Study H-855 October 7, 2009

Memorandum 2009-44

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

At the April 2009, meeting, the Commission directed the staff to revise the Commission's proposed recodification of the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act"), as follows:

(1) Noncontroversial substantive improvements will be retained.
(2) Changes in wording that are necessary to clarify unclear language in existing law will be retained.
(3) Improvements to the structural organization of the Davis-Stirling Common Interest Development Act will be retained.
(4) The attempt to integrate applicable elements of the Corporations Code into the Davis-Stirling Common Interest Development Act will be abandoned. Where appropriate, cross-references to relevant provisions of the Corporations Code may be added to the proposed law, in statutory or Comment language.
(5) The general attempt to make the language of existing law simpler and easier to understand will be abandoned. But see (2) above.

Minutes (April 2009), p. 3.

The staff prepared a draft of the revised proposal, consistent with the decisions set out above. It was presented at the Commission's August 2009 meeting.

The Commission approved the staff draft, subject to a few minor adjustments. See Minutes (August 2009), p. 4.

The Commission has since received further comments on the staff draft, which should be considered before finalizing a tentative recommendation. Those comments are attached in the Exhibit as follows:

The issues raised in those letters are discussed below. Except as otherwise indicated, all statutory references in this memorandum are to the Civil Code.

COMMENT OVERVIEW

E. Howard Green writes as an individual. He thanks the Commission for its efforts toward recodification of the Davis-Stirling Act and offers a list of suggestions for improvement of the proposed law. See Exhibit p. 1.

David K. Milton, writing for the California Association of Realtors ("CAR") expresses general appreciation for the Commission's efforts in this study. See Exhibit p. 4. CAR's letter then provides a lengthy set of proposed revisions to improve the staff draft. Nearly all of the proposed changes would implement a suggestion as to how best to structure the content of sections within the proposed law.

Attorney Duncan R. McPherson writes as an individual. Mr. McPherson was a member of the "ad hoc attorney group" that opposed Assembly Bill 1921 (Saldaña) last year. He sees the staff draft as an improvement over AB 1921. However, he believes that it would not do enough to address basic problems with the definitions and language used in existing law and would provide "no obvious benefits" to justify the transitional costs it would impose. See Exhibit pp. 46-49. He urges the Commission to address "known and correctable problems" with the existing statute. The staff has asked Mr. McPherson to provide more information about those problems. Mr. McPherson's specific suggestions for improvements to the staff draft are discussed below.

Attorney Elaine Roberts Musser is on the board of a group that has been very active in the Commission's work on CID law: the California Center for Homeowner Association Law. However, she writes as an individual, so her comments should not be attributed to CCHAL. Ms. Musser is generally supportive of the Commission's work to recodify CID law, subject to some concerns about its perceived effect:

> I applaud the massive effort undertaken to reorganize existing CID law, in a way that is more user friendly, **so long as it does not erode any consumer protections provided therein**. Greater subdivision of the material is helpful, as is renumbering the statutes, even though it will require a cross-referencing table. It is the "simplification" in some areas that is of grave concern to me.

See Exhibit p. 50 (emphasis in original). The remainder of Ms. Musser's letters details her specific concerns as well as listing some proposed improvements in the staff draft that she strongly supports. The details of Ms. Musser's comments are discussed below.

Kazuko Artus writes as an individual. Ms. Artus has been a long time supporter of this project. She writes with several specific suggestions for improvement of the staff draft, which are discussed below. See Exhibit p. 59.

GENERAL MATTERS

General Drafting Style

Some of the comments propose general improvements to the drafting style used in the staff draft, as discussed below.

Parentheticals

Mr. Green proposes that, as a general drafting practice, statutory cross-references should be followed by parentheticals that briefly characterize the referenced provision. For example: "This article does not apply to a decision made pursuant to Section 5665 [on Payment Plans]…." See Exhibit pp. 2-3.

While it is plain that this could help a layperson to follow and understand the law, the staff sees two problems with the suggested approach:

(1) Existing statutory drafting style in California strongly disfavors the use of parentheticals.
(2) It is possible that the wholesale addition of parenthetical glosses on the meaning of cross-references could lead to inadvertent changes in meaning (or at least invite the argument that substantive changes were made).

In a similar vein, Ms. Artus suggests that a parenthetical should be added to reference the definition of a defined term ("rule change") when that term is first used. See Exhibit p. 62. Again, this would be contrary to longstanding statutory drafting practice, which disfavor parentheticals.

Admittedly, the proposed law deviates from this practice slightly, by using parentheticals when referring to standard procedures for notice delivery and member approval thresholds. Those limited deviations were modeled after precedents in the Corporations Code, where a parenthetical is used when referencing and incorporating standard procedural rules. The staff is not aware

of any precedent for including a parenthetical cross-reference when using a defined term.

On balance, the staff recommends against adopting these suggested drafting changes.

"Primary Thrust" of Section Stated in First Paragraph

Most of the suggested edits offered by CAR involve changes to impose a consistent organizational structure on the sections making up the Davis-Stirling Act. Under the proposed restructuring, each section would begin with an unnumbered paragraph that states the "primary thrust" of the section, followed by subdivisions that supplement or support the primary thrust. For example, CAR suggests revising proposed Section 4010, as follows:

> 4010. ~~(a)~~ A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be considered as a restatement and continuation thereof and not as a new enactment~~, and a reference~~.
>
> (a) Reference in a statute to the provision of this part shall be deemed to include a reference to the previously existing provision unless a contrary intent appears.
>
> (b) A reference in an association's governing documents, to a former provision that is restated and continued in this part, is deemed to include a reference to the provision of this part that restates and continues the former provision.

As can be seen, the proposed revisions would convert the first part of the first sentence into an unnumbered paragraph and designate the remainder of that sentence as a new subdivision (a). Similar changes comprise the bulk of CAR's forty pages of proposed revisions.

The staff sees three potential problems with the proposed revisions:

(1) Existing statutory drafting style in California strongly disfavors the use of unnumbered paragraphs. Such paragraphs complicate cross-referencing, as there is no established shorthand way to reference an unnumbered paragraph.

(2) Because the proposed revisions would change the subdivision designations in most sections, numerous cross-references would need to be adjusted. Although CAR has developed language to make those changes, considerable staff work would be required to confirm how to implement those changes without introducing errors or subtle changes in meaning.

(3) The intentional imposition of an organizational structure that is premised on the primacy of the first paragraph of each section over the secondary subdivisions that follow could lead to a

> substantive change in interpretation of the restructured sections. Provisions that CAR sees as "secondary" may be of co-equal importance to provisions identified as "primary." Considering the wholesale breadth of the proposed changes, it would not be an easy task to evaluate how significant this problem might be.

In addition to those problems, the staff is not convinced that restructuring the sections of the Davis-Stirling Act in the manner proposed by CAR would result in a significant improvement to the user-friendliness of the law. **The staff is not inclined to make the proposed changes.**

Annotations

Ms. Musser suggests that each section of the proposed law be followed by a small print cross-reference showing the provision of existing law that would be continued by that section. See Exhibit pp. 50-51.

That is good description of the Commission Comments that follow each section. They serve exactly that function.

Commission Comments are not part of statutory law, and so may not be reproduced in a third party publication of CID law, though it seems likely that any publisher intending to provide a good product would include the Comments. The only way to *ensure* that the Comments are always reproduced, would be to include them in the statutory law itself. There is no precedent for doing that, and the staff is certain that the Legislative Counsel and other guardians of legislative drafting style would not permit such a radical departure from existing practice. **The staff believes that the existing Comments provide the sort of historical information Ms. Musser is proposing, in the most effective form that is possible within the constraints of statute drafting.**

Organizational Model

Mr. McPherson sees considerable merit in the distinction drawn by the Commission between the "foundational" and "operational" provisions of the Davis-Stirling Act (as discussed in the context of the Commission's study of nonresidential CIDs). See, e.g., Memorandum 2009-32.

Mr. McPherson suggests that the Commission use that distinction as a basis for organizing the recodified statute, with foundational provisions at the beginning of the act, followed by any special operational provisions. For example, he proposes that the statute could be divided into the following divisions:

- Definitions
- Fundamental requirements of association formation
- Fundamental requirements of association operation
- Special residential operational requirements
- Special nonresidential provisions
- Special procedures for small associations (if developed)
- Miscellaneous provisions
- Special provisions governing period of developer control (if developed)

See Exhibit pp. 47-48.

That proposed organization is not too different from the organization used in the proposed law, which is organized as follows:

- Chapter 1. General Provisions (including definitions and rules of construction)
- Chapter 2. Governing Documents (including provisions on formation)
- Chapter 3. Ownership and Transfer of Interests
- Chapter 4. Property Use and Maintenance
- Chapter 5. Association Governance
- Chapter 6. Finances
- Chapter 7. Insurance and Liability
- Chapter 8. Dispute Resolution and Enforcement
- Chapter 9. Construction Defect Litigation

The first four of the proposed chapters relate to "foundational" matters. The remaining five chapters address governance issues, without any attempt to distinguish between which of those provisions address "foundational" governance matters and which are "special" governance provisions added to only protect residential homeowners (or some other sub-group).

In the staff's view, it is better to group all provisions addressing a single subject together, rather than trying to sort and separate them on the basis of whether they are "foundational." For example, the provision establishing an association's authority to lien and foreclose on a lien is arguably foundational. The provision requiring that a decision to foreclose on a lien must be made in an open meeting of the board, after specified types of notice, is arguably a special protection for residential homeowners and not foundational to the existence of a CID. Despite that, the staff believes that it is best for both of these procedures to

be in the same general location, as part of a coherently articulated collection procedure, rather than split into two different areas in the act.

For that reason, and because the organization of the staff draft already achieves much of what Mr. McPherson is proposing, **the staff recommends against making his proposed changes to the organization used in the staff draft.**

Catalog of Deferred Issues

In the course of developing the proposed law, the Commission has noted, but deferred taking any action on, a number of possible substantive changes to the law. Mr. Green sees considerable value in the preservation of a list of those possible reforms. See Exhibit p. 3.

The staff has been actively maintaining a list of proposed CID reform topics, which it presents periodically when the Commission is deciding which CID-related topics to examine next. **The staff will continue to follow that existing practice.**

Developer Provisions

Mr. McPherson suggests that the Commission study the extent to which the protections afforded homeowners in the Davis-Stirling Act should also be available to the property developer, during the period in which the developer controls the association. See Exhibit p. 49. **The staff agrees that this is a worthwhile topic for study, but recommends against attempting to address that topic in the staff draft.** The issue is severable from the current study and too complex and important to rush. It should be added to the list of topics for possible future study.

GENERAL PROVISIONS

Short Title

Mr. Green suggests changing the short title of the Davis-Stirling Act to something like "(the former Davis-Stirling) Recodified Common Interest Development Act." See Exhibit p. 2. **The staff doesn't see any advantage in making that change.** It would be longer than the current name and would preserve the inclusion of legislator names that had prompted the original suggestion that the title be shortened (to omit those names).

Calculation of Time

Mr. Green suggests that it would be helpful to laypeople to add language to the Davis-Stirling Act explaining how to calculate time for the purposes of statutory deadlines. See Exhibit p. 1.

The Civil Code already provides such guidance in its preliminary provisions. See Sections 7, 7.1, 9, 10, 11. **The staff is inclined against duplicating those rules in the Davis-Stirling Act.**

Notice Delivery

Individual Delivery Opt-In

One of the improvements proposed in the staff draft would be to standardize delivery methods for "individual notices" (aimed at achieving actual notice through individualized delivery methods) and "general notices" (aimed at achieving constructive notice through broader delivery methods, such as public posting). See proposed Sections 4040, 4045.

Under proposed Section 4045(b), a member may request that "general notices" be delivered by the methods prescribed for "individual notices" (i.e., by personal delivery, US mail, or electronic delivery). Mr. Green wonders whether a single request would be sufficient to cover all general delivery notices (rather than requiring that the member make a separate request for each type of general delivery notice). See Exhibit p. 1. The staff believes that the Commission intended to permit one request to cover all future notices. That would be the most efficient way to address the issue.

If the Commission is concerned about possible ambiguity on this point, proposed Section 4045(b) could be revised to address the issue more directly, thus:

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

Personal Delivery

Proposed Section 4040 specifies the method for delivery of notices designated as "individual notices" in the staff draft. It is drawn from and generalizes existing Section 1350.7, which applies to the extent it is incorporated by other

provisions of the Davis-Stirling Act. (At present, it governs notice of a proposed rule change.)

Both the existing provision and proposed Section 4040 authorize "personal delivery" as an acceptable method of delivery.

Ms. Musser is concerned that the meaning of "personal delivery" is unclear. She also notes that, under existing law, some types of notices must be delivered by mail. (E.g., notice of an assessment increase under Section 1366(d).) She believes that permitting personal delivery of such a notice would remove an important consumer protection. See Exhibit pp. 51, 55.

The inclusion of "personal delivery" provides greater flexibility to an association, especially a small association, where hand delivery of a notice is a practical alternative to mailing. It also provides greater certainty of actual receipt, when a document is placed into the hand of the intended recipient.

However, use of personal delivery could introduce problems of proof of delivery. If used casually, it could also produce actual errors or misunderstandings. As Ms. Musser notes, there might be confusion about whether leaving a document on a person's porch constitutes completed personal delivery.

Exclusive reliance on delivery by mail would probably be simpler to understand and easier to prove.

The Commission should consider whether to delete the option of personal delivery altogether. That would result in only a minor substantive change in the law (because existing law only authorizes personal delivery of one type of notice). But it would create procedural regularity that might reduce misunderstandings and mistakes.

Electronic Delivery

Mr. Green expresses some concern about the provisions of the staff draft that permit electronic delivery of notices. See Exhibit p. 1. The staff does not understand his comment. Mr. Green should is encouraged to provide further explanation.

Publication of Notice

Proposed Section 4045 authorizes a number of methods for delivery of a "general notice." One of those methods is by publication in a "periodical that is circulated primarily to members of the association." CAR proposes that the word "primarily" be deleted, without explanation. See Exhibit p. 5.

That language was drawn from existing Section 1350.7(b)(4), which uses the same phrase. The apparent purpose of the word "primarily" is to distinguish publications that are specifically aimed at the members of the association, as contrasted to a publication of general circulation that just happens to be delivered to some members of an association.

It seems certain that removal of the word "primarily" would significantly expand the scope of periodicals that could be used for publication of notice. It is not clear that this change would be seen as an improvement by all affected groups and individuals. **Given the late stage of this study, the proposal is probably too substantive and potentially controversial for inclusion in the proposed law.**

Accessibility of Posted Notice

Proposed Section 4045(a)(3) would permit distribution of a "general notice" by posting of the notice "in a location that is accessible to all members, including on an Internet website," provided that the association's annual policy notice has designated a location for posting of general notices.

Ms. Musser has two concerns about this proposed option:

(1) She worries that "accessible to all members" might not be understood to require that the location be accessible to those with physical disabilities.
(2) She maintains that Internet posting is not an acceptable alternative, because many homeowners (perhaps especially seniors or low income owners) will not have Internet access.

See Exhibit pp. 51-52.

As to the first point, the Commission's intention was to require that the posting location be accessible to *all* members (as the statute expressly requires), which would include a member who has a physical disability that might impede access. The staff does not see how posting in a location that is not physically accessible to a member due to that member's disability would satisfy the statutory requirement that the location be accessible to *all* members.

Because the statutory language is plain and addresses Ms. Musser's concern directly, the staff does not see the need to revise it. Further, the staff is concerned that any attempt to provide more specific guidance in the statute itself might cause new problems, given the complexity and importance of disability law. The staff does not feel confident of being able to draft language that would add

clarity without also creating the possibility of an unintended change in meaning. (E.g., Ms. Musser proposes using the phrase "handicapped accessible." Is the word "handicapped" proper in this context? Is it sufficiently broad?)

If the Commission would like to add emphasis on this issue, the more prudent approach would be to add language to the Comment, thus:

> Subdivision (a)(3) provides for posting of notice in a location that is accessible to all members. A location that is inaccessible to a member due to the member's physical disability would not satisfy that requirement.

That would emphasize the statute's intended meaning, without adding a new statutory element that might have unintended legal effect.

Ms. Musser's second point, that Internet posting is not a sufficiently inclusive alternative to physical posting is persuasive. Although Internet access is increasingly ubiquitous, it is not yet universal. Exclusive reliance on Internet posting would probably result in some degree of member inaccessibility. The proposed new option for individual members to have all general notices delivered as individual notices, would help to minimize that problem, but it probably would not eliminate the problem altogether.

Internet posting is sensible as a supplemental form of notice, but it should probably not be the exclusive method of posting. **The staff recommends that the language authorizing Internet posting as an adequate form of delivery of general notices be deleted from proposed Section 4045(a)(3), thus:**

> Posting in a location that is accessible to all members, ~~including on an Internet website,~~ if the location has been designated in the annual policy notice (Section 5310) for the posting of general notices by the association.

Font Size

Ms. Musser objects to the staff draft's omission of two specific provisions requiring that specify the font size and type of particular documents. See Section 1365.1(a) (12 point type), 1365(d) (10 point bold type). She writes persuasively that minimum font size requirements are essential to protecting those with sight disabilities. See Exhibit pp. 50, 54, 56.

As can be seen, the two provisions noted above impose different requirements. They only govern two specific types of notices. Most of the member notices required under the Davis-Stirling Act (including election ballots) are not subject to any font requirements.

A minimal response to Ms. Musser's objection would be to restore the specific requirements that she has identified. However, that would perpetuate the inconsistent and minimal protections provided by existing law and would probably lead to the further development of a patchwork approach.

If the Commission is persuaded that there should be font size limitations for member notices, in order to protect homeowners with sight disabilities (including many seniors who live in CIDs), it would be better to address the issue comprehensively. The two specific requirements noted by Ms. Musser would still be omitted from the staff draft, but a general provision would be added to apply to all notices and reports that are delivered to members, thus:

> **§ 4060 (NEW). Minimum font size for member notices**
>
> 4060. In any notice, ballot, report, or other writing that the association is required to prepare and deliver to a member pursuant to this part, the text shall be printed in a 12 point font or larger.
>
> **Comment**. Section 4060 is new. This section does not apply to an association record that was not prepared for delivery to a member, merely because the record may be subject to inspection under Section 5205.

