibits amendment of that provision.

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

(d) A declaration may be amended to extend the termination date of the declaration, notwithstanding any contrary provision of the declaration. No single extension of the term of the declaration made pursuant to this subdivision shall exceed the initial term of the declaration or 20 years, whichever is less. However, more than one extension may be made pursuant to this subdivision.

Comment. Subdivisions (a)-(b) of Section 6040 restate the first sentence of former Section 1355(b) without substantive change.

Subdivisions (c)-(d) restate Section 1357 without substantive change except that the procedure for approving an amendment of a declaration to extend its termination date is not continued. An amendment under this subdivision would be approved pursuant to Section 6045.

See also Sections 4080 ("association"), 4095 ("common interest development"), 4125 ("declaration").

☞ **Staff Notes.** (1) The Commission invites comment on whether the proposed restatement of the first sentence of Section 1355(b) would cause any substantive change in the law.

(2) Existing law acknowledges that a declaration may be drafted so as to limit or prohibit its amendment. That could result in permanent restrictions that become inappropriate over time, due to changed circumstances or the changed desires of the property owners. The common law recognizes a defense to the enforcement of an equitable servitude where "the original purpose for the restrictions has become obsolete and continued enforcement of the restrictions would be oppressive and inequitable." H. Miller & M. Starr, California Real Estate § 24:20 (3d ed. 2004).

As a matter of policy, should there be a procedure for amendment of a declaration by the members of a homeowner association, even if the declaration prohibits its own amendment?

§ 6045. Approval of amendment

6045. (a) If the governing documents provide a procedure for approval of an amendment of the declaration, an amendment may be approved by that procedure.

(b) If the governing documents do not provide a procedure for approval of an amendment of the declaration, an amendment may be approved by a majority of all members (Section 4055).

(c) The board shall provide individual notice (Section 4040) to all members of an amendment approved under this section.

Comment. Section 6045 is comparable to the provisions of former Section 1355 that relate to approval of an amendment of the declaration. See Sections 4040 (individual notice), 4055 (approved by all members).

See also Sections 4085 ("board"), 4125 ("declaration"), 4140 ("governing documents"), 4150 ("member").

☞ **Staff Notes.** (1) The Corporations Code provisions governing the amendment of the articles of incorporation and bylaws address the possibility that the governing documents may require the approval of a specific class of voters or of a specified third party in order to amend the governing documents. See, e.g. Corp. Code § 7150(b), (d). Should similar provisions be applied to amendment of the declaration? For example, suppose that the declaration provides that a minority class of voters must approve any action that changes the proportional share of assessments collected from each class. Should the majority class be able to delete that provision from the declaration without the approval of a majority of the other class?

(2) Civil Code Section 1356 authorizes a director or member to petition the superior court for an order lowering the number or percentage of affirmative votes required to approve an amendment of the declaration. A comparable order may be obtained under Corporations Code Section 7515. The staff does not see the benefit in providing two separate and slightly different provisions to achieve the same result. For that reason, Section 1356 is not continued in the proposed law. Instead, the staff intends to restate Section 7515 in the provisions of the proposed law that will govern election procedures. That general provision would apply to any action that requires member approval (as Section 7515 currently does). The Commission invites comment on whether this would create any problems.

§ 6050. Approval of amendment to delete obsolete construction or marketing provision

6050. Notwithstanding Section 6045, the deletion of a provision of the declaration may be approved by the board (Section 4050) and by a majority of a quorum of the members (Section 4060) if all of the following conditions are satisfied:

(a) The provision to be deleted is unequivocally designed and intended, or by its nature can only have been designed or intended, to facilitate the developer in completing the construction or marketing of the development or of a particular phase of the development.

(b) The provision to be deleted authorizes access by the developer over or across the common area for the purposes of (1) completion of construction of the development, and (2) the erection, construction, or maintenance of structures or

other facilities designed to facilitate the completion of construction or marketing of separate interests.

(c) The construction or marketing activities governed by the provision to be deleted have been completed or terminated.

Comment. Section 6050 is comparable to former Section 1355.5 but applies only to the amendment of a declaration. The requirement of former Section 1355.5(c), that members be given notice before the board approves the amendment is not continued. As a general rule, member notice is required before board meetings and before a member vote is held. See [§ 1363.05(d)]; Corp. Code § 7511.

See Sections 4050 (approved by the board), 4060 (approved by majority of quorum of all members). See also Sections 4085 ("board"), 4090 ("common area"), 4125 ("declaration"), 4150 ("member"), 4175 ("separate interest").

☞ **Staff Notes.** (1) Existing Section 1355.5 provides an optional procedure for deletion of obsolete developer provisions from any type of governing document, including the articles of incorporation and bylaws. However, it doesn't appear that this section serves a useful purpose when applied to the articles or bylaws. The existing procedures for amendment of those documents is as expeditious or more expeditious than the procedure provided in Section 1355.5. See Corp. Code §§ 7151 (amendment of bylaws), 7810-7820 (amendment of articles).