The requirement of bold face type in Section 1365(d) would be addressed separately. See staff recommendation under "Report Summaries," below.

Delivery of Notice to the Association

Proposed Section 4035 would provide, for the first time, basic statutory guidance on delivery of notice to the association. It would require delivery by first-class mail to a specified representative of the association.

Ms. Musser would like to see that provision expanded to authorize the use of certified mail and to expressly require that the recipient of the certified mail actually accept delivery. Otherwise, she believes that some association representatives will refuse acceptance "as a ploy to create plausible deniability of delivery." See Exhibit p. 51.

The staff is not convinced that the proposed changes would adequately address the concern that has been expressed. The staff has no objection to permitting the use of certified mail as an optional alternative to first-class mail. However, it is not clear how a statutory requirement that the addressee accept delivery would work in practice. What would be the legal significance of a violation of that requirement?

If the Commission is concerned about bad faith nonacceptance of certified mail as an impediment to delivery, the more direct solution would be to provide that proof of *mailing* is sufficient to prove *delivery*. A person sending notice by certified mail would simply need to keep the documents provided by the Post Office when paying for delivery. This would also avoid a problem that has been reported in connection with the Commission's study of mechanics liens. Reportedly, the Post Office frequently loses the form signed by the recipient of certified mail, making it impossible for the sender to actually prove receipt. The Commission's recommendation to recodify the mechanics lien law would address that problem by providing that proof of *mailing* is proof of *delivery*.

This change could be implemented by revising proposed Section 4035 as follows:

> 4035. (a) If a provision of this part requires that a document be "delivered to the association," the document shall be delivered by first-class mail, postage prepaid, or by certified mail, to the person designated in the annual policy notice (Section 5310) to receive documents on behalf of the association. If no person has been designated to receive documents, the document shall be delivered to the president or secretary of the association.
>
> (b) If notice is delivered by certified mail, proof of mailing shall be deemed proof of delivery to the indicated addressee.

For the purposes of soliciting comment in a tentative recommendation, the staff recommends that this change be made.

Standards for Member Approval

Borrowing a concept from the Corporations Code, the proposed law includes special terminology to specify the number of member votes required to approve a proposal, under different scenarios. See proposed Sections 4065 (approved by majority of all members), 4070 (approved by majority of quorum of members).

Ms. Musser wonders whether use of the term "voting power" in those sections is sufficiently clear. See Exhibit p. 52.

"Voting power" is a well-established concept in corporate governance. It refers to the total number of votes eligible to be cast at the time that a vote is held. For example:

> "Voting power" means the power to vote for the election of directors at the time any determination of voting power is made and does not include the right to vote upon the happening of some condition or event which has not yet occurred. In any case where different classes of memberships are entitled to vote as separate

> classes for different members of the board, the determination of percentage of voting power shall be made on the basis of the percentage of the total number of authorized directors which the memberships in question (whether of one or more classes) have the power to elect in an election at which all memberships then entitled to vote for the election of any directors are voted.

Corp. Code § 5078.

Given the widespread use of that term in the Corporations Code and the fact that most associations are governed by both the Davis-Stirling Act and the Corporations Code, **the staff sees merit in using the established terminology**. Note also that Section 1363.03, governing CID elections, uses the term "voting power." The Commission has been generally reluctant to second-guess the choices made in framing that provision.

DEFINITIONS AND TERMINOLOGY

Some of the comments relate to existing definitions that are included in the staff draft. Other comments propose the addition of new definitions to regularize terminology. Finally, there are comments noting the inconsistent use of different terms to express a single concept. All of those comments are discussed below.

Existing Definitions

"Board Meeting"

Proposed Section 4090 defines "board meeting" as follows:

> 4090. "Board meeting" includes any congregation at the same time and place, of a sufficient number of members of the board to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business scheduled to be heard by the board, *except those matters that may be discussed in executive session.*

(Emphasis added.)

Ms. Artus objects to the italicized clause, which she finds confusing because another provision refers to "meetings of the board held in executive session." See Exhibit p. 60. Arguably, if "board meetings" do not include executive sessions, then there can be no "meetings of the board held in executive session."

The exclusion of executive session matters from the definition of "board meeting" is a substantively important part of existing law. It affects the extent to which such sessions are subject to all of the various procedures governing board meetings.

While the staff understands Ms. Artus' technical concern, the staff is not convinced that there is any significant misunderstanding that would require a revision on this potentially controversial issue. **It is probably best to preserve existing law on this point verbatim.**

Proposed New Definitions

"Conveyed"

Proposed Section 4030 provides, consistent with existing law, that a CID "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 that certain specified documents have been recorded.

Mr. McPherson notes that the term "conveyed" is not defined for the purposes of this provision, despite its obvious importance in establishing whether or not a CID has been created (thereby triggering the applicability of the Davis-Stirling Act). See Exhibit p. 48. He notes that the meaning of "conveyed" may not always be clear. For example, suppose that a lender takes a security interest in some or all of the units in a condominium project, but no unit has been sold. Has there been a conveyance? **The staff invites input from knowledgeable experts on this issue, which clearly involves the technicalities of real estate practice.** If a consensus proposal can be submitted to the Commission before the conclusion of work on this study, it might be possible to provide useful clarification on this issue.

"Levy" of Assessments

Mr. McPherson also suggests some uncertainty as to the meaning of "levy" in the provisions that govern the levy of assessments. See Exhibit p. 49. For example, proposed Section 5600 (which continues existing law without relevant change) provides:

> 5600. (a) Except as provided in Section 5605, the association shall levy regular and special assessments sufficient to perform its obligations under the governing documents and this title.
>
> (b) An association shall not impose or collect an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied.

See also proposed Sections 5300 (notice of need to levy special assessment), 5515 (levy of special assessment to replace transferred reserve funds).

Mr. McPherson has not explained what ambiguity he sees in the term. The general dictionary definition of "levy" seems appropriate in this context: "To impose or collect (a tax, for example)." American Heritage Dictionary (4th ed. 2009).

T**he staff invites input on whether the term "levy" needs to be defined, and if so, suggestions on how it should be defined.**

Inconsistent Terminology

Mr. McPherson has pointed out that existing law is inconsistent in its use of terminology. For example, a recent bill uses the term "subdivider" when the defined term "declarant" is probably a synonym. See Exhibit p. 47.

The Commission has also heard complaints about the interchanged use of the terms "member," "owner," "homeowner," and "owner of a separate interest." Similarly, the term "dwelling" has been used when the defined term "separate interest" would be more precise.

Ms. Artus points out that the terms "association board," "board," and "board of directors" are also used interchangeably. She reports that one section uses the term "governing body" to similar effect. See Exhibit p. 60.

Similarly, some statutes refer to the "board" when it would be more apt to refer to "the association" as an entity (because responsibility to act for the association in that instance may or may not lie with the board). Ms. Artus also cites provisions that refer to an "agent," "staff," "secretary," or "president" of the board of directors, and suggests that it would be more appropriate to refer to an agent or staff of the association as an entity. See Exhibit pp. 61 (discussing proposed Sections 4930(b)-(c)), 63 (discussing proposed Section 4365(b)). There are probably other examples where loose and inconsistent terminology could be tightened up, to good effect.

The staff invites comment identifying other similar problems in existing law. **The staff recommends that the Commission attempt to address these concerns.** If the Commission agrees, the staff will comb through the Davis-Stirling Act and develop detailed proposals to improve terminological consistency, for consideration at a future meeting.

Amendment of the Declaration

Under existing law, there are multiple sections that provide differing procedures for amendment of the declaration, applicable in slightly differing situations. For example, Section 1355(b) provides a specific procedure applicable when a declaration is silent on whether it is amendable. The proposed law would consolidate those slightly differing procedures into a single procedure that applies in all cases. See proposed Section 4270.

Ms. Musser is concerned that proposed Section 4270 does not include one specific element of the procedure outlined in Section 1355(b). Specifically, the existing provision requires that the proposed amendment be "distributed to all of the owners of separate interests in the common interest development by first-class mail postage prepaid or personal delivery not less than 15 days and not more than 60 days prior to any approval being solicited." See Exhibit p. 50.

That element was omitted because a declaration amendment must be approved by the membership in an election governed by Section 1363.03, which requires distribution of a written ballot at least 30 days before the election. It was assumed that this ballot would include the text of the amendment being voted on. If so, then there is no need for a second separate mailing of the proposed amendment.

However, in reviewing the existing election procedure, the staff is persuaded that more is needed. There is nothing in the ballot provisions that require that the text of a proposed amendment be set out in the ballot. This could be addressed in one of two ways:

(1) Revise the provision on amending the declaration to require that the text of the proposed amendment be included in the ballot provided to the membership for the approval election.
(2) Amend the election provision governing ballots to require that the text of a proposed amendment be included in any ballot used to approve an amendment of the governing documents.

The latter approach would be slightly broader, as it would extend the requirement to amendment of *any* governing document that requires members approval, and not just the declaration.

The staff recommends the second approach. A new subdivision should be added to proposed Section 5115 along the following lines:

(e) In an election to approve an amendment of the governing documents, the ballot shall include the text of the proposed amendment.

Some may object to the cost of this requirement, especially if the amendments are extensive. However, the requirement already exists with respect to amendment of a declaration. The proposed change would simply extend that requirement to other governing documents. The added cost of doing so seems justified, as a necessary cost of meaningful self-governance.

PROPERTY USE AND MAINTENANCE

Proposed Section 4725 continues an existing provision on the installation of a television antenna. The Comment to that section includes a reference to an FCC regulation on the same issue. A staff note following the section asks for public comment on the extent to which the FCC regulation supersedes the statute.

Ms. Musser suggests that a reference to the FCC regulation be added to the statute itself. **Until the Commission has better information about the relationship between the FCC regulation and California law, the staff recommends against doing so.** A reference in the Comment will help to alert homeowners to the federal authority on this issue. Inclusion of a reference in the statute itself might have some unintended legal effect. **The Commission should revisit this issue after public comment on a tentative recommendation.** At that time, we might have enough information on this issue to address the matter more directly.

BOARD MEETINGS

Emergency Meetings

Proposed Section 4920 provides:

4920. (a) Unless the time and place of meeting is fixed by the governing documents, or unless the governing documents provide for a longer period of notice, members shall be given notice of the time and place of a board meeting, except for an emergency meeting, at least four days prior to the meeting. Notice shall be given by general delivery (Section 4045). The notice shall contain the agenda for the meeting.

(b) An emergency meeting of the board may be called by the president of the association, or by any two members of the governing body other than the president, if there are circumstances

that could not have been reasonably foreseen which require immediate attention and possible action by the board, and which of necessity make it impracticable to provide notice as required by this section.

(c) If the association is organized as a nonprofit mutual benefit corporation, notice of a board meeting is also governed by Section 7211 of the Corporations Code.

Ms. Artus suggests that subdivision (b) should be broken out as a separate section, making it easier for a board to quickly find the law governing emergency meetings. See Exhibit p. 60.

This is a reasonable suggestion. However, the only consequence of holding an emergency meeting is exemption from statutory meeting notice requirements. So there is also a good argument for locating it with the law governing notices.

A possible compromise would be to move the emergency meeting language to a section immediately following the notice provision and add connecting references, thus:

Civ. Code § 4920. Board meeting notice

4920. (a) Unless the time and place of meeting is fixed by the governing documents, or unless the governing documents provide for a longer period of notice, members shall be given notice of the time and place of a board meeting, except for an emergency meeting held pursuant to Section 4923, at least four days prior to the meeting. Notice shall be given by general delivery (Section 4045). The notice shall contain the agenda for the meeting.

(b) If the association is organized as a nonprofit mutual benefit corporation, notice of a board meeting is also governed by Section 7211 of the Corporations Code.

Civ. Code § 4923. Emergency board meeting

4923. An emergency meeting of the board may be called by the president of the association, or by any two members of the governing body other than the president, if there are circumstances that could not have been reasonably foreseen which require immediate attention and possible action by the board, and which of necessity make it impracticable to provide notice as required by Section 4920.

That might be an improvement in terms of user-friendliness. **Should that change be made?**

Judicial Remedy for Violation of Open Meeting Requirements

Under existing law, a single provision (Section 1363.09) provides for a court action to enforce the open meeting requirements, the member election requirements, and the special rules governing a grant of the common area. In the proposed law, that single provision was reiterated as three separate provisions that would continue the substantive content of Section 1363.09, to the extent that content is relevant in each of the three contexts. See proposed Sections 4605 (grant of exclusive use of common area), 4955 (open meetings), 5145 (member elections).

For example, proposed Section 4955 would not include language specific to the procedure for conducting a member election. (Section 5145 would include that content.)

Ms. Artus believes that an error was made in implementing the approach described above. She believes that the existing reference to "election procedures" in Section 1363.09(a) refers to both a member election, *and a vote of the board of directors*. By failing to continue that "election procedure" language in proposed Section 4955, the proposed law would remove existing authority to challenge a board's vote on the grounds of a procedural violation. See Exhibit p. 62.

The staff respectfully disagrees. With respect to board meetings, Section 1363.09 only applies to compliance with Section 1363.05. That section regulates notice of a board meeting, the use of executive sessions, and the production of meeting minutes. There is nothing in Section 1363.05 that regulates the board's voting process or decision making process, beyond the requirements on notice, executive sessions, and minutes.

Proposed Section 4955 is adequate to enforce the requirements of Section 1363.05. Proposed Section 4955(a) provides:

> A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues.

"A violation of this article" would encompass a violation of *any* of the existing provisions of Section 1363.05. Adding a reference to the "election procedures of this article" would be confusing at best (because the article contains no election procedures). **The staff recommends against making any change on this point.**

Open Meeting to Approve Rule Change

Proposed Section 4360(b) provides:

> A decision on a proposed rule change shall be made at a meeting of the board of directors, after consideration of any comments made by association members.

Ms. Artus suggests that this provision should be revised to emphasize that these actions must take place at an *open* meeting. See Exhibit pp. 62-63.

The staff does not believe that this change is needed. Under existing law and the proposed law, a meeting is open as a default, unless statutory grounds exist for a closed session. See proposed Section 4925. Those grounds are limited and do not include a meeting to discuss a rule change. See proposed Section 4935. Thus it seems clear that the meeting described by Section 4360(b) must be an open meeting under existing law.

Of course, it is possible to add language stating that the rulemaking decision must be made at an open meeting, merely to emphasize that point. However, the staff is reluctant to add such emphasis in one section, without adding it in every section that references a board meeting. To do so would invite a problematic implication, that meetings that are not expressly described as open are actually closed.

One possible alternative would be to add a cross-reference to the open meeting requirement in the Comment to proposed Section 4360. With a bit more effort, the staff could place such references in all of the sections of the proposed law that reference board meetings. **Should those changes be made?**

Executive Session to Consider Assessment Payments

Proposed Section 4935(a) makes clear that a board may meet in executive session, on a member's request, to discuss that member's payment of assessments "as specified in Section 5665."

Proposed Section 5665 continues existing Section 1367.1(c)(3), which establishes a member's right to request a payment plan for overdue assessment debt.

Ms. Musser notes that existing law provides for an executive session when a member requests a closed session to discuss a payment plan under *either* Section 1367 or 1367.1. She wonders why proposed Section 4935 only refers to the provision that would continue Section 1367.1. Why is the reference to Section 1367 omitted? See Exhibit p. 53.

Under existing law, Sections 1367 and 1367.1 are substantially duplicative, but have different application dates. Because Section 1367 only applies to liens recorded between January 1, 1986 and January 1, 2003, it has little or no relevance to future transactions.

In the proposed law, Section 1367 is omitted as obsolete. A transitional provision (proposed Section 5740) would make clear that a lien recorded before January 1, 2003 is governed by the law applicable at that time. That would preserve the legal effect of Section 1367, should there ever be a dispute that arises with regard to a lien of that time period. But the code would no longer be cluttered with an antiquated provision.

That is why the reference to a payment plan request under Section 1367 is not continued. It is superseded by the procedure for making such a request under Section 1367.1.

MEMBER ELECTIONS

Under existing law and the proposed law, the statutory member election procedure applies to, among other things, an election relating to "amendments to the governing documents." See Section 1363.03(b); proposed Section 5100(a).

Ms. Artus wonders whether a member vote to reverse an operating rule change, under proposed Section 4365, falls within the scope of "amendments to the governing documents" and is therefore governed by the statutory election procedure. See Exhibit p. 63.

The staff believes that such votes are governed by the election procedure. Operating rules are governing documents. See proposed Section 4150. The election held pursuant to proposed Section 4365 would be to decide whether or not to make a change to the operating rules of the association.

That conclusion leads Ms. Artus to wonder whether proposed Section 4365 is in conflict with the general provisions governing member elections, because Section 4365 would continue existing language that requires that the meeting to vote on a rule change be conducted pursuant to Corporations Code Section 7211.

The staff does not see any irreconcilable conflicts between Section 7211, which governs the conduct of a member meeting, and the election procedures of the Davis-Stirling Act, which regulate the balloting process.

The staff recommends that a staff note following proposed Section 4365 invite comment on whether the reference to Section 7211 is in conflict with the general member election procedure.

ALTERNATIVE DISPUTE RESOLUTION

Exemption of Board Hearings from Subsequent Meet and Confer Procedure

Under existing law, an association is required to provide an internal dispute resolution ("IDR") procedure for its members, at no cost. See Section 1363.820; proposed Section 5905. The procedure must meet specified minimum standards. See Section 1363.830; proposed Section 5910. If the association does not adopt its own procedure, a default "meet and confer" procedure applies, under which a member has the right to meet with a member of the board to discuss and hopefully resolve the dispute. See Section 1363.840; proposed Section 5915.

The proposed law would state expressly that the IDR process is not available to contest board decisions on two specific topics: member discipline and payment plans for overdue assessments. See proposed Section 5900(c). In each of those two cases, there is already an express statutory right to petition the full board, with discussion of the relevant issues in a closed executive session. See proposed Sections 5665 (board hearing on payment plan), 5855 (board hearing on member discipline).