(2) Existing Section 1355.5 limits the optional procedure to deletion of provisions that "[provide] for access by the developer over or across the common area for the purposes of (a) completion of construction of the development, and (b) the erection, construction, or maintenance of structures or other facilities designed to facilitate the completion of construction or marketing of separate interests. Does the use of "and" imply that the provision must satisfy both of the enumerated criteria? Should "and" be changed to "or"?

(3) Is it necessary to continue the requirement that the board approve an amendment under this section? It seems unlikely that a board would ever oppose such an amendment if it were approved by the members.

§ 6055. Effective date of amendment

6055. Notwithstanding any contrary provision of the governing documents, an amendment approved pursuant to this article becomes effective once the following actions have been completed:

(a) An officer of the association certifies, in a writing that is signed and acknowledged by the officer, that the amendment was approved pursuant to this article. The certifying officer shall be the officer designated for that purpose by the governing documents, or if no one is designated, the president of the association.

(b) The written certification and the amended text of the declaration are recorded in each county in which a portion of the common interest development is located.

Comment. Subdivisions (a) and (b) of Section 6055 are comparable to the provisions of former Section 1355 that relate to certification and recordation of an amendment of the declaration. See Sections 1180-1207 (acknowledgement of instrument).

See also Sections 4080 ("association"), 4095 ("common interest development"), 4125 ("declaration"), 4140 ("governing documents").

Article 3. Articles of Incorporation

§ 6060. Content of articles

6060. (a) The articles of incorporation of an association that are filed with the Secretary of State on or after January 1, 1995, shall include all of the following:

(1) A statement that the corporation is an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act.

(2) The address of the business or corporate office of the association, if any.

(3) If the association has no business or corporate office, or if the business or corporate office is not on the site of the common interest development, the nine-digit ZIP Code, front street, and nearest cross street for the physical location of the common interest development.

(4) The name and address of the association's managing agent.

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

Comment. Section 6060 restates former Section 1363.5 without substantive change, except that the requirement to state the location of the common interest development is expanded to apply to an association that has no business or corporate office. See Corp. Code §§ 1502 (annual statement), 7130-7135 (content of articles of incorporation), 7810-7820 (amendment of articles of incorporation), 7150-7153 (content and amendment of bylaws).

See also Sections 4080 ("association"), 4095 ("common interest development"), 4145 ("managing agent").

Article 4. Condominium Plan

§ 6075. Content of condominium plan

6075. A condominium plan shall include all of the following:

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

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

(c) A certificate consenting to the recordation of the condominium plan pursuant to this title signed and acknowledged by all of the following persons:

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

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

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

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

(5) In a conversion of a community apartment project or stock cooperative to a condominium project that has been approved by the required number of owners, trustees, beneficiaries, and mortgagees pursuant to Section 66452.10 of the Government Code, by those owners, trustees, beneficiaries, and mortgagees who approved the conversion.

(d) A person who owns only a mineral right, easement, right-of-way, or other nonpossessory interest in the property that is included in the condominium project does not need to sign the condominium plan.

Comment. Section 6075 continues former Section 1351(e) without substantive change, except that last paragraph is not continued. That paragraph is continued without substantive change in Section 4660.

See also Sections 4090 ("common area"), 4110 ("condominium plan"), 4115 ("condominium project"), 4160 ("person"), 4175 ("separate interest"), 4180 ("stock cooperative").

§ 6080. Amendment of condominium plan

6080. A condominium plan may be amended or revoked by a recorded instrument that is acknowledged and signed by all the persons whose signatures are required pursuant to subdivision (c) of Section 6075.

Comment. Section 6080 continues the last paragraph of former Section 1351(e) without substantive change.

See also Sections 4110 ("condominium plan"), 4160 ("person").

Article 5. Operating Rules

§ 6100. Requirements for validity and enforceability

6100. An operating rule is valid and enforceable only if all of the following requirements are satisfied:

(a) The rule is in writing.

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

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

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

(e) The rule is reasonable.

Comment. Section 6100 continues former Section 1357.110 without substantive change.

See also Sections 4080 ("association"), 4085 ("board"), 4125 ("declaration"), 4155 ("operating rule).

§ 6110. Application of rulemaking procedures

6110. (a) Sections 6115 and 6120 only apply to an operating rule that relates to one or more of the following subjects:

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

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

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

(4) Any standards for delinquent assessment payment plans.

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

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

(b) Sections 6115 and 6120 do not apply to the following actions by the board:

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

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

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

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

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

Comment. Section 6110 continues former Section 1357.120 without substantive change.

See also Sections 4080 ("association"), 4085 ("board"), 4090 ("common area"), 4135 ("exclusive use common area"), 4140 ("governing documents"), 4150 ("member"), 4155 ("operating rule), 4170 ("rule change"), 4175 ("separate interest").

§ 6115. Approval of rule change by board

6115. (a) The board shall provide general notice (Section 4045) of a proposed rule change at least 30 days before making the rule change. The notice shall include the text of the proposed rule change and a description of the purpose and effect of the proposed rule change. Notice is not required under this subdivision if the board determines that an immediate rule change is necessary to address an imminent threat to public health or safety or imminent risk of substantial economic loss to the association.