Those sections provide a *fuller* opportunity to be heard than is provided under IDR, because the meeting is with the full board rather than a representative of the board. Once the full board has heard the member out and made its decision, there is no need for a second meeting to reconsider the board's decision. The point of IDR is to guarantee that a member has at least *one* opportunity to be heard. There is no compelling policy reason to provide *two* opportunities to be heard.

Ms. Musser objects to the provision that would exclude those board decisions from the IDR process. See Exhibit pp. 56-57. However, it appears that Ms. Musser may not be concerned about guaranteeing members a second bite at the apple. Rather, she may be concerned that the first bite (the board hearings at issue in proposed Sections 5665 and 5855) be governed by the same standards that govern IDR (i.e., those proceedings should be "fair and reasonable" and should provide the affected member with a reasonable opportunity to be heard). See Exhibit p. 57; proposed Section 5910 (minimum standards for IDR procedure).

That is a reasonable concern, as those standards are basic to due process. However, the staff does not believe that proposed Section 5910 is relevant to that concern. Technically, Section 5910 only governs the IDR process adopted by the association, which is separate from the board meeting process. The staff does not believe that Section 5910 has any application to board meetings. It only covers the informal IDR process. **For that reason, the staff does not recommend making any change to proposed Section 5910.**

However, the Commission might want to address the substantive point that seems to be at the heart of Ms. Musser's concern, that the law should expressly require that board meetings follow "fair and reasonable" procedures.

If so, the most direct way to address that issue would be to add such a requirement to the statute that governs the conduct of board meetings generally, thus:

> 4925. (a) Any member of the association may attend meetings of the board of directors of the association, except when the board adjourns to executive session.
>
> (b) The board of directors of the association shall permit any member of the association to speak at any meeting of the association or the board of directors, except for meetings of the board held in executive session. A reasonable time limit for all members of the association to speak to the board of directors or before a meeting of the association shall be established by the board of directors.
>
> (c) The board of directors shall follow fair and reasonable procedures when making any decision.

This change would affect all board meetings, and not just those that involve member discipline or payment plans. **The staff invites comment on whether a change along those lines would be helpful or would cause new problems.**

ASSOCIATION RECORDS AND REPORTS

Inspection of "Journal"

Ms. Artus believes that the provision describing which association records are subject to member inspection (proposed Section 5200) should include both the association's general ledger and its "accompanying journal." She maintains that the journal is a common element of the accounting records and should have been included. See Exhibit p. 64.

The staff is not sufficiently familiar with accounting procedures to know whether inclusion of the journal in the list of records would cause any problems. **The staff recommends that a note inviting comment on this point be added to the staff draft, following Section 5200.**

Inspection of Contracts

Ms. Artus raises two narrow questions about language providing that certain association contracts are subject to member inspection.

First, she notes that proposed Section 5200, which lists the association records subject to member inspection, includes an entry for "executed contracts not otherwise privileged under law." She wonders whether the term "executed" is sufficiently understandable for laypeople and suggests that the provision instead refer to a contract "signed by the parties." See Exhibit pp. 64-65.

The proposed change might work to clarify existing law without changing its substantive meaning. However, the staff is generally reluctant to tinker with the language of the record inspection provisions, absent demonstrated necessity. It is the staff's sense that those provisions were developed through extensive negotiations during the legislative process. The resulting language may reflect a carefully crafted compromise, which should not be changed lightly.

On a related point, Ms. Artus notes that proposed Section 5215, which discusses records that may lawfully be redacted or withheld by an association, includes a sentence elaborating on what is meant by a contract that is "privileged under law." Proposed Section 5215(a)(5)(D) provides for withholding of records that contain:

> Agendas, minutes, and other information from executive sessions of the board of directors as described in Article 2 (commencing with Section 4900), except for executed contracts not otherwise privileged. *Privileged contracts shall not include contracts for maintenance, management, or legal services.*

(Emphasis added.) Ms. Artus believes that the guidance provided by the italicized sentence should also be provided in Section 5200(a)(4). See Exhibit p. 65. This could be implemented as follows:

> 5200. For the purposes of this article, the following definitions shall apply:
> (a) "Association records" means all of the following:
> …

(4) Executed contracts not otherwise privileged under law. Privileged contracts shall not include contracts for maintenance, management, or legal services.

On its face, this suggestion makes sense. However, as noted above, the staff is concerned that the language used in Sections 5200 and 5215 was the product of negotiated compromise and that minor changes that appear to be innocuous might disturb an intended meaning.

The staff encourages interested persons and groups, particularly those who were active in the development of the statutes governing association record inspection, to comment on whether the proposed changes would cause any problems.

Records to be Retained

Proposed Section 5250 is new. It would require that specified types of records be retained by an association. The list of record types was derived in part from general advice on corporate record retention practices and in part from the list of records that are subject to member inspection. It provides:

5250. (a) An association shall maintain at least one copy of the following association records, for the periods specified in Section 5255:

(1) The original governing documents and any amendment of or addition to the governing documents.

(2) The membership list, including the name, address, and membership class of each member.

(3) The notice, agenda, and minutes of a member meeting, board meeting, or meeting of a committee that exercises a power of the board.

(4) A report prepared pursuant to Article 7 (commencing with Section 5300).

(5) Books and records of account.

(6) A tax return or other tax-related record.

(7) A deed or other record that relates to title of real property within the common interest development.

(8) A record that relates to the design, construction, or physical condition of the common interest development.

(9) A record that relates to a proposed modification of a member's separate interest.

(10) A record that relates to litigation involving the association or legal services provided to the association.

(11) An employment or payroll record.

(12) An insurance policy or record relating to insurance coverage or claims.

(13) A contract to which the association is a party.
(14) A loan document.
(15) A ballot, proxy, or other record that relates to an election.
(16) A reserve funding study.
(17) A record that relates to enforcement of a restriction.

(b) The association may keep a record in paper form or in any other form that can be converted to a paper copy, provided that the paper copy accurately portrays the content of the record. A paper copy produced from a non-paper record is admissible in evidence and is accepted for all other purposes, to the same extent as an original paper record of the same information.

Ms. Musser suggests that the section should be revised to make clear that the list is not exclusive. She points out a type of record that is not listed, but that she believes should be retained: an agreement to reimburse a member who is paying for electricity in the common area. See Exhibit p. 53.

The staff believes that the type of record cited in Ms. Musser's example might already be covered by Section 5250(a)(13) as a "contract to which the association is a party." It is not yet clear to the staff that there is a need to broaden the list. Doing so would encompass every conceivable association record, including those that might have little historical relevance (e.g., notice of a member picnic). **The staff invites further comment on this issue. It might also be a good idea to expand the staff note that follows proposed Section 5250 to specifically ask whether there are other identifiable types of records that should be included in the list.**

Record Retention Period

Proposed Section 5255 is new. It would specify retention periods for different classes of records, as follows:

5255. (a) Unless a longer period is required by law or by the governing documents, an association shall retain a record listed in Section 5250 for at least four years after its date of creation, except that a record with continuing legal or operational effect shall be retained during the period of its effect and for at least four years after the termination of its effect.

(b) The association shall retain the following records permanently:

(1) The original governing documents and each amendment of or addition to the governing documents.

(2) The minutes of a member meeting, board meeting, or meeting of a committee that exercises a power of the board.

(3) A deed or other record that relates to title of real property within the common interest development.

(4) A record that relates to the design, construction, or physical condition of the common interest development.

(c) A ballot cast in a member election shall be retained for the period provided in Section 5125.

(d) This section does not apply to a record that is discarded or destroyed before January 1, 2010.

In other words, the statute would provide a default retention period of four years, subject to any longer period required by other law and the specific exceptions stated in subdivisions (b) and (c).

Ms. Musser wonders why the Commission chose four years, rather than "the general rule of thumb as in tax records of a **7 year retention period**." See Exhibit p. 53 (emphasis in original).

In preparing the retention period provision, the Commission reviewed a number of sources on record retention, none of which were squarely authoritative. The four-year default rule was chosen as being compatible with most of the authorities reviewed, as well as being consistent with most common statutes of limitation (the longer period for construction defect suits is the reason for the exceptions provided in proposed Section 5255(b)(3)-(4)).

The Commission had considered imposing a longer retention period for tax records, based on some guidance from the Internal Revenue Service, but it was informed by accounting specialist Don Haney that three years is the prevailing retention period for tax-related records. He also recommended against attempting to use the Davis-Stirling Act to define retention requirements that would be better left to the agencies responsible for their enforcement. See Memorandum 2007-55, p. 23.

Given the lack of any conclusive and complete guidance on this issue, and the advice to tread lightly for fear of creating preemption problems, the Commission decided to use a default period that would be appropriate in most cases, with express subordination to other law governing this issue. **The staff believes this was a reasonable approach to this complex problem, providing helpful guidance to the extent possible, without creating new problems.**

Report Summaries

Existing law provides that an association may distribute a *summary* of its annual pro forma budget, rather than a copy of the complete budget. Any

member may request a copy of the complete budget at no cost. Section 1365(d) provides:

> Instead of the distribution of the pro forma operating budget required by subdivision (a), the board of directors may elect to distribute a summary of the pro forma operating budget to all of its members with a written notice that the pro forma operating budget is available at the business office of the association or at another suitable location within the boundaries of the development, and that copies will be provided upon request and at the expense of the association. If any member requests that a copy of the pro forma operating budget required by subdivision (a) be mailed to the member, the association shall provide the copy to the member by first-class United States mail at the expense of the association and delivered within five days. The written notice that is distributed to each of the association members shall be in at least 10-point boldface type on the front page of the summary of the budget.

Proposed Section 5320 would preserve that option and would generalize it so that the same basic approach could be used with respect to the annual financial statement review (proposed Section 5305) and the annual policy notice that aggregates various member disclosures that are currently sprinkled throughout the Davis-Stirling Act (proposed Section 5310).

Ms. Musser opposes extending that approach to the review of the financial statement distributed pursuant to proposed Section 5305. She believes that permitting a summary of the financial review would give a board too much leeway to slant the summary so as to obscure problems. If the summary is misleadingly bland, members might not think to ask for the full report. See Exhibit p. 72.

This is a reasonable concern. It might make sense to carve that one report out of the summary distribution process. A financial review of this type should perhaps be distributed in "unvarnished" form. **Should that change be made?**

(Note that Ms. Musser asserts that proposed Section 5310 was mislabeled as "REVISED" when it should have been labeled as "NEW." That is a close call, as Section 5310 is an amalgam of existing requirements. But it is probably more accurate to label it as "NEW" as suggested. **The staff will make that change.)**

Ms. Musser also suggests that notice of the availability of a full report should be printed in bold print on the first page of any summary. See Exhibit p. 54. That change could be effectuated by revising proposed Section 5320(a) as follows:

> 5320. (a) When a report is prepared pursuant to Section 5300, 5305, or 5310, the association shall deliver one of the following documents to all members, by individual delivery (Section 4040):
>
> (1) The full report.
>
> (2) A summary of the report. The summary shall include a general description of the content of the report ~~and instructions~~ . Instructions on how to request a complete copy of the report at no cost to the member shall be printed in bold face on the first page of the summary.

That change makes sense as a matter of policy and would be faithful to existing Section 1365(d). **The staff recommends that the proposed change be made.**

Report Delivery Deadlines

Ms. Musser is concerned that the deadline for delivery of the annual policy notice is not sufficiently clear. See Exhibit p. 54.

Proposed Section 5310(a) is clear in requiring that the report be *prepared* within 120 days after the end of the fiscal year. Subdivision (c) of that section then provides for delivery of that report pursuant to Section 5320. Section 5320 requires delivery of the report "when [it] is prepared pursuant to Section ... 5310…."

The staff reads that as requiring delivery as soon as the report is prepared, with Section 5310 providing a clear deadline for preparation. Perhaps this would be clearer if Section 5320(a) were revised as follows:

> 5320. (a) When a report is prepared pursuant to Section 5300, 5305, or 5310, the association shall promptly deliver one of the following documents to all members, by individual delivery (Section 4040):
>
> …

Should that change be made? That change would also resolve similar concerns Ms. Musser has about the lack of a clear delivery deadline for the annual budget report and the review of the association's financial statement. See Exhibit p. 54.

Ms. Musser also asserts that proposed Section 5615 would not preserve an existing requirement that notice of an increase in assessments be delivered to members "not less than 30 nor more than 60 days prior to the increased assessment becoming due." See Exhibit p. 55.

The staff does not understand this comment. Proposed Section 5615 would continue the existing timing requirement without change:

> 5615. The association shall provide individual notice (Section 4040) to the owners of the separate interests of any increase in the regular or special assessments of the association, not less than 30 nor more than 60 days prior to the increased assessment becoming due.

The staff would appreciate receiving further input on this issue.

ASSESSMENT COLLECTION

Ms. Musser is concerned that an existing limitation on foreclosure is worded poorly and is allowing unscrupulous debt collectors to defeat the Legislature's intentions.

Proposed Section 5720(b), which would continue the existing language without relevant change, would provide in relevant part:

> (b) An association that seeks to collect delinquent regular or special assessments of an amount less than one thousand eight hundred dollars ($1,800), not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, *may not collect that debt through judicial or nonjudicial foreclosure*, but may attempt to collect or secure that debt in any of the following ways:

(Emphasis added.) Similarly, proposed Section 5720(b)(2) provides:

> (2) By recording a lien on the owner's separate interest upon which the association *may not foreclose* until the amount of the delinquent assessments secured by the lien, exclusive of any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, equals or exceeds one thousand eight hundred dollars ($1,800) or the assessments secured by the lien are more than 12 months delinquent. An association that chooses to record a lien under these provisions, prior to recording the lien, shall offer the owner and, if so requested by the owner, participate in dispute resolution as set forth in Article 2 (commencing with Section 5900) of Chapter 8.

(Emphasis added.)

Ms. Musser maintains that some debt collectors are reading that language narrowly, as only prohibiting a *completed* foreclosure. She reports that some debt collectors are *initiating* foreclosures well before the statute would allow *completion* of foreclosure, thereby "racking up huge foreclosure procedure costs, including huge attorneys fee, long before the debt reaches the stated time/dollar

limits." She proposes that the statutory limits be revised to prohibit *initiation* of foreclosure before the specified limits have been reached. See Exhibit pp. 55-56.

The staff is not sure what to make of this. If foreclosures are being initiated long before they could be completed, and then abandoned, solely in order to obtain collection costs, that would seem to be improper.

If premature foreclosures are being initiated merely as an intimidation tactic — to threaten a homeowner who is ignorant of the statutory limitations on foreclosure — that too would seem to be improper.

However, it might be the case that some foreclosures are being initiated prior to the statutory limit, but are not completed until after the statutory limitation period, with the intent being to time completion to occur as soon *after* the statutory limitation period as possible. It is not clear that this would be improper or contrary to legislative intent. The staff does not know what the Legislature intended with respect to this issue.

This strikes the staff as a complex and important issue that should not be addressed without full review and extensive input from interested persons and groups. As such, it is probably not an issue that could be addressed in the current study. **That said, the staff invites further comment on this issue.**

TECHNICAL CORRECTIONS

The commenters note a number of purely technical concerns that can be addressed without affecting the meaning of the law. Those issues are listed below, but the staff does not intend to discuss them at the meeting (unless a Commissioner or member of the public raises an issue).

Punctuation

CAR points out an extraneous comma in proposed Section 4030. See Exhibit p. 5. **The staff will delete that comma.** (CAR also suggests deletion of commas in proposed Section 4255. See Exhibit p. 9. However, those commas are present in existing law and are not plainly erroneous. **The staff does not intend to delete those commas.)**

CAR proposes adding a hyphen to the word "cotenancy" used in proposed Section 4610. The proposed section is faithful to existing Section 1359, which does not hyphenate "cotenancy." The existing spelling (without a hyphen) appears to be proper. See Black's Law Dictionary 712 (6th Ed. 1990). **The staff does not intend to make the proposed change.**

Typographical Errors

CAR points out typographical errors in the staff notes following proposed Sections 4255 and 5735. See Exhibit pp. 10, 41. **The staff will correct those errors.**

The staff discovered an extraneous parenthesis in proposed Section 5665(a). **It will be deleted.**

Transitional Date

CAR proposes deletion of an operative date provision in proposed Section 4815(c) (which refers to actions commenced on or after January 1, 1993). See Exhibit p. 19. That provision is probably obsolete, but the Commission is taking a conservative approach in preparing the revised recodification draft. **Lacking certainty that the provision has no continuing relevance, the staff does not intend to delete it from the staff draft.**

Suggested Phrasing Changes

Some comments offer proposed revisions to improve the readability or clarity of language. The staff appreciates these suggestions. However, as a conservative default approach, the staff is inclined against making such changes unless they offer a clear advantage. Specific details are set out below:

Approval by Majority of a Quorum

Proposed Section 4070 provides a standard for a decision that requires the approval of a majority of a quorum of the members. It requires the affirmative vote of members representing "more than 50 percent of the votes cast in an election at which a quorum is achieved." Ms. Musser finds that language to be unnecessarily wordy. She proposes that it be simplified to refer to the "votes cast at which a quorum is achieved" (on the theory that it is implicit that the votes are cast at an election). See Exhibit p. 52.

Respectfully, the staff does not agree that the proposed change would make the provision easier to understand. **The staff prefers the existing phrasing and does not intend to make the proposed change.**

Member Notice of ADR Requirements

Existing Section 1360.590 and proposed Section 5965 require annual notice to members of the applicable pre-litigation ADR requirements. The proposed notice reads as follows:

> "Failure of *a member* of the association to comply with the alternative dispute resolution requirements of Section 5930 of the Civil Code may result in the loss of *your* right to sue the association or another member of the association regarding enforcement of the governing documents or the applicable law."

(Emphasis added.)

CAR points out a lack of parallelism between the italicized terms and proposes that "your" be changed to "the member's." See Exhibit p. 44. **The staff agrees that this would be an improvement and recommends that the change be made.**

Limitation of Association Authority

Ms. Musser suggests revising proposed Section 4700 to rephrase a sentence that refers to a provision "that limits the authority of an association," to instead refer to a provision "limiting the authority of an association." See Exhibit p. 52-53. **The staff believes that both phrasings are equally clear and does not intend to make the proposed change.**

Reference to Corporations Code Section 7211

Ms. Artus suggests that a reference, in proposed Section 4920(c), to Corporations Code Section 7211, would be more precise if it were limited to subdivision (a) of Section 7211. See Exhibit p. 60. **Given that the broader reference is not incorrect, the staff is inclined against changing it.**

Limit on Member Testimony at Board Meeting

Ms. Artus proposes restating, in proposed Section 4925, the existing rule recognizing that a board may impose reasonable limits on member testimony at a board meeting. Unfortunately, the staff does not understand exactly what Ms. Artus is proposing. She is invited to expand on her suggestion.

"Adjournment" to Executive Session

Proposed Section 4935(a) provides that a board "may meet in executive session" under specified circumstances. Ms. Artus points out that existing law provides for a board to "adjourn" to an executive session. She suggests that the term "adjourn" be used in place of "meet" to more faithfully preserve existing law. See Exhibit p. 61. **The staff agrees with this suggestion and intends to make the proposed change.**

Executive Session to Consider "Litigation"

Ms. Artus notes that existing law permits a board to adjourn to executive session to consider "litigation." She believes that the term "litigation" is not well understood by laypeople, and suggests that it be replaced with "lawsuit," which she maintains is a synonym. See Exhibit p. 62.

It is not obvious that the proposed language would be any clearer than the existing language. For that reason alone, the staff is inclined against making the change. However, there is another possible problem with the proposed change. It is possible that discussion of "litigation" includes discussion of a possible lawsuit, while discussion of a "lawsuit" would not. Therefore, the change in terminology could create at least an argument that the rule was changed substantively. **The staff recommends against making this change.**

"How and Where" to Obtain Minutes of Board Meeting

Existing Section 1363.05(e) requires member of notice of "how and where" to obtain a copy of the minutes of a board meeting. Proposed Section 4950(b) would rephrase that requirement, instead requiring that members be given notice of "the procedure for obtaining a copy of the minutes."

Ms. Artus prefers the less bureaucratic language of existing law, which she believes is easier to understand. See Exhibit p. 62. Although the staff sees little difference between the two in terms of ease of comprehension, the more conservative way to address this difference of opinion would be to revert to the existing language. **The staff recommends doing so.**

SUPPORT FOR SPECIFIC ELEMENTS OF PROPOSED LAW

Ms. Musser expresses strong approval for several of the reforms included in the proposed law. Because no action is required in connection with these comments, the reforms favored by Ms. Musser are listed below for the Commission's information only:

> Revised Section 4225(c), requiring a governing document in the public record to be publicly updated to reflect an amendment.
>
> Revised Section 5685, providing for reversal of costs if a lien is recorded in error, not limiting it to ADR discovery.
>
> Revised Section 5850, requiring the schedule of monetary penalties be distributed on an annual basis rather than just once.
>
> Revised Section 5855, expanding scope of existing disciplinary process to encompass board action to assess member for damage to common area.

Revised Section 5980 allowing member to bring a civil action to enforce any requirement of Davis-Stirling Act.

See Exhibit p. 57.

Regarding the last point, Ms. Musser wonders whether there is a contradiction between proposed Section 5980, which authorizes a civil action to enforce any provision of the Davis-Stirling Act and proposed Section 5930, which continues an existing requirement that a person offer ADR before filing certain equitable actions to enforce the Davis-Stirling Act.

The staff does not see a conflict. Proposed Section 5980 makes clear that a private action may be brought to enforce any provision of the Davis-Stirling Act. Proposed Section 5930 continues an existing *procedural* requirement, that a person contemplating filing an enforcement action must first make an offer of ADR. The two provisions are not in conflict.

CONCLUSION

The Commission has already approved the prior version of the staff draft of the proposed legislation. Minutes (August 2009), p. 4. That draft will be revised to reflect any changes made by the Commission in connection with this memorandum.

The next step will be to prepare a draft of a tentative recommendation, to be approved for public distribution. The staff hopes to have a draft ready for Commission review at the December meeting.

Respectfully submitted,

Brian Hebert
Executive Secretary

E Howard Green
4400 Shadow Hills
Santa Barbara, CA
93130 - 3903

August 27, 2009

Brian Hebert *Sent via e-mail to: bhebert@clrc.ca.gov*
Executive Secretary
California Law Revision Commission
3200 Fifth Avenue
Sacramento, CA 95817

Re: http://www.clrc.ca.gov/pub/2009/MM09-33.pdf

Dear Brian:

Thank you for your continued work on the proposed recodification of the Common Interest Development Act. I realize much will be happening to prepare for the October update, but I must again ask renewed attention to earlier requests, and new points.

- Definitions need to include common legal parlance to specify time spans (perhaps well known to lawyers); does "posting four days prior to event date" include both the posting date and the event date in the "day count", or one, or neither? Does time of day have any effect, or are all days midnight to midnight, or noon to noon? Is four days effectively 72 hours?

- In the proposal for opt-in individual distribution, is it intended by the wording that a member may receive all distributions by the chosen method? This would be particularly beneficial for travelers who chose e-mail, which presumably can be accessed from anywhere.

- Electronic distribution does raise some concern for "turn-around documents" like ballots and return envelopes. Further, it means that Associations should require vendors like CPAs and Reserve Study reports to be provided both in paper and "machine distributable formats" (PDF or similar types). Scanning text dominated documents into page images is not a preferred distribution format for such information. Whether this could be legislatively banned is problematic,

but generating searchable text is the rational for many electronic distribution needs.

- Enclosed is a proposal for a "Legislative Style" to preclude references to code sections without any indication of their meaning. This is submitted lacking any experience with the drafting and crafting art, but for the horrible results of trying to understand the results of legal words-man-ship. These examples are real and simple to do.

- The proposal in MM09-33-s1 for a Short Title is interesting. Reference to a defrocked governor is embarrassing. Retired Judge Stirling has joined a firm which is commercializing on the name with a web site, so it appears appropriate to strip the Old Name.

- Realizing the staff may not realistically take a position, they might be able to say "This part shall be known and may be cited as the (former Davis-Stirling) Recodified Common Interest Development Act."

Many significant proposals have been identified during the near decade of study that have been "tabled" as beyond the scope of current project. In most cases, that was truly necessary.

Moreover, now Goal (5) of the referenced memorandum states "The general attempt to make the language of existing law simpler and easier to understand **will be abandoned**." (emphasis mine).

Along with the finished recodification there MUST BE a PUBLIC inventory of issues known as not having been addressed in the version presented. Maybe that could be done in a staff report, as was done in 2005, I believe.

The many unmet needs for substantial reform cannot be lost, thrown out like the baby's bath water. Failure to document "unmet concerns", and your commission will have missed its greatest potential value.

Respectfully,

s/ E Howard Green

E Howard Green

Enclosure

STYLE: Reference to other sections within a current section

See as an example, section 5900 on **Informal Dispute Resolution**, proposed new paragraph c. Here two other sections are referenced because they logically do not apply within the context of the added section. The need for "c" or the exemption is NOT debated, only the presentation style.

BECAUSE the intended audience includes lay persons, I believe just the Number of a Section being "referenced" (exempted, in this case) is not sufficient. The Reference should somehow include the (what is said to be a non-legally binding) Heading associated with that section, so as to provide context for the reader as to its relevance.

The validity of this "General Requirement" is demonstrated by the prior paragraph, 5900 (b) as shown below.

Reflecting on the non-binding nature of those headings, perhaps they should be in italics, quotes, parenthesis, brackets or some other distinctive typographic style .

These headings already exist.
These headings categorize the content of the referenced section.
These heading would provide an "ease of use" character to the law.
The value IN THIS title is particularly important.

Compare the following styles – b is "your words", sparsely applied:
c in brackets is Proposed, and easy to implement, with clerical help.

(b) This article supplements, and does not replace, Article 3 (commencing with Section 5925), relating to alternative dispute resolution as a prerequisite to an enforcement action.

(c) This article does not apply to a decision made pursuant to Section 5665 [on *Payment Plans*] or 5855 [on *Disciplinary process*].

This is a GENERAL STYLE for throughout the entirety of the rewrite, not just the specified example.

CALIFORNIA ASSOCIATION OF REALTORS®

September 2, 2009

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

Re Study H-855

Dear Mr. Hebert:

The California Association of REALTORS® (C.A.R.) wishes to compliment CLRC for continuing its effort to provide long over-due "reform" to the Davis-Stirling Act, a body of law unlike any other in California because its interpretation and implementation is executed primarily by "lay persons" consisting of volunteer home owner association (HOA) board members and non-attorney management personnel. This law was clearly not initially drafted with this implementation logistic in mind.

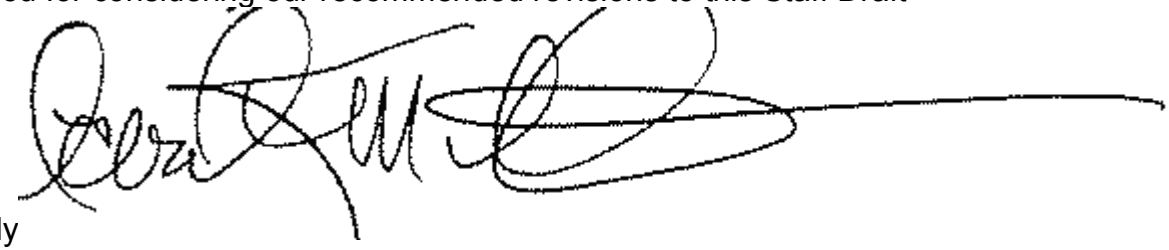
C.A.R. respectfully requests that you consider the attached recommended edits as part of your recodification project. We initiated this evaluation with the following principles in mind, as stated in your Memorandum 2009-33 "Statutory Clarification and Simplification of CID Law" (Staff Draft):

- "Changes in wording that are necessary to clarify unclear language in existing law…"
- "Improvements to the structural organization of the Davis-Stirling ..Act…"

The C.A.R. proposed edits can be placed in three **non-substantive** categories:

1) Recommended correction of "typos" or missing words.
2) Clarifying verbiage to render sections more readable and understandable.
3) Re-structuring when the first subdivision was actually the primary thrust of the code section and all other subdivisions were supplementary or supportive thereto.

Thank you for considering our recommended revisions to this Staff Draft



Sincerely
David K. Milton, Legislative Advocate

4010. ~~(a)~~ A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be considered as a restatement and continuation thereof and not as a new enactment~~.~~ ~~and a~~

(a)~~reference~~ Reference in a statute to the provision of this part shall be deemed to include a reference to the previously existing provision unless a contrary intent appears.

(b)A reference in an association's governing documents, to a former provision that is restated and continued in this part, is deemed to include a reference to the provision of this part that restates and continues the former provision.

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

(1) A declaration.

(2) A condominium plan, if any exists.

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

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

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

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

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

(3) Posting in a location that is accessible to all members, including on an Internet website, if the location has been designated in the annual policy notice (Section 5310) for the posting of general notices by the association.

(4) 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.

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

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

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

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

4095. ~~(a)~~ "Common area" means the entire common interest development except the separate interests therein.

(a)The estate in the common area may be a fee, a life estate, an estate for years, or any combination of the foregoing.

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

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

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

~~(c)~~ (b)The portion or portions of the real property held in undivided interest may be all of the real property, except for the separate interests, or may include a particular three-dimensional portion thereof, the boundaries of which are described on a recorded final map, parcel map, or condominium plan. The area within these boundaries may be filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support.

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

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

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

~~(c)~~ (b)Notwithstanding the provisions of the declaration, internal and external telephone 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. For the purposes of this section, "wiring" includes nonmetallic transmission lines.

4190. ~~(a)~~ "Stock cooperative" means a development in which a corporation is formed or availed of, primarily for the purpose of holding title to, either in fee simple or for a term of years, improved real property, and all or substantially all of the shareholders of the corporation receive a right of exclusive occupancy in a portion of the real property, title to which is held by the corporation.
(a) The owners' interest in the corporation, whether evidenced by a share of stock, a certificate of membership, or otherwise, shall be deemed to be an interest in a common interest development and a real estate development for purposes of ~~subdivision (f) of~~ Section 25100 of the Corporations Code.
(b) A "stock cooperative" includes a limited equity housing cooperative which is a stock cooperative that meets the criteria of Section 33007.5 of the Health and Safety Code.

4205. ~~(a)~~ In order to facilitate the collection of regular assessments, special assessments, transfer fees, and similar charges, the board of directors of any association is authorized to record a statement or amended statement identifying relevant information for the association.
(a) This statement may include any or all of the following information:
(1) The name of the association as shown in the conditions, covenants, and restrictions or the current name of the association, if different.
(2) The name and address of a managing agent or treasurer of the association or other individual or entity authorized to receive assessments and fees imposed by the association.
(3) A daytime telephone number of the authorized party identified in paragraph (2) if a telephone number is available.
(4) A list of separate interests subject to assessment by the association, showing the assessor's parcel number or legal description, or both, of the separate interests.
(5) The recording information identifying the declaration or declarations of covenants, conditions, and restrictions governing the association.
(6) If an amended statement is being recorded, the recording information identifying the prior statement or statements which the amendment is superseding.
(b) The county recorder is authorized to charge a fee for recording the ~~document~~ statement described in ~~subdivision (a)~~ in this section, which fee shall be based upon the number of pages in the ~~document~~ statement and the recorder's per-page recording fee.

4225. ~~(a)~~ No declaration or other governing document shall include a restrictive covenant in violation of Section 12955 of the Government Code.
~~(b)~~ (a) Notwithstanding any other provision of law or provision of the governing documents, the board of directors of an association, without approval of the owners, shall amend any declaration or other governing document that includes a restrictive covenant prohibited by this section to delete the restrictive covenant, and shall restate the declaration or other governing document without the restrictive covenant but with no other change to the declaration or governing document.
~~(c)~~ (b) 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)~~ (c) If after providing written notice to an association (Section 4035) requesting that the association delete a restrictive covenant that violates ~~subdivision (a)~~ this section, and the association fails to delete the restrictive covenant within 30 days of receiving the notice, the Department of Fair Employment and Housing, a city or county in which a common interest development is located, or any person may bring an action against the association for injunctive relief to enforce ~~subdivision (a)~~ this section. The court may award attorney's fees to the prevailing party.

4230. ~~(a)~~ Notwithstanding any provision of the governing documents of a common interest development to the contrary, the board of directors of the association may, after the developer of the common interest development has completed construction of the development, has terminated construction activities, and has terminated marketing activities for the sale, lease, or other disposition of separate interests within the development, adopt an amendment deleting from any of the governing documents any provision which is unequivocally designed and intended, or which by its nature can only have been designed or intended, to facilitate the developer in completing the construction or marketing of the development. ~~However,~~

(a) The provisions of the governing documents relative to a particular construction or marketing phase of the development may not be deleted under the authorization of this subdivision until that construction or marketing phase has been completed.

(b) The provisions which may be deleted by action of the board shall be limited to those which provide for access by the 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) At least 30 days prior to taking action pursuant to ~~subdivision (a)~~ this section, the board of directors of the association shall mail to all owners of the separate interests, by first-class mail, (1) a copy of all amendments to the governing documents proposed to be adopted under ~~subdivision (a)~~ this section and (2) a notice of the time, date, and place the board of directors will consider adoption of the amendments.

(d) The board of directors of an association may consider adoption of amendments to the governing documents pursuant to ~~subdivision (a)~~ this section only at a meeting which is open to all owners of the separate interests in the common interest development, who shall be given opportunity to make comments thereon.

(e) All deliberations of the board of directors on any action proposed under ~~subdivision (a)~~ this section shall only be conducted in such an open meeting.

~~(d)~~ (f) The board of directors of the association may not amend the governing documents pursuant to this section without the approval of the owners, casting a majority of the votes at a meeting or election of the association constituting a quorum and conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Section 7613 of, the Corporations Code. For the purposes of this section, "quorum" means more than 50 percent of the owners who own no more than two separate interests in the development.

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

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

NOTICE OF AIRPORT IN VICINITY

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

(c) (a) 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, over-flight, safety, or airspace protection factors may significantly affect land uses or necessitate restrictions on those uses as determined by an airport land use commission.
(d) (b) If a common interest development is within the San Francisco Bay Conservation and Development Commission jurisdiction, as described in Section 66610 of the Government Code, a declaration recorded on or after January 1, 2006, shall contain the following notice:

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

(b) (c) The statement in a declaration acknowledging that a property is located in an airport influence area or within the jurisdiction of the San Francisco Bay

Conservation and Development Commission does not constitute a title defect, lien, or encumbrance.

☞ **Staff Note.** The language of proposed Section 4255 differs slightly from its source, primarily to accommodate making the provision a ~~stand-along~~ stand-alone section. The changes would be non-substantive.

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

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

~~(c)~~ (b) 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.

4270. ~~(a)~~ A declaration may be amended pursuant to the governing documents or this part.

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

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

4275. ~~(a)~~ If in order to amend a declaration, the declaration requires owners having more than 50 percent of the votes in the association, in a single class voting structure, or owners having more than 50 percent of the votes in more than one class in a voting structure with more than one class, to vote in favor of the amendment, the association, or any owner of a separate interest, may petition the superior court of the county in which the common interest development is located for an order reducing the percentage of the affirmative votes necessary for such an amendment.

(a) The petition shall describe the effort that has been made to solicit approval of the association members in the manner provided in the declaration, the number of affirmative and negative votes actually received, the number or

percentage of affirmative votes required to effect the amendment in accordance with the existing declaration, and other matters the petitioner considers relevant to the court's determination. The petition shall also contain, as exhibits thereto, copies of all of the following:

(1) The governing documents.

(2) A complete text of the amendment.

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

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

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

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

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

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

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

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

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

(5) The amendment is reasonable.

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

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

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

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

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

(3) Would impair the security interest of a mortgagee of a mortgage or the beneficiary of a deed of trust without the approval of the percentage of the

mortgagees and beneficiaries specified in the declaration, if the declaration requires the approval of a specified percentage of the mortgagees and beneficiaries.

(f) An amendment is not effective pursuant to this section until the court order and amendment have been recorded in every county in which a portion of the common interest development is located.

(g) The amendment may be acknowledged by, and the court order and amendment may be recorded by, any person designated in the declaration or by the association for that purpose, or if no one is designated for that purpose, by the president of the association.