(b) A proposed rule change may be approved by the board (Section 4050).

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

(d) If the board determines that an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, the board may approve an emergency rule change (Section 4050) without providing general notice (Section 4045) of the proposed rule change. An emergency rule change is effective for 120 days, unless

the board provides for a shorter effective period. A rule change made under this subdivision may not be readopted under this subdivision.

Comment. Section 6115 restates former Section 1357.130 without substantive change. See Sections 4045 (general notice), 4050 (approved by the board).

See also Sections 4080 ("association"), 4085 ("board"), 4170 ("rule change").

§ 6120. Reversal of rule change by members

6120. (a) Members of an association owning five percent or more of the separate interests may call a special meeting of the members to reverse a rule change that was approved by the board.

(b) A special meeting of the members may be called by delivering a request to the board (Section 4035) that includes the requisite number of member signatures, after which the board shall provide general notice (Section 4045) of the meeting and hold the meeting in conformity with Section 7511 of the Corporations Code. A written request may only be delivered within 30 days after general notice (Section 4045) of the rule change or enforcement of the resulting rule, whichever occurs first.

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

(d) A decision to reverse a rule change may be approved by a majority of a quorum of the members (Section 4060), or if the declaration or bylaws require a greater proportion, by the affirmative vote or written ballot of the proportion required. In lieu of calling the meeting described in this section, the board may distribute a written ballot to every member of the association in conformity with the requirements of Section 7513 of the Corporations Code.

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

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

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

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

(i) This section does not apply to an emergency rule change made under subdivision (d) of Section 6115.

Comment. Section 6120 continues former Section 1357.140 without substantive change. See Sections 4035 (delivered to board) 4045 (general notice), 4065 (approved by majority of quorum of the members).

See also Sections 4080 ("association"), 4085 ("board"), 4125 ("declaration"), 4150 ("member"), 4170 ("rule change"), 4175 ("separate interest").

☞ **Staff Note.** A future installment of the proposed law will address general procedures for meetings. That installment will reconcile the differences the notice requirements provided in the proposed law and those provided in the Corporations Code.

§ 6125. Applicability of article to changes commenced before and after January 1, 2004

6125. (a) This article applies to a rule change commenced on or after January 1, 2004.

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

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

Comment. Section 6125 continues former Section 1357.150 without substantive change.

See also Sections 4085 ("board"), 4170 ("rule change").

Article 6. Unlawful Restrictions

§ 6150. Discriminatory restriction

6150. (a) No governing document shall include a restrictive covenant in violation of Section 12955 of the Government Code.

(b) Notwithstanding any other provision of law or provision of the governing documents, the board shall amend the governing documents to delete the unlawful restrictive covenant and to restate the governing document without the deleted restrictive covenant. No other person is required to approve the amendment.

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

(d) The Department of Fair Employment and Housing, a city or county in which a common interest development is located, or any other person may provide written notice to a board (Section 6030) requesting that it comply with this section. If the board fails to comply with this section within 30 days after receiving a notice under this subdivision, the person who sent the notice may bring an action against the association for injunctive relief to enforce this section. The court may award attorney's fees to the prevailing party.

Comment. Section 6150 restates former Section 1352.5 without substantive change, except that subdivision (c) is added. See Section 4030 (delivery to board).

See also Sections 4080 ("association"), 4085 ("board"), 4095 ("common interest development"), 4125 ("declaration"), 4140 ("governing documents"), 4160 ("person").

☞ **Staff Note.** The use of the term "restrictive covenant" in existing Section 1352.5 would seem to limit its scope to a discriminatory provision in the recorded declaration (see Civ. Code § 1468(d) (covenant must be recorded to bind successive owners)). That is contrary to the express terms of the section, which provide that it applies to a "declaration *or other governing documents*." Would it be appropriate to replace the term "restrictive covenant" with the broader term "rule or restriction"?

Article 7. Construction of Documents

§ 6175. Liberal construction of instruments

6175. (a) Any deed, declaration, or condominium plan for a common interest development shall be liberally construed to facilitate the operation of the common interest development, and its provisions shall be presumed to be independent and severable.

(b) Nothing in Article 3 (commencing with Section 715) of Chapter 2 of Title 2 of Part 1 of Division 2 shall operate to invalidate any provisions of the governing documents of a common interest development.

Comment. Section 6175 continues former Section 1370 without substantive change.

See also Sections 4095 ("common interest development"), 4110 ("condominium plan"), 4125 ("declaration"), 4140 ("governing documents").

§ 6180. Boundaries of units

6180. In interpreting a deed or condominium plan, the existing physical boundaries of a unit in a condominium project, when the boundaries of the unit are contained within a building, or of a unit reconstructed in substantial accordance with the original plans thereof, shall be conclusively presumed to be its boundaries rather than the metes and bounds expressed in the deed or condominium plan, if any exists, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building.

Comment. Section 6180 continues former Section 1371 without substantive change.

See also Sections 4110 ("condominium plan"), 4115 ("condominium project").