(h) Upon recordation of the amendment and court order, the declaration, as amended in accordance with this section, shall have the same force and effect as if the amendment were adopted in compliance with every requirement imposed by the governing documents.

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

4360. ~~(a)~~ The board of directors shall provide general notice (Section 4045) of a proposed rule change to the members at least 30 days before making the rule change.

(a) The notice shall include the text of the proposed rule change and a description of the purpose and effect of the proposed rule change.

(b) Notice is not required under this subdivision if the board of directors 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)~~ (c) A decision on a proposed rule change shall be made at a meeting of the board of directors, after consideration of any comments made by association members.

~~(c)~~ (d) As soon as possible after making a rule change, but not more than 15 days after making the rule change, the board of directors shall deliver general notice (Section 4045) of the rule change. If the rule change was an emergency rule change made under this section ~~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)~~ (e) If the board of directors determines that an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, it may make an emergency rule change; and no notice is required~~, as specified in subdivision (a)~~. An emergency rule change is effective for 120 days, unless the rule change provides for a shorter effective period. A rule change made under this subdivision may not be readopted under this subdivision.

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

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

~~(c)~~ (b) 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)~~ (c)The rule change may be reversed by the affirmative vote of a majority of a quorum of the members (Section 4070), or if the declaration or bylaws require a greater proportion, by the affirmative vote or written ballot of the proportion required.

(d) 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 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.

(h) Nothing in this section precludes the board of directors from adopting a different rule on the same subject as the rule change that has been reversed.

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

4530. ~~(a)~~ Upon written request, an association shall, within 10 days of the mailing or delivery of the request, provide the owner of a separate interest with a copy of the requested items specified in Section 4525.

~~(b)~~ (a) The items required to be made available pursuant to this section may be maintained in electronic form and requesting parties shall have the option of receiving them by electronic transmission or machine readable storage media if the association maintains these items in electronic form.

~~(c)~~ (b) The association may charge a reasonable fee for this service based upon the association's actual cost to procure, prepare, and reproduce the requested items.

4600. ~~(a)~~ Unless the governing documents specify a different percentage, the affirmative vote of members owning at least 67 percent of the separate interests in

the common interest development shall be required before the board of directors may grant exclusive use of any portion of the common area to a member.

~~(b)~~ (a) ~~Subdivision (a)~~ This section does not apply to the following actions:

(1) A reconveyance of all or any portion of that common area to the sub-divider to enable the continuation of development that is in substantial conformance with a detailed plan of phased development submitted to the Real Estate Commissioner with the application for a public report.

(2) Any grant of exclusive use that is in substantial conformance with a detailed plan of phased development submitted to the Real Estate Commissioner with the application for a public report or in accordance with the governing documents approved by the Real Estate Commissioner.

(3) Any grant of exclusive use that is for any of the following reasons:

(A) To eliminate or correct engineering errors in documents recorded with the county recorder or on file with a public agency or utility company.

(B) To eliminate or correct encroachments due to errors in construction of any improvements.

(C) To permit changes in the plan of development submitted to the Real Estate Commissioner in circumstances where the changes are the result of topography, obstruction, hardship, aesthetic considerations, or environmental conditions.

(D) To fulfill the requirement of a public agency.

(E) To transfer the burden of management and maintenance of any common area that is generally inaccessible and not of general use to the membership at large of the association.

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

4605. ~~(a)~~ A member of an association may bring a civil action for declaratory or equitable relief for a violation of Section 4600 by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues.

~~(b)~~ (a) A member who prevails in a civil action to enforce the member's rights pursuant to Section 4600 shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally.

(b) A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

4610. ~~(a)~~ Except as provided in this section, the common areas in a condominium project shall remain undivided, and there shall be no judicial partition thereof.

(a) Nothing in this section shall be deemed to prohibit partition of a co-tenancy in a condominium.

(b) The owner of a separate interest in a condominium project may maintain a partition action as to the entire project as if the owners of all of the separate

interests in the project were tenants in common in the entire project in the same proportion as their interests in the common areas.

(c) ~~The~~ A court shall order partition under this subdivision only by sale of the entire condominium project and only upon a showing of one of the following:

(1) More than three years before the filing of the action, the condominium project was damaged or destroyed, so that a material part was rendered unfit for its prior use, and the condominium project has not been rebuilt or repaired substantially to its state prior to the damage or destruction.

(2) Three-fourths or more of the project is destroyed or substantially damaged and owners of separate interests holding in the aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project.

(3) The project has been in existence more than 50 years, is obsolete and uneconomic, and owners of separate interests holding in the aggregate more than a 50-percent interest in the common area oppose repair or restoration of the project.

(4) The conditions for such a sale, set forth in the declaration, have been met.

4615. ~~(a)~~ In a condominium project, no labor performed or services or materials furnished with the consent of, or at the request of, an owner in the condominium project or the owners' agent or contractor shall be the basis for the filing of a lien against any other property of any other owner in the condominium project unless that other owner has expressly consented to or requested the performance of the labor or furnishing of the materials or services. ~~However, express~~

(a) Express consent shall be deemed to have been given by the owner of any condominium in the case of emergency repairs thereto.

(b) Labor performed or services or materials furnished for the common areas, if duly authorized by the association, shall be deemed to be performed or furnished with the express consent of each condominium owner.

(c) The owner of any condominium may remove the owner's condominium from a lien against two or more condominiums or any part thereof by payment to the holder of the lien of the fraction of the total sum secured by the lien which is attributable to the owner's condominium.

4705. ~~(a)~~ Except as required for the protection of the public health or safety, no declaration or other governing document shall limit or prohibit, or be construed to limit or prohibit, the display of 1 the flag of the United States by an owner on or in the owner's separate interest or within the owner's exclusive use common area.

~~(b)~~ (a) For purposes of this section, "display of the flag of the United States" means a flag of the United States made of fabric, cloth, or paper displayed from a staff or pole or in a window, and does not mean a depiction or emblem of the flag of the United States made of lights, paint, roofing, siding, paving materials, flora, or balloons, or any other similar building, landscaping, or decorative component.

~~(c)~~ (b) In any action to enforce this section, the prevailing party shall be awarded reasonable attorneys' fees and costs.

4710. ~~(a)~~ The governing documents, including the operating rules, may not prohibit posting or displaying of noncommercial signs, posters, flags, or banners on or in an owner's separate interest, except as required for the protection of

public health or safety or if the posting or display would violate a local, state, or federal law.

~~(b)~~ (a) For purposes of this section, a noncommercial sign, poster, flag, or banner may be made of paper, cardboard, cloth, plastic, or fabric, and may be posted or displayed from the yard, window, door, balcony, or outside wall of the separate interest, but may not be made of lights, roofing, siding, paving materials, flora, or balloons, or any other similar building, landscaping, or decorative component, or include the painting of architectural surfaces.

~~(c)~~ (b) An association may prohibit noncommercial signs and posters that are more than 9 square feet in size and noncommercial flags or banners that are more than 15 square feet in size.

4715. ~~(a)~~ No governing documents shall prohibit the owner of a separate interest within a common interest development from keeping at least one pet within the common interest development, subject to reasonable rules and regulations of the association.

(a) This section may not be construed to affect any other rights provided by law to an owner of a separate interest to keep a pet within the development.

(b) For purposes of this section, "pet" means any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the association and the homeowner.

(c) If the association implements a rule or regulation restricting the number of pets an owner may keep, the new rule or regulation shall not apply to prohibit an owner from continuing to keep any pet that the owner currently keeps in the owner's separate interest if the pet otherwise conforms with the previous rules or regulations relating to pets.

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

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

4725~~. (a)~~ Any covenant, condition, or restriction contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, a common interest development that effectively prohibits or restricts the installation or use of a video or television antenna, including a satellite dish, or that effectively prohibits or restricts the attachment of that antenna to a structure within that development where the antenna is not visible from any street or common area, except as otherwise prohibited or restricted by law, is void and unenforceable as to its application to the installation or use of a video or television antenna that has a diameter or diagonal measurement of 36 inches or less.

~~(b)~~ (a) This section shall not apply to any covenant, condition, or restriction~~, as described in subdivision (a),~~ that imposes reasonable restrictions on the installation or use of a video or television antenna, including a satellite dish, that has a diameter or diagonal measurement of 36 inches or less.

(b) For purposes of this section, "reasonable restrictions" means those restrictions that do not significantly increase the cost of the video or television antenna

system, including all related equipment, or significantly decrease its efficiency or performance and include all of the following:

(1) Requirements for application and notice to the association prior to the installation.

(2) Requirement of the owner of a separate interest, as defined in Section 4185, to obtain the approval of the association for the installation of a video or television antenna that has a diameter or diagonal measurement of 36 inches or less on a separate interest owned by another.

(3) Provision for the maintenance, repair, or replacement of roofs or other building components.

(4) Requirements for installers of a video or television antenna to indemnify or reimburse the association or its members for loss or damage caused by the installation, maintenance, or use of a video or television antenna that has a diameter or diagonal measurement of 36 inches or less.

(c) Whenever approval is required for the installation or use of a video or television antenna, including a satellite dish, the application for approval shall be processed by the appropriate approving entity for the common interest development in the same manner as an application for approval of an architectural modification to the property, and the issuance of a decision on the application shall not be willfully delayed.

(d) In any action to enforce compliance with this section, the prevailing party shall be awarded reasonable attorney's fees.

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

~~(b)~~ (a) No association may adopt, enforce, or otherwise impose any governing document that does either of the following:

(1) Imposes an assessment or fee in connection with the marketing of an owner's interest in an amount that exceeds the association's actual or direct costs. ~~That~~ Such an assessment or fee shall be deemed to violate the limitation set forth in ~~subdivision (b) of~~ Section 5600.

(2) Establishes an exclusive relationship with a real estate broker through which the sale or marketing of interests in the development is required to occur. The limitation set forth in this paragraph does not apply to the sale or marketing of separate interests 1 owned by the association or to the sale or marketing of common areas by the association.

~~(c)~~ (b) For purposes of this section, "market" and "marketing" mean listing, advertising, or obtaining or providing access to show the owner's interest in the development.

~~(d)~~ (c) This section does not apply to rules or regulations made pursuant to Section 712 or 713 regarding real estate signs.

4765. ~~(a)~~ This section applies if an association's governing documents require association approval before an owner of a separate interest may make a physical change to the owner's separate interest or to the common area.

(a) In reviewing and approving or disapproving a proposed change, the association shall satisfy the following requirements:

(1) The association shall provide a fair, reasonable, and expeditious procedure for making its decision. The procedure shall be included in the association's governing documents. The procedure shall provide for prompt deadlines. The procedure shall state the maximum time for response to an application or a request for reconsideration by the board of directors.

(2) A decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious.

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

(4) A decision on a proposed change shall be in writing. If a proposed change is disapproved, the written decision shall include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board of directors.

(5) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors of the association that made the decision, at an open meeting of the board. This paragraph does not require reconsideration of a decision that is made by 1 the board of directors or a body that has the same membership as the board of directors, at a meeting that satisfies the requirements of Article 2 (commencing with Section 4900) of Chapter 5. Reconsideration by the board does not constitute dispute resolution within the meaning of Section 5905.

(b) Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents, unless the change is required by law.

(c) An association shall annually provide its members with notice of any requirements for association approval of physical changes to property. The notice shall describe the types of changes that require association approval and shall include a copy of the procedure used to review and approve or disapprove a proposed change.

4785. ~~(a)~~ The association may cause the temporary, summary removal of any occupant of a common interest development for such periods and at such times as may be necessary for prompt, effective treatment of wood-destroying pests or organisms.

~~(b)~~ (a) The association shall give notice of the need to temporarily vacate a separate interest to the occupants and to the owners, not less than 15 days nor more than 30 days prior to the date of the temporary relocation. (b) The notice required by this section shall state the reason for the temporary relocation, the date and time of the beginning of treatment, the anticipated date and time of termination of treatment, and that the occupants will be responsible for their own accommodations during the temporary relocation.

(c) Notice by the association shall be deemed complete upon either:

(1) Personal delivery of a copy of the notice to the occupants, and sending a copy of the notice to the owners, if different than the occupants, by first-class

mail, postage prepaid at the most current address shown on the books of the association.

(2) By sending a copy of the notice to the occupants at the separate interest address and a copy of the notice to the owners, if different than the occupants, by first-class mail, postage prepaid, at the most current address shown on the books of the association.

(d) For purposes of this section, "occupant" means an owner, resident, guest, invitee, tenant, lessee, sub-lessee, or other person in possession on the separate interest.

4790. ~~(a)~~ Notwithstanding the provisions of the declaration, the owner of a separate interest is entitled to reasonable access to the common areas for the purpose of maintaining the internal and external communication wiring made part of the exclusive use common areas of a separate interest pursuant to ~~subdivision (c) of~~ Section 4145.

(a) The access shall be subject to the consent of the association, whose approval shall not be unreasonably withheld, and which may include the association's approval of telephone wiring upon the exterior of the common areas, and other conditions as the association determines reasonable.

(b) For the purposes of this section, "wiring" includes nonmetallic transmission lines.

4815. ~~(a)~~ In an action maintained by an association pursuant to ~~subdivisions (b), (c), or (d) of~~ Section 4810, the amount of damages recovered by the association shall be reduced by the amount of damages allocated to the association or its managing agents in direct proportion to their percentage of fault based upon principles of comparative fault.

(a) The comparative fault of the association or its managing agents may be raised by way of defense, but shall not be the basis for a cross-action or separate action against the association or its managing agents for contribution or implied indemnity, where the only damage was sustained by the association or its members. It is the intent of the Legislature in enacting this ~~subdivision~~ section to require that comparative fault be pleaded as an affirmative defense, rather than a separate cause of action, where the only damage was sustained by the association or its members.

(b) In an action involving damages described in ~~subdivision (b), (c), or (d) of~~ Section 4810, the defendant or cross-defendant may allege and prove the comparative fault of the association or its managing agents as a setoff to the liability of the defendant or cross-defendant even if the association is not a party to the litigation or is no longer a party whether by reason of settlement, dismissal, or otherwise.

~~(c) Subdivisions (a) and (b) apply to actions commenced on or after January 1,1993.~~

~~(d)~~ (c) Nothing in this section affects a person's liability under Section 1431, or the liability of the association or its managing agent for an act or omission that causes damages to another.

4920. ~~(a)~~ Unless the time and place of meeting is fixed by the governing

documents, or unless the governing documents provide for a longer period of notice, members shall be given notice of the time and place of a board meeting, except for an emergency meeting, at least four days prior to the meeting.
(a) Notice shall be given by general delivery (Section 4045). The notice shall contain the agenda for the meeting.
(b) An emergency meeting of the board may be called by the president of the association, or by any two members of the governing body other than the president, if there are circumstances that could not have been reasonably foreseen which require immediate attention and possible action by the board, and which of necessity make it impracticable to provide notice as required by this section.
(c) If the association is organized as a nonprofit mutual benefit corporation, notice of a board meeting is also governed by Section 7211 of the Corporations Code.

4930. ~~(a)~~ Except as provided by this section ~~described in paragraphs (b) to (e), inclusive,~~ the board of directors of the association may not discuss or take action on any item at a nonemergency meeting unless the item was placed on the agenda included in the notice that was distributed pursuant to ~~subdivision (a) of~~ Section 4920. This ~~subdivision~~ section does not prohibit a resident who is not a member of the board from speaking on issues not on the agenda.
~~(b)~~ (a) ~~Notwithstanding subdivision (a), a~~ A member of the board of directors, a managing agent or other agent of the board of directors, or a member of the staff of the board of directors, may do any of the following:
(1) Briefly respond to statements made or questions posed by a person speaking at a meeting as described in ~~subdivision (b) of~~ Section 4925.
(2) Ask a question for clarification, make a brief announcement, or make a brief report on the person's own activities, whether in response to questions posed by a member of the association or based upon the person's own initiative.
~~(c)~~ (b) ~~Notwithstanding subdivision (a), the~~ The board of directors or a member of the board of directors, subject to rules or procedures of the board of directors, may do any of the following:
(1) Provide a reference to, or provide other resources for factual information to, its managing agent or other agents or staff.
(2) Request its managing agent or other agents or staff to report back to the board of directors at a subsequent meeting concerning any matter, or take action to direct its managing agent or other agents or staff to place a matter of business on a future agenda.
(3) Direct its managing agent or other agents or staff to perform administrative tasks that are necessary to carry out this section.
~~(d)~~ (c) ~~Notwithstanding subdivision (a), the~~ The board of directors may take action on any item of business take action on any item of business not appearing on the agenda distributed pursuant to ~~Section subdivision (a) of~~ Section 4920 under any of the following conditions:
(1) Upon a determination made by a majority of the board of directors present at the meeting that an emergency situation exists. An emergency situation exists if there are circumstances that could not have been reasonably foreseen by the board, that require immediate attention and possible action by the board, and that, of necessity, make it impracticable to provide notice.
(2) Upon a determination made by the board by a vote of two-thirds of the

10 members present at the meeting, or, if less than two-thirds of total membership of the board is present at the meeting, by a unanimous vote of the members present, that there is a need to take immediate action and that the need for action came to the attention of the board after the agenda was distributed pursuant to ~~subdivision (a) of~~ Section 4920.

(3) The item appeared on an agenda that was distributed pursuant to ~~subdivision (a) of~~ Section 4920 for a prior meeting of the board of directors that occurred not more than 30 calendar days before the date that action is taken on the item and, at the prior meeting, action on the item was continued to the meeting at which the action is taken.

~~(c)~~ (d) Before discussing any item of business not appearing on the agenda ~~pursuant to subdivision (d)~~, the board of directors shall openly identify the item to the members in attendance at the meeting.

4935. ~~(a)~~ The board may meet in executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments, as specified in Section 5665.

~~(b)~~ (a)The board of directors of the association shall meet in executive session, if requested by a member who may be subject to a fine, penalty, or other form of discipline and the member shall be entitled to attend the executive session.

~~(c)~~ (b)The board of directors of the association shall meet in executive session to discuss a payment plan pursuant to Section 5665.

~~(d)~~ (c)The board of directors of the association shall meet in executive session to decide whether to foreclose on a lien pursuant to subdivision (b) of Section 5705.

~~(e)~~ (d)Any matter discussed in executive session shall be generally noted in the minutes of the immediately following meeting that is open to the entire membership.

4950. ~~(a)~~ The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes, of any meeting of the board of directors of an association, other than an executive session, shall be available to members within 30 days of the meeting.

(a) The minutes, proposed minutes, or summary minutes shall be distributed to any member of the association upon request and upon reimbursement of the association's costs for making that distribution.

(b) The annual policy notice (Section 5310) shall inform the members of their right to obtain copies of board meeting minutes and shall describe the procedure for obtaining a copy of the minutes.

4955. ~~(a)~~ A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues.

~~(b)~~ (a) A member who prevails in a civil action to enforce the member's rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally.

(b) A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

5000. ~~(a)~~ Meetings of the membership of the association shall be conducted in accordance with a recognized system of parliamentary procedure or any parliamentary procedures the association may adopt.
~~(b)~~ (a) Notwithstanding any other provision of law, notice of meetings of the members shall specify those matters the board intends to present for action by the members, but, except as otherwise provided by law, any proper matter may be presented at the meeting for action.
~~(c)~~ (b) If an association is organized as a nonprofit mutual benefit corporation, a member meeting is also governed by Sections 7510 through 7527 of the Corporations Code, inclusive.

5100. ~~(a)~~ Notwithstanding any other law or provision of the governing documents, elections regarding assessments legally requiring a vote, election and removal of members of the association board of directors, amendments to the governing documents, or the grant of exclusive use of common area property pursuant to Section 4600 shall be held by secret ballot in accordance with the procedures set forth in this article.
~~(b)~~ (a) This article also governs an election on any topic that is expressly identified in the operating rules as being governed by this article.
~~(c)~~ (b) The provisions of this article apply to both incorporated and unincorporated associations, notwithstanding any contrary provision of the governing documents.
~~(d)~~ (c) The procedures set forth in this article shall apply to votes cast directly by the membership, but do not apply to votes cast by delegates or other elected representatives.
~~(e)~~ (d) In the event of a conflict between this article and the provisions of the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code) relating to elections, the provisions of this article shall prevail.

5110. ~~(a)~~ The association shall select an independent third party or parties as an inspector of election. The number of inspectors of election shall be one or three.
~~(b)~~ (a) For the purposes of this section, an independent third party includes, but is not limited to, a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public.
(b) An independent third party may be a member of the association, but may not be a member of the board of directors or a candidate for the board of directors or related to a member of the board of directors or a candidate for the board of directors.
(c) An independent third party may not be a person, business entity, or subdivision of a business entity who is currently employed or under contract to the association for any compensable services unless expressly authorized by rules of the association adopted pursuant to ~~paragraph (5) of subdivision (a) of~~ Section 5105.
~~(c)~~ (d) The inspector or inspectors of election shall do all of the following:

(1) Determine the number of memberships entitled to vote and the voting power of each.
(2) Determine the authenticity, validity, and effect of proxies, if any.
(3) Receive ballots.
(4) Hear and determine all challenges and questions in any way arising out of or in connection with the right to vote.
(5) Count and tabulate all votes.
(6) Determine when the polls shall close, consistent with the governing documents.
(7) Determine the tabulated results of the election.
(8) Perform any acts as may be proper to conduct the election with fairness to all members in accordance with this article, the Corporations Code, and all applicable rules of the association regarding the conduct of the election that are not in conflict with this article.

~~(d)~~ (e) An inspector of election shall perform all duties impartially, in good faith, to the best of the inspector of election's ability, and as expeditiously as is practical. If there are three inspectors of election, the decision or act of a majority shall be effective in all respects as the decision or act of all.

(f) Any report made by the inspector or inspectors of election is prima facie evidence of the facts stated in the report.

5115. ~~(a)~~ Ballots and two preaddressed envelopes with instructions on how to return ballots shall be mailed by first-class mail or delivered by the association to every member not less than 30 days prior to the deadline for voting.

(a) In order to preserve confidentiality, a voter may not be identified by name, address, or lot, parcel, or unit number on the ballot.

(b) The association shall use as a model those procedures used by California counties for ensuring confidentiality of voter absentee ballots, including all of the following:
(1) The ballot itself is not signed by the voter, but is inserted into an envelope that is sealed. This envelope is inserted into a second envelope that is sealed. In the upper left hand corner of the second envelope, the voter shall sign the voter's name, indicate the voter's name, and indicate the address or separate interest identifier that entitles the voter to vote.
(2) The second envelope is addressed to the inspector or inspectors of election, who will be tallying the votes. The envelope may be mailed or delivered by hand to a location specified by the inspector or inspectors of election. The member may request a receipt for delivery.

~~(b)~~ (c) A quorum shall be required only if so stated in the governing documents of the association or other provisions of law. If a quorum is required by the governing documents, each ballot received by the inspector of elections shall be treated as a member present at a meeting for purposes of establishing a quorum.

~~(c)~~ (d) An association shall allow for cumulative voting using the secret ballot procedures provided in this section, if cumulative voting is provided for in the governing documents.

~~(d)~~ (e) Except for the meeting to count the votes required in ~~subdivision (a) of~~ Section 5120, an election may be conducted entirely by mail unless otherwise specified in the governing documents.

5120. ~~(a)~~ All votes shall be counted and tabulated by the inspector of election, or the inspector of election's designee, in public at a properly noticed open meeting of the board of directors or members.

(a) Any candidate or other member of the association may witness the counting and tabulation of the votes.

(b) No person, including a member of the association or an employee of the management company, shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated.

(c) The inspector of election, or the inspector of election's designee, may verify the member's information and signature on the outer envelope prior to the meeting at which ballots are tabulated.

(d) Once a secret ballot is received by the inspector of elections, it shall be irrevocable.

~~(b)~~(e) The tabulated results of the election shall be promptly reported to the board of directors of the association and shall be recorded in the minutes of the next meeting of the board of directors and shall be available for review by members of the association.

(f) Within 15 days of the election, the board shall give general notice (Section 4045) of the tabulated results of the election.

5125. ~~(a)~~ The sealed ballots at all times shall be in the custody of the inspector or inspectors of election or at a location designated by the inspector or inspectors until after the tabulation of the vote, and until the time allowed by Section 5145 for challenging the election has expired, at which time custody shall be transferred to the association.

(a) If there is a recount or other challenge to the election process, the inspector or inspectors of election shall, upon written request, make the ballots available for inspection and review by an association member or the member's authorized representative.

(b) Any recount shall be conducted in a manner that preserves the confidentiality of the vote.

~~(b)~~ (c) After the transfer of the ballots to the association, the ballots shall be stored by the association in a secure place for no less than one year after the date of the election.

5130. ~~(a)~~ For purposes of this article, ~~the following definitions shall apply:~~

~~(1)~~ "~~Proxy~~ proxy" means a written authorization signed by a member or the authorized representative of the member that gives another member or members the power to vote on behalf of that member.

~~(2)~~ (a) "Signed" means the placing of the member's name on the proxy (whether by manual signature, typewriting, telegraphic transmission, or otherwise) by the member or authorized representative of the member.

(b) Proxies shall not be construed or used in lieu of a ballot.

(c) An association may use proxies if permitted or required by the bylaws of the association and if those proxies meet the requirements of this article, other laws, and the association's governing documents, but the association shall not be required to prepare or distribute proxies pursuant to this article.

~~(c)~~ (d) Any instruction given in a proxy issued for an election that directs the manner in which the proxy-holder is to cast the vote shall be set forth on a

separate page of the proxy that can be detached and given to the proxy-holder to retain.

(e) The proxy-holder shall cast the member's vote by secret ballot.

(f) The proxy may be revoked by the member prior to the receipt of the ballot by the inspector of elections as described in Section 7613 of the Corporations Code.

5135. ~~(a)~~ Association funds shall not be used for campaign purposes in connection with any association board election.

(a) Funds of the association shall not be used for campaign purposes in connection with any other association election except to the extent necessary to comply with duties of the association imposed by law.

(b) For the purposes of this section, "campaign purposes" includes, but is not limited to, the following:

(1) Expressly advocating the election or defeat of any candidate that is on the association election ballot.

(2) Including the photograph or prominently featuring the name of any candidate on a communication from the association or its board, excepting the ballot, ballot materials, or a communication that is legally required, within 30 days of an election. ~~This~~

(c) It is not a campaign purpose if the communication is one for which subdivision (a) of Section 5105 requires that equal access be provided to another candidate or advocate.

5145. ~~(a)~~ A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues.

(a) Upon a finding that the election procedures of this article, or the adoption of and adherence to rules provided by Article 5 (commencing with Section 4350) of Chapter 2, were not followed, a court may void any results of the election.

(b) A member who prevails in a civil action to enforce the member's rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally.

(c) A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

~~(c)~~ (d) A cause of action under Sections 5100 to 5130, inclusive, with respect to access to association resources by a candidate or member advocating a point of view, the receipt of a ballot by a member, or the counting, tabulation, or reporting of, or access to, ballots for inspection and review after tabulation may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court.

5205. ~~(a)~~ The association shall make available association records for the time periods and within the timeframes provided in Section 5210 for inspection and copying by a member of the association, or the member's designated representative.

(a) The association may bill the requesting member for the direct and actual cost of copying requested documents. The association shall inform the member of the amount of the copying costs before copying the requested documents.
(b) A member of the association may designate another person to inspect and copy the specified association records on the member's behalf. The member shall make this designation in writing.
(c) The association shall make the specified association records available for inspection and copying in the association's business office within the common interest development.
(d) If the association does not have a business office within the development, the association shall make the specified association records available for inspection and copying at a place that the requesting member and the association agree upon.
(e) If the association and the requesting member cannot agree upon a place for inspection and copying pursuant to subdivision (d) or if the requesting member submits a written request directly to the association for copies of specifically identified records, the association may satisfy the requirement to make the association records available for inspection and copying by mailing copies of the specifically identified records to the member by first-class mail within the timeframes set forth in ~~subdivision (b) of~~ Section 5210.
(f) The association may bill the requesting member for the direct and actual cost of copying and mailing requested documents. The association shall inform the member of the amount of the copying and mailing costs, and the member shall agree to pay those costs, before copying and sending the requested documents.
(g) In addition to the direct and actual costs of copying and mailing, the association may bill the requesting member an amount not in excess of ten dollars ($10) per hour, and not to exceed two hundred dollars ($200) total per written request, for the time actually and reasonably involved in redacting the enhanced association record.
(h) If the enhanced association records include~~s~~ a reimbursement request, the person submitting the reimbursement request shall be solely responsible for removing all personal identification information from the request.
(i) The association shall inform the member of the estimated costs, and the member shall agree to pay those costs, before retrieving the requested documents.
~~(h)~~ (j) Requesting parties shall have the option of receiving specifically identified records by electronic transmission or machine-readable storage media as long as those records can be transmitted in a redacted format that does not allow the records to be altered.
(k) The cost of duplication shall be limited to the direct cost of producing the copy of a record in that electronic format. The association may deliver specifically identified records by electronic transmission or machine readable storage media as long as those records can be transmitted in a redacted format that prevents the records from being altered.

5225. A member requesting the membership list shall state the purpose for which the list is requested which purpose shall be reasonably related to the requester's interest as a member.
(a) If the association reasonably believes that the information in the list will be used for another purpose, it may deny the member access to the list.

(b) If the request is denied, in any subsequent action brought by the member under Section 5235, the association shall have the burden to prove that the member would have allowed use of the information for purposes unrelated to the member's interest as a member.

5230. ~~(a)~~ The association records, and any information from them, may not be sold, used for a commercial purpose, or used for any other purpose not reasonably related to a member's interest as a member.
(a) An association may bring an action against any person who violates this article for injunctive relief and for actual damages to the association caused by the violation.
(b) This article may not be construed to limit the right of an association to damages for misuse of information obtained from the association records pursuant to this article or to limit the right of an association to injunctive relief to stop the misuse of this information.
(c) An association shall be entitled to recover reasonable costs and expenses, including reasonable attorney's fees, in a successful action to enforce its rights under this article.

5235. ~~(a)~~ A member of an association may bring an action to enforce the member's right to inspect and copy the association records.
(a) If a court finds that the association unreasonably withheld access to the association records, the court shall award the member reasonable costs and expenses, including reasonable attorney's fees, and may assess a civil penalty of up to five hundred dollars ($500) for the denial of each separate written request.
(b) A cause of action under this section may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court.
(c) A prevailing association may recover any costs if the court finds the action to be frivolous, unreasonable, or without foundation.

5240. ~~(a)~~ As applied to an association and its members, the provisions of this article are intended to supersede the provisions of Sections 8330 and 8333 of the Corporations Code to the extent those sections are inconsistent.
~~(b)~~ (a) Except as provided ~~in subdivision (a)~~ by this section, members of the association shall have access to association records, including accounting books and records and membership lists, in accordance with Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of Title 1 of the Corporations Code.
~~(c)~~ (b) The provisions of this article apply to any community service organization or similar entity that is related to the association, and this article shall operate to give a member of the community service organization or similar entity a right to inspect and copy the records of that organization or entity equivalent to that granted to association members by this article.
~~(d)~~ (c) The provisions of this article shall not apply to any common interest development in which separate interests are being offered for sale by a subdivider under the authority of a public report issued by the Department of Real Estate so long as the subdivider or all subdividers offering those separate interests for sale, or any employees of those subdividers or any other person who receives direct or

indirect compensation from any of those subdividers, comprise a majority of the members of the board of directors of the association.

(d) Notwithstanding the foregoing, this article shall apply to that common interest development no later than 10 years after the close of escrow for the first sale of a separate interest to a member of the general public pursuant to the public report issued for the first phase of the development.

5255. ~~(a)~~ Unless a longer period is required by law or by the governing documents, an association shall retain a record listed in Section 5250 for at least four years after its date of creation, except that a record with continuing legal or operational effect shall be retained during the period of its effect and for at least four years after the termination of its effect.

~~(b)~~ (a) The association shall retain the following records permanently:

(1) The original governing documents and each amendment of or addition to the governing documents.

(2) The minutes of a member meeting, board meeting, or meeting of a committee that exercises a power of the board.

(3) A deed or other record that relates to title of real property within the common interest development.

(4) A record that relates to the design, construction, or physical condition of the common interest development.

~~(c)~~ (b) A ballot cast in a member election shall be retained for the period provided in Section 5125.

~~(d)~~ (c) This section does not apply to a record that is discarded or destroyed before January 1, 2010.

5300. ~~(a)~~ Notwithstanding a contrary provision in the governing documents, an association shall prepare and distribute an annual budget report, 30 to 90 days before the end of its fiscal year.

~~(b)~~ (a) Unless the governing documents impose more stringent standards, the annual budget report shall include all of the following information:

(1) A pro forma operating budget, showing the estimated revenue and expenses on an accrual basis.

(2) A summary of the association's reserves, prepared pursuant to Section 5565.

(3) Commencing January 1, 2009, a summary of the reserve funding plan adopted by the board of directors of the association, as specified in ~~subdivision (d) of~~ Section 5555. The summary shall include notice to members that the full reserve study plan is available upon request, and the association shall provide the full reserve plan to any member upon request.

(4) A statement as to whether the board of directors of the association has determined to defer or not undertake repairs or replacement of any major component with a remaining life of 30 years or less, including a justification for the deferral or decision not to undertake the repairs or replacement.

(5) A statement as to whether the board of directors of the association, consistent with the reserve funding plan adopted pursuant to Section 5560 has determined or anticipates that the levy of one or more special assessments will be required to repair, replace, or restore any major component or to provide adequate reserves therefore. If so, the statement shall also set out the estimated amount, commencement date, and duration of the assessment.

(6) A statement as to the mechanism or mechanisms by which the board of directors will fund reserves to repair or replace major components, including assessments, borrowing, use of other assets, deferral of selected replacements or repairs, or alternative mechanisms.

(7) A general statement addressing the procedures used for the calculation and establishment of those reserves to defray the future repair, replacement, or additions to those major components that the association is obligated to maintain. The report shall include, but need not be limited to, reserve calculations made using the formula described in ~~paragraph (4) of subdivision (b) of~~ Section 5570, and may not assume a rate of return on cash reserves in excess of 2 percent above the discount rate published by the Federal Reserve Bank of San Francisco at the time the calculation was made.

(8) A statement as to whether the association has any outstanding loans with an original term of more than one year, including the payee, interest rate, amount outstanding, annual payment, and when the loan is scheduled to be retired.

(9) A summary of the association's property, general liability, earthquake, flood, and fidelity insurance policies. For each policy, the summary shall include the name of the insurer, the type of insurance, the policy limit, and the amount of any deductible, if any. To the extent that any of the required information is specified in the insurance policy declaration page, the association may meet its obligation to disclose that information by making copies of that page and distributing it with the annual budget report. The summary distributed pursuant to this paragraph shall contain, in at least 10-point boldface type, the following statement:

"This summary of the association's policies of insurance provides only certain information, as required by Section 5300 of the Civil Code, and should not be considered a substitute for the complete policy terms and conditions contained in the actual policies of insurance. Any association member may, upon request and provision of reasonable notice, review the association's insurance policies and, upon request and payment of reasonable duplication charges, obtain copies of those policies. Although the association maintains the policies of insurance specified in this summary, the association's policies of insurance may not cover your property, including personal property or, real property improvements to or around your dwelling, or personal injuries or other losses that occur within or around your dwelling. Even if a loss is covered, you may nevertheless be responsible for paying all or a portion of any deductible that applies. Association members should consult with their individual insurance broker or agent for appropriate additional coverage."

~~(c)~~ (b) The annual budget report shall be made available to the members pursuant to Section 5320.

~~(d)~~ (c)The summary of the association's reserves disclosed pursuant to ~~paragraph (2) of subdivision (b)~~ the provisions of this section shall not be admissible in evidence to show improper financial management of an association, provided that other relevant and competent evidence of the financial condition of the association is not made inadmissible by this provision.

~~(e)~~ (d) The Assessment and Reserve Funding Disclosure Summary form, prepared pursuant to Section 5570, shall accompany each annual budget report or summary of the annual budget report that is delivered pursuant to this article.

5305. ~~(a)~~ A review of the financial statement of the association shall be prepared in accordance with generally accepted accounting principles by a licensee of the California Board of Accountancy for any fiscal year in which the gross income to the association exceeds seventy-five thousand dollars ($75,000).
(a) A copy of the review of the financial statement shall be distributed within 120 days after the close of each fiscal year.
(b) The review required by this section shall be made available to the members pursuant to Section 5320.

5310. ~~(a)~~ Within 120 days after the end of the fiscal year, the board shall prepare an annual policy statement that provides the members with information about association policies.
(a) The annual policy statement shall include all of the following information:
(1) The name and address of the person designated to receive official communications to the association, pursuant to Section 4035.
(2) A statement explaining that a member may submit a request to have notices sent to up to two different specified addresses, pursuant to ~~subdivision (b) of~~ Section 4040 and ~~subdivision (f) of~~ Section 5675.
(3) The location, if any, designated for posting of a general notice, pursuant to ~~paragraph (3) of subdivision (a) of~~ Section 4045.
(4) Notice of a member's option to receive general notices by individual delivery, pursuant ~~to subdivision (b) of~~ Section 4045.
(5) Notice of a member's right to receive copies of meeting minutes, pursuant to ~~subdivision (b) of~~ Section 4950.
(6) The statement of assessment collection policies required by Section 5730.
(7) A statement describing the association's policies and practices in enforcing lien rights or other legal remedies for default in the payment of assessments.
(8) A statement describing the association's discipline policy, if any, including any schedule of penalties for violations of the governing documents pursuant to Section 5850.
(9) A summary of alternative dispute resolution procedures, pursuant to Sections 5920 and 5965.
(10) A summary of any requirements for association approval of a physical change to property, pursuant to Section 4765.
(11) Any other information that is required by law or the governing documents or that the board determines to be appropriate for inclusion.
(b) The board shall promptly deliver a copy of the most recent annual policy statement to any new member, at no cost to the member.
(c) The annual policy statement shall be made available to the members pursuant to Section 5320.

5350. ~~(a)~~ Notwithstanding any other law, and regardless of whether an association is incorporated or unincorporated, the provisions of Sections 7223 and 7224 of the Corporations Code shall apply to any contract or other transaction authorized, approved, or ratified by the board or a committee of the board.
~~(b)~~ (a) A director or member of a committee shall not vote or otherwise act on behalf of the association with respect to any of the following matters:
(1) Discipline of the director or committee member.

(2) An assessment against the director or committee member for damage to the common area or facilities.
(3) A request, by the director or committee member, for a payment plan for overdue assessments.
(4) A decision whether to foreclose on a lien on the separate interest of the director or committee member.
(5) Review of a proposed physical change to the separate interest of the director or committee member.
(6) A grant of exclusive use common area to the director or committee member.
~~(c)~~ (b) Nothing in this section limits any other provision of law or the governing documents that governs a decision in which a director may have an interest.

5380. ~~(a)~~ A managing agent of a common interest development who accepts or receives funds belonging to the association shall deposit ~~all~~ any funds that are not placed into an escrow account with a bank, savings association, or credit union or into an account under the control of the association, into a trust fund account maintained by the managing agent in a bank, savings association, or credit union in this state.
(a) All funds deposited by the managing agent in the trust fund account shall be kept in this state in a financial institution, as defined in Section 31041 of the Financial Code, which is insured by the federal government, and shall be maintained there until disbursed in accordance with written instructions from the association entitled to the funds.
(b) At the written request of the board of directors of the association, the funds the managing agent accepts or receives on behalf of the association shall be deposited into an interest-bearing account in a bank, savings association, or credit union in this state, provided all of the following requirements are met:
(1) The account is in the name of the managing agent as trustee for the association or in the name of the association.
(2) All of the funds in the account are covered by insurance provided by an agency of the federal government.
(3) The funds in the account are kept separate, distinct, and apart from the funds belonging to the managing agent or to any other person or entity for whom the managing agent holds funds in trust except that the funds of various associations may be commingled as permitted pursuant to subdivision (d).
(4) The managing agent discloses to the board of directors of the association the nature of the account, how interest will be calculated and paid, whether service charges will be paid to the depository and by whom, and any notice requirements or penalties for withdrawal of funds from the account.
(5) No interest earned on funds in the account shall inure directly or indirectly to the benefit of the managing agent or the managing agent's employees.
(c) The managing agent shall maintain a separate record of the receipt and disposition of all funds described in this section, including any interest earned on the funds.
(d) The managing agent shall not commingle the funds of the association with the managing agent's own money or with the money of others that the managing agent receives or accepts, unless all of the following requirements are met:
(1) The managing agent commingled the funds of various associations on or before February 26, 1990, and has obtained a written agreement with the board

of directors of each association that the managing agent will maintain a fidelity and surety bond in an amount that provides adequate protection to the associations as agreed upon by the managing agent and the board of directors of each association.

(2) The managing agent discloses in the written agreement whether the managing agent is deriving benefits from the commingled account or the bank, credit union, or savings institution where the moneys will be on deposit.

(3) The written agreement provided pursuant to this subdivision includes, but is not limited to, the name and address of the bonding companies, the amount of the bonds, and the expiration dates of the bonds.

(4) If there are any changes in the bond coverage or the companies providing the coverage, the managing agent discloses that fact to the board of directors of each affected association as soon as practical, but in no event more than 10 days after the change.

(5) The bonds assure the protection of the association and provide the association at least 10 days' notice prior to cancellation.

(6) Completed payments on the behalf of the association are deposited within 24 hours or the next business day and do not remain commingled for more than 10 calendar days.

(e) The prevailing party in an action to enforce this section shall be entitled to recover reasonable legal fees and court costs.

(f) As used in this section, "completed payment" means funds received that clearly identify the account to which the funds are to be credited.

5405. ~~(a)~~ To assist with the identification of common interest developments, each association, whether incorporated or unincorporated, shall submit to the Secretary of State, on a form and for a fee not to exceed thirty dollars ($30) that the Secretary of State shall prescribe, the ~~following~~ information required by this section concerning the association and the development that it manages~~:~~.

(a) The following information shall be submitted to the Secretary of State:

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

(2) The name of the association.

(3) The street address of the association's onsite office, or, if none, of the responsible officer or managing agent of the association.

(4) The name, address, and either the daytime telephone number or e-mail address of the president of the association, other than the address, telephone number, or e-mail address of the association's onsite office or managing agent of the association.

(5) The name, street address, and daytime telephone number of the association's managing agent, if any.

(6) The county, and if in an incorporated area, the city in which the development is physically located. If the boundaries of the development are physically located in more than one county, each of the counties in which it is located.

(7) If the development is in an unincorporated area, the city closest in proximity to the development.

(8) The nine-digit ZIP Code, front street, and nearest cross street of the physical location of the development.

(9) The type of common interest development, as defined in Section 4100,

managed by the association.

(10) The number of separate interests, as defined in Section 4185, in the development.

(b) The association shall submit the information required by this section as follows:

(1) By incorporated associations, within 90 days after the filing of its original articles of incorporation, and thereafter at the time the association files its biennial statement of principal business activity with the Secretary of State pursuant to Section 8210 of the Corporations Code.

(2) By unincorporated associations, in July of 2003, and in that same month biennially thereafter. Upon changing its status to that of a corporation, the association shall comply with the filing deadlines in paragraph (1).

(c) The association shall notify the Secretary of State of any change in the street address of the association's onsite office or of the responsible officer or managing agent of the association in the form and for a fee prescribed by the Secretary of State, within 60 days of the change.

(d) On and after January 1, 2006, the penalty for an incorporated association's noncompliance with the initial or biennial filing requirements of this section shall be suspension of the association's rights, privileges, and powers as a corporation and monetary penalties, to the same extent and in the same manner as suspension and monetary penalties imposed pursuant to Section 8810 of the Corporations Code.

(e) The Secretary of State shall make the information submitted pursuant to paragraph (4) of subdivision (a) available only for governmental purposes and only to Members of the Legislature and the Business, Transportation and Housing Agency, upon written request. All other information submitted pursuant to this section shall be subject to public inspection pursuant to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code. The information submitted pursuant to this section shall be made available for governmental or public inspection, as the case may be, on or before July 1, 2004, and thereafter.

5515. ~~(a)~~ Notwithstanding Section 5510, the board may authorize the temporary transfer of moneys from a reserve fund to the association's general operating fund to meet short-term cash-flow requirements or other expenses, if the board has provided notice of the intent to consider the transfer in a notice of meeting, which shall be provided as specified in Section 4920.

~~(b)~~ (a) The notice shall include the reasons the transfer is needed, some of the options for repayment, and whether a special assessment may be considered.

~~(c)~~ (b) If the board authorizes the transfer, the board shall issue a written finding, recorded in the board's minutes, explaining the reasons that the transfer is needed, and describing when and how the moneys will be repaid to the reserve fund.

~~(d)~~ (c) The transferred funds shall be restored to the reserve fund within one year of the date of the initial transfer, except that the board may, after giving the same notice required for considering a transfer, and, upon making a finding supported by documentation that a temporary delay would be in the best interests of the common interest development, temporarily delay the restoration.

~~(c)~~ (d)The board shall exercise prudent fiscal management in maintaining the integrity of the reserve account, and shall, if necessary, levy a special assessment to recover the full amount of the expended funds within the time limits required by this section.

(1) This special assessment is subject to the limitation imposed by Section 5605.

(2)The board may, at its discretion, extend the date the payment on the special assessment is due.

(3) Any extension shall not prevent the board from pursuing any legal remedy to enforce the collection of an unpaid special assessment.

5520. ~~(a)~~ When the decision is made to use reserve funds or to temporarily transfer moneys from the reserve fund to pay for litigation, the association shall provide general notice (Section 4045) of that decision, and of the availability of an accounting of those expenses.

~~(b)~~ (a) Unless the governing documents impose more stringent standards, the association shall make an accounting of expenses related to the litigation on at least a quarterly basis.

(b) The accounting required by this section shall be made available for inspection by members of the association at the association's office.

5560. ~~(a)~~ The reserve funding plan required by ~~subdivision (c) of~~ Section 5555 shall include a schedule of the date and amount of any change in regular or special assessments that would be needed to sufficiently fund the reserve funding plan.

~~(b)~~ (a) The plan shall be adopted by the board of directors at an open meeting before the membership of the association as described in Article 2 (commencing with Section 4900) of Chapter 5.

~~(c)~~ (b) If the board of directors determines that an assessment increase is necessary to fund the reserve funding plan, any increase shall be approved in a separate action of the board that is consistent with the procedure described in Section 5605.

5580. ~~(a)~~ Unless the governing documents impose more stringent standards, any community service organization whose funding from the association or its members exceeds 10 percent of the organization's annual budget shall prepare and distribute to the association a report that meets the requirements of Section 5012 of the Corporations Code, and that describes in detail administrative costs and identifies the payees of those costs in a manner consistent with the provisions of Article 5 (commencing with Section 5200).

~~(b)~~ (a) If the community service organization does not comply with the standards, the report shall disclose the noncompliance in detail.

(b) If a community service organization is responsible for the maintenance of major components for which an association would otherwise be responsible, the community service organization shall supply to the association the information regarding those components that the association would use to complete disclosures and reserve reports required under this article and Section 5300.

(c) An association may rely upon information received from a community service organization, and shall provide access to the information pursuant to the provisions of Article 5 (commencing with Section 5200).

5605. ~~(a)~~ Annual increases in regular assessments for any fiscal year shall not be imposed unless the board has complied with Section 5300 with respect to that fiscal year, or has obtained the approval of a majority of a quorum of members (Section 4070) at a member meeting or election.

~~(b)~~ (a) Notwithstanding more restrictive limitations placed on the board by the governing documents, the board of directors may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding fiscal year or impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses of the association for that fiscal year without the approval of a majority of a quorum of members (Section 4070) at a member meeting or election.

~~(c)~~ (b) For the purposes of this section, "quorum" means more than 50 percent of the owners of an association.

5620. ~~(a)~~ Regular assessments imposed or collected to perform the obligations of an association under the governing documents or this title shall be exempt from execution by a judgment creditor of the association only to the extent necessary for the association to perform essential services, such as paying for utilities and insurance.

(a) In determining the appropriateness of an exemption, a court shall ensure that only essential services are protected under this ~~subdivision~~ section.

(b) This exemption shall not apply to any consensual pledges, liens, or encumbrances that have been approved by a majority of a quorum of members (Section 4070) at a member meeting or election, or to any state tax lien, or to any lien for labor or materials supplied to the common area.

5650. ~~(a)~~ A regular or special assessment and any late charges, reasonable fees and costs of collection, reasonable attorney's fees, if any, and interest, if any, as determined in accordance with ~~subdivision (b)~~ this section, shall be a debt of the owner of the separate interest at the time the assessment or other sums are levied.

~~(b)~~ (a) Regular and special assessments levied pursuant to the governing documents are delinquent 15 days after they become due, unless the declaration provides a longer time period, in which case the longer time period shall apply.

(b) If an assessment is delinquent the association may recover all of the following:

(1) Reasonable costs incurred in collecting the delinquent assessment, including reasonable attorney's fees.

(2) A late charge not exceeding 10 percent of the delinquent assessment or ten dollars ($10), whichever is greater, unless the declaration specifies a late charge in a smaller amount, in which case any late charge imposed shall not exceed the amount specified in the declaration.

(3) Interest on all sums imposed in accordance with this section, including the delinquent assessments, reasonable fees and costs of collection, and reasonable attorney's fees, at an annual interest rate not to exceed 12 percent, commencing 30 days after the assessment becomes due, unless the declaration specifies the

recovery of interest at a rate of a lesser amount, in which case the lesser rate of interest shall apply.
(c) Associations are hereby exempted from interest-rate limitations imposed by Article XV of the California Constitution, subject to the limitations of this section.

5655. ~~(a)~~ Any payments made by the owner of a separate interest toward assessments shall first be applied to the assessments owed, and, only after the assessments owed are paid in full shall the payments be applied to the fees and costs of collection, attorney's fees, late charges, or interest.
~~(b)~~ (a) When an owner makes a payment, the owner may request a receipt and the association shall provide it. The receipt shall indicate the date of payment and the person who received it.
~~(c)~~ (b) The association shall provide a mailing address for overnight payment of assessments.

5665. ~~(a)~~ An owner, other than an owner of any interest that is described in Section 11212 of the Business and Professions Code that is not otherwise exempt from this section pursuant to ~~subdivision (a) of~~ Section 11211.7, may submit a written request to meet with the board to discuss a payment plan for the debt noticed pursuant to Section 5660).
(a) The association shall provide the owners the standards for payment plans, if any exist.
(b) The board shall meet with the owner in executive session within 45 days of the postmark of the request, if the request is mailed within 15 days of the date of the postmark of the notice, unless there is no regularly scheduled board meeting within that period, in which case the board may designate a committee of one or more members to meet with the owner.
(c) Payment plans may incorporate any assessments that accrue during the payment plan period. Additional late fees shall not accrue during the payment plan period if the owner is in compliance with the terms of the payment plan.
(d) Payment plans shall not impede an association's ability to record a lien on the owner's separate interest to secure payment of delinquent assessments.
(e) In the event of a default on any payment plan, the association may resume its efforts to collect the delinquent assessments from the time prior to entering into the payment plan.

5673. For liens recorded on or after January 1, 2006, the decision to record a lien for delinquent assessments shall be made only by the board of directors of the association and may not be delegated to an agent of the association.
(a) The board shall approve the decision by a majority vote of the board members in an open meeting.
(b) The board shall record the vote in the minutes of that meeting.

5675. ~~(a)~~ The amount of the assessment, plus any costs of collection, late charges, and interest assessed in accordance with ~~subdivision (b) of~~ Section 5650, shall be a lien on the owner's separate interest in the common interest development from and after the time the association causes to be recorded with the county recorder of the county in which the separate interest is located, a notice of delinquent assessment, which shall state the amount of the assessment

and other sums imposed in accordance with ~~subdivision (b) of~~ Section 5650, a legal description of the owner's separate interest in the common interest development against which the assessment and other sums are levied, and the name of the
record owner of the separate interest in the common interest development against which the lien is imposed.

~~(b)~~ (a) The itemized statement of the charges owed by the owner described in ~~subdivision (b) of~~ Section 5660 shall be recorded together with the notice of delinquent assessment.

~~(c)~~ (b) In order for the lien to be enforced by nonjudicial foreclosure as provided in Sections 5700 through 5710, inclusive, the notice of delinquent assessment shall state the name and address of the trustee authorized by the association to enforce the lien by sale.

~~(d)~~ (c)The notice of delinquent assessment shall be signed by the person designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association.

~~(e)~~ (d) A copy of the recorded notice of delinquent assessment shall be mailed by certified mail to every person whose name is shown as an owner of the separate interest in the association's records, and the notice shall be mailed no later than 10 calendar days after recordation.

~~(f)~~ (e) Upon receipt of a written request by an owner identifying a secondary address for purposes of collection notices, the association shall send additional copies of any notices required by this section to the secondary address provided.

(1)The association shall notify owners of their right to submit secondary addresses to the association, in the annual policy notice distributed pursuant to Section 5310.

(2)The owner's request shall be in writing and shall be mailed to the association in a manner that shall indicate the association has received it.

(3) The owner may identify or change a secondary address at any time, provided that, if a secondary address is identified or changed during the collection process, the association shall only be required to send notices to the indicated secondary address from the point the association receives the request.

~~(g)~~ (f) An association that fails to comply with the procedures set forth in this section shall, prior to recording a lien, recommence the required notice process.

(g) Any costs associated with recommencing the notice process shall be borne by the association and not by the owner of a separate interest.

5685~~. (a)~~ Within 21 days of the payment of the sums specified in the notice of delinquent assessment, the association shall record or cause to be recorded in the office of the county recorder in which the notice of delinquent assessment is recorded a lien release or notice of rescission and provide the owner of the separate interest a copy of the lien release or notice that the delinquent assessment has been satisfied.

~~(b)~~ (a) If it is determined that a lien previously recorded against the separate interest was recorded in error, the party who recorded the lien shall, within 21 calendar days, record or cause to be recorded in the office of the county recorder in which the notice of delinquent assessment is recorded a lien release or notice of rescission and provide the owner of the separate interest with a declaration that

the lien filing or recording was in error and a copy of the lien release or notice of rescission.

~~(c)~~ (b) If it is determined that an association has recorded a lien for a delinquent assessment in error, the association shall promptly reverse all late charges, fees, interest, attorney's fees, costs of collection, costs imposed for the notice prescribed in Section 5660, and costs of recordation and release of the lien authorized under ~~subdivision (b) of~~ Section 5720, and pay all costs related to any related dispute resolution or alternative dispute resolution.

5705. ~~(a) Notwithstanding any law or any provisions of the governing documents to the contrary, this section shall apply to debts for assessments that arise on and after January 1, 2006.~~ [*moved to subdivision (d)*]

~~(b)~~ Prior to initiating a foreclosure on an owner's separate interest, the association shall offer the owner and, if so requested by the owner, participate in dispute resolution pursuant to the association's "meet and confer" program required in Article 2 (commencing with Section 5900) of Chapter 8 or alternative dispute resolution as set forth in Article 3 (commencing with Section 5925) of Chapter 8.

(a) The decision to pursue dispute resolution or a particular type of alternative dispute resolution shall be the choice of the owner, except that binding arbitration shall not be available if the association intends to initiate a judicial foreclosure.

~~(c)~~ (b) The decision to initiate foreclosure of a lien for delinquent assessments that has been validly recorded shall be made only by the board of directors of the association and may not be delegated to an agent of the association.

(1) The board shall approve the decision by a majority vote of the board members in an executive session.

(2) The board shall record the vote in the minutes of the next meeting of the board open to all members.

(3) The board shall maintain the confidentiality of the owner or owners of the separate interest by identifying the matter in the minutes by the parcel number of the property, rather than the name of the owner or owners.

(4) A board vote to approve foreclosure of a lien shall take place at least 30 days prior to any public sale.

~~(d)~~ (c) The board shall provide notice by personal service in accordance with the manner of service of summons in Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure to an owner of a separate interest who occupies the separate interest or to the owner's legal representative, if the board votes to foreclose upon the separate interest.

(1) The board shall provide written notice to an owner of a separate interest who does not occupy the separate interest by first-class mail, postage prepaid, at the most current address shown on the books of the association.

(2) In the absence of written notification by the owner to the association, the address of the owner's separate interest may be treated as the owner's mailing address.

(d) Notwithstanding any law or any provisions of the governing documents to the contrary, this section shall apply to debts for assessments that arise on and after January 1, 2006.

5710. ~~(a)~~ Any sale by the trustee shall be conducted in accordance with Sections 2924, 2924b, and 2924c applicable to the exercise of powers of sale in mortgages and deeds of trust.

~~(b)~~ (a) In addition to the requirements of Section 2924, a notice of default shall be served by the association on the owner's legal representative in accordance with the manner of service of summons in Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure. The owner's legal representative shall be the person whose name is shown as the owner of a separate interest in the association's records, unless another person has been previously
designated by the owner as his or her legal representative in writing and mailed to the association in a manner that indicates that the association has received it.

~~(c)~~ (b) The fees of a trustee may not exceed the amounts prescribed in Sections 2924c and 2924d, plus the cost of service for either of the following:

(1) The notice of default pursuant to subdivision ~~(b)~~(a).

(2) The decision of the board to foreclose upon the separate interest of an owner as described in ~~subdivision (d) of~~ Section 5705.

5715. ~~(a) Notwithstanding any law or any provisions of the governing documents to the contrary, this section shall apply to debts for assessments that arise on and after January 1, 2006.~~[*moved to subdivision (c)*]

~~(b)~~ A nonjudicial foreclosure by an association to collect upon a debt for delinquent assessments shall be subject to a right of redemption.

(a) The redemption period within which the separate interest may be redeemed from a foreclosure sale under this paragraph ends 90 days after the sale.

(b) In addition to the requirements of Section 2924f, a notice of sale in connection with an association's foreclosure of a separate interest in a common interest development shall include a statement that the property is being sold subject to the right of redemption created in this section.

(c) Notwithstanding any law or any provisions of the governing documents to the contrary, this section shall apply to debts for assessments that arise on and after January 1, 2006.

5720. ~~(a) Notwithstanding any law or any provisions of the governing documents to the contrary, this section shall apply to debts for assessments that arise on and after January 1, 2006.~~ [*moved to subdivision (c)*]

~~(b)~~ An association that seeks to collect delinquent regular or special assessments of an amount less than one thousand eight hundred dollars ($1,800), not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, may not collect that debt through judicial or nonjudicial foreclosure~~, but~~.

(a) The association may attempt to collect or secure that debt in any of the following ways:

(1) By a civil action in small claims court, pursuant to Chapter 5.5 (commencing with Section 116.110) of Title 1 of the Code of Civil Procedure. An association that chooses to proceed by an action in small claims court, and prevails, may enforce the judgment as permitted under Article 8 (commencing with Section 116.810) of Title 1 of the Code of Civil Procedure. The amount that may be recovered in small claims court to collect upon a debt for delinquent assessments

may not exceed the jurisdictional limits of the small claims court and shall be the sum of the following:

(A) The amount owed as of the date of filing the complaint in the small claims court proceeding.

(B) In the discretion of the court, an additional amount to that described in subparagraph (A) equal to the amount owed for the period from the date the complaint is filed until satisfaction of the judgment, which total amount may include accruing unpaid assessments and any reasonable late charges, fees and costs of collection, attorney's fees, and interest, up to the jurisdictional limits of the small claims court.

(2) By recording a lien on the owner's separate interest upon which the association may not foreclose until the amount of the delinquent assessments secured by the lien, exclusive of any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, equals or exceeds one thousand eight hundred dollars ($1,800) or the assessments secured by the lien are more than 12 months delinquent. An association that chooses to record a lien under these provisions, prior to recording the lien, shall offer the owner and, if so requested by the owner, participate in dispute resolution as set forth in Article (commencing with Section 5900) of Chapter 8.

(3) Any other manner provided by law, except for judicial or nonjudicial foreclosure.

~~(c)~~ (b) The limitation on foreclosure of assessment liens for amounts under the stated minimum in this section does not apply to any of the following:

(1) Assessments secured by a lien that are more than 12 months delinquent.

(2) Assessments owed by owners of separate interests in timeshare estates, as defined in subdivision (x) of Section 11212 of the Business and Professions Code.

(3) Assessments owed by the declarant.

(c) Notwithstanding any law or any provisions of the governing documents to the contrary, this section shall apply to debts for assessments that arise on and after January 1, 2006.

5725. ~~(a)~~ A monetary charge imposed by the association as a means of reimbursing the association for costs incurred by the association in the repair of damage to common areas and facilities caused by a member, a resident of the member's separate interest, or the member's guest, invitee, or tenant may become a lien against the member's separate interest enforceable by the sale of the interest under Sections 2924, 2924b, and 2924c, provided the authority to impose a lien is set forth in the governing documents.

(a) It is the intent of the Legislature not to contravene Section 2792.26 of Title 10 of the California Code of Regulations, as that section appeared on January 1, 1996, for associations of subdivisions that are being sold under authority of a subdivision public report, pursuant to Part 2 (commencing with Section 11000) of Division 4 of the Business and Professions Code.

(b) A monetary penalty imposed by the association as a disciplinary measure for failure of a member to comply with the governing instruments, except for the late payments, may not be characterized nor treated in the governing documents as an assessment that may become a lien against the member's separate interest enforceable by the sale of the interest under Sections 2924, 2924b, and 2924c.

5735. ~~(a)~~ An association may not voluntarily assign or pledge the association's right to collect payments or assessments, or to enforce or foreclose a lien to a third party~~, except~~.

(a) The provisons of this section shall not apply when the assignment or pledge is made to a financial institution or lender chartered or licensed under federal or state law, when acting within the scope of that charter or license, as security for a loan obtained by the association.

(b) Nothing in ~~subdivision (a)~~ this section restricts the right or ability of an association to assign any unpaid obligations of a former member to a third party for purposes of collection.

Staff Note. Proposed Section ~~5660~~ 5735 would break the first sentence of Section 1367.1(g) into two subdivisions and add an introductory clause in the second provision, to better define their relationship. (In existing law the two provisions are joined by a semi-colon and the ambiguous conjunction "however.").

5800. ~~(a) A~~ Subject to the criteria in subdivision (a), volunteer officer or volunteer director of an association which manages a common interest development that is exclusively residential, shall not be personally liable in excess of the coverage of insurance specified in paragraph (4) of subdivision (a) to any person who suffers injury, including, but not limited to, bodily injury, emotional distress, wrongful death, or property damage or loss as a result of the tortious act or omission of the volunteer officer or volunteer director.

(a) The provisions of this section apply if all of the following criteria are met:

(1) The act or omission was performed within the scope of the officer's or director's association duties.

(2) The act or omission was performed in good faith.

(3) The act or omission was not willful, wanton, or grossly negligent.

(4) The association maintained and had in effect at the time the act or omission occurred and at the time a claim is made one or more policies of insurance which shall include coverage for (A) general liability of the association and (B) individual liability of officers and directors of the association for negligent acts or omissions in that capacity; provided, that both types of coverage are in the following minimum amount:

(A) At least five hundred thousand dollars ($500,000) if the common interest development consists of 100 or fewer separate interests.

(B) At least one million dollars ($1,000,000) if the common interest development consists of more than 100 separate interests.

(b) The payment of actual expenses incurred by a director or officer in the execution of the duties of that position does not affect the director's or officer's status as a volunteer within the meaning of this section.

(c) An officer or director who at the time of the act or omission was a declarant, or who received either direct or indirect compensation as an employee from the declarant, or from a financial institution that purchased a separate interest at a judicial or nonjudicial foreclosure of a mortgage or deed of trust on real property, is not a volunteer for the purposes of this section.

(d) Nothing in this section shall be construed to limit the liability of the association for its negligent act or omission or for any negligent act or omission of an officer or director of the association.

(e) This section shall only apply to a volunteer officer or director who is a tenant of a separate interest in the common interest development or is an owner of no more than two separate interests in the common interest development.

(f) ~~(1)~~ For purposes of paragraph (1) of subdivision (a), the scope of the officer's or director's association duties shall include, but shall not be limited to, both of the following decisions:

~~(A)~~ (1) Whether to conduct an investigation of the common interest development for latent deficiencies prior to the expiration of the applicable statute of limitations.

~~(B)~~ (2) Whether to commence a civil action against the builder for defects in design or construction.

~~(2)~~ (g) It is the intent of the Legislature that this section clarify the scope of association duties to which the protections against personal liability in this section apply. It is not the intent of the Legislature that these clarifications be construed to expand, or limit, the fiduciary duties owed by the directors or officers.

5855. ~~(a)~~ When the board of directors is to meet to consider or impose discipline upon a member, or to assess costs for damage to the common area, the board shall notify the member in writing, by either personal delivery or first-class mail, at least 10 days prior to the meeting.

~~(b)~~ (a) The notification shall contain, at a minimum, the date, time, and place of the meeting, the nature of the alleged violation for which a member may be disciplined or the nature of the damage to the common area for which the member may be assessed, and a statement that the member has a right to attend and may address the board at the meeting. (b) The board of directors of the association shall meet in executive session if requested by the member being disciplined or assessed costs.

(c) If the board imposes discipline on a member or assesses the member for damage to the common area, the board shall provide the member a written notification of the decision, by either personal delivery or first-class mail, within15 days following the action.

(d) A disciplinary action or assessment of costs for damage to the common area shall not be effective against a member unless the board fulfills the requirements of this section.

5900. ~~(a)~~ This article applies to a dispute between an association and a member involving their rights, duties, or liabilities under this title, under the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code), or under the governing documents of the common interest development or association.

~~(b)~~ (a) This article supplements, and does not replace, Article 3 (commencing with Section 5925), relating to alternative dispute resolution as a prerequisite to an enforcement action.

~~(c)~~ (b) This article does not apply to a decision made pursuant to Section 5665 or 5855.

5905. ~~(a)~~ An association shall provide a fair, reasonable, and expeditious procedure for resolving a dispute within the scope of this article.

~~(b)~~ (a) In developing a procedure pursuant to this article, an association shall make maximum, reasonable use of available local dispute resolution programs involving a neutral third party, including low-cost mediation programs such as those listed on the Internet Web sites of the Department of Consumer Affairs and the United States Department of Housing and Urban Development.

~~(c)~~ (b) If an association does not provide a fair, reasonable, and expeditious procedure for resolving a dispute within the scope of this article, the procedure provided in Section 5915 applies and satisfies the requirement of ~~subdivision (a)~~ this section.

5915. ~~(a)~~ This section applies in an association that does not otherwise provide a fair, reasonable, and expeditious dispute resolution procedure. (a) The procedure provided in this section is fair, reasonable, and expeditious, within the meaning of this article.

(b) Either party to a dispute within the scope of this article may invoke the following procedure:

(1) The party may request the other party to meet and confer in an effort to resolve the dispute. The request shall be in writing.

(2) A member of an association may refuse a request to meet and confer. The association may not refuse a request to meet and confer.

(3) The association's board of directors shall designate a member of the board to meet and confer.

(4) The parties shall meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in good faith in an effort to resolve the dispute.

(5) A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including the board designee on behalf of the association.

(c) An agreement reached under this section binds the parties and is judicially enforceable if both of the following conditions are satisfied:

(1) The agreement is not in conflict with law or the governing documents of the common interest development or association.

(2) The agreement is either consistent with the authority granted by the board of directors to its designee or the agreement is ratified by the board of directors.

(d) A member of the association may not be charged a fee to participate in the process.

5930. ~~(a)~~ An association or an owner or a member of a common interest development may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article.

~~(b)~~ (a) This section applies only to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the jurisdictional limits stated in Sections 116.220 and 116.221 of the Code of Civil Procedure.

~~(c)~~ (b) This section does not apply to a small claims action.

~~(d)~~ (c) Except as otherwise provided by law, this section does not apply to an assessment dispute.

5935. ~~(a)~~ Any party to a dispute may initiate the process required by Section 5930 by serving on all other parties to the dispute a Request for Resolution.
(a) The Request for Resolution shall include all of the following:
(1) A brief description of the dispute between the parties.
(2) A request for alternative dispute resolution.
(3) A notice that the party receiving the Request for Resolution is required to respond within 30 days of receipt or the request will be deemed rejected.
(4) If the party on whom the request is served is the owner of a separate interest, a copy of this article.
(b) Service of the Request for Resolution shall be by personal delivery, first class mail, express mail, facsimile transmission, or other means reasonably calculated to provide the party on whom the request is served actual notice of the request.
(c) A party on whom a Request for Resolution is served has 30 days following service to accept or reject the request. If a party does not accept the request within that period, the request is deemed rejected by the party.

5940. ~~(a)~~ If the party on whom a Request for Resolution is served accepts the request, the parties shall complete the alternative dispute resolution within 90 days after the party initiating the request receives the acceptance, unless this period is extended by written stipulation signed by both parties.
~~(b)~~ (a) Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code applies to any form of alternative dispute resolution initiated by a Request for Resolution under this article, other than arbitration.
~~(c)~~ (b) The costs of the alternative dispute resolution shall be borne by the parties.

5955. ~~(a)~~ After an enforcement action is commenced, on written stipulation of the parties, the matter may be referred to alternative dispute resolution. (a) The referred action is stayed during the alternative dispute resolution process.
(b) During the stay, the action is not subject to the rules implementing subdivision (c) of Section 68603 of the Government Code.
~~(b)~~ (c) The costs of the alternative dispute resolution shall be borne by the parties.

5965. ~~(a)~~ An association shall annually provide its members a summary of the provisions of this article that specifically references this article.
(a) The summary shall include the following language:
"Failure of a member of the association to comply with the alternative dispute resolution requirements of Section 5930 of the Civil Code may result in the loss of ~~your~~ the member's right to sue the association or another member of the association regarding enforcement of the governing documents or the applicable law."
(b) The summary shall be included in the annual policy notice prepared pursuant to Section 5310.

5975. ~~(a)~~ The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. (a) Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

(b) A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association.
(c) In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs.

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September 17, 2009

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

Re: CLRC Memorandum 2009-33
Statutory Clarification and Simplification of CID Law

Dear Mr. Hebert:

I have reviewed the CLRC Memorandum 2009-33, and a preliminary review of the attached proposed reorganization of the Davis-Stirling Common Interest Development Act ("**Act**"). This reorganization is an improvement over the previous reorganization contained in AB 1921. The reorganization suffers from a basic problem of AB 1921 in that it attempts to reorganize the Act without clarifying and correcting the many issues that exist with the basic fabric of the existing Act.

My concerns with the Act are not those commonly discussed which deal with the operations of owners' associations, but with more fundamental problems of the definitions used in the Act and in some of the basic formation and operating provisions of the Act. What this reorganization does, if adopted, is to impose a substantial administrative and expense burden on the entire community of CID associations and their members and the various consultants who serve them with no obvious benefits other than an organization of the existing provisions. This approach is likely to encounter much the same opposition that caused the withdrawal of AB 1921.

I understand the Commission's desire to achieve a structural reorganization of the Act, without getting into conflicts over substantive changes, but at the same time I feel there must be a real benefit for the users of the Act to obtain the support needed for the passage of the reorganization. This is not obstruction to any change in the present law but a concern as to how the changes should be made. Almost everyone who works with the Act agrees that substantive revisions to the Act are necessary even if they cannot agree on the exact nature of those revisions.

Despite my concerns over the continued attempt to reorganize the Act in this fashion, I believe that the Commission has now achieved an involvement of most of the various groups and interests that use the Act something the Commission did not have prior to the introduction of AB 1921.

This is itself a major step forward. The Commission staff is now aware of a much wider range of both issues and the scope of the use of the Act than it was prior to the introduction of AB 1921 which gives the Commission a much better insight into what changes may be needed. Also from my prospective the Commission staff in the course of the various studies which have been undertaken and especially in working with the working group requesting expansion of the exemptions for non-residential CIDs, has developed some interesting concepts regarding the structure of the Act which should integrated into any reorganization of the Act.

As you are well aware, when the Act was first enacted in 1985, it was a fairly lean statute that dealt with the minimum requirements to form CIDs and the basic operational requirements of operating associations. In this respect, it followed the pattern of the uniform acts, including UCIOA. Over the years, several factors have created issues with the fabric of the original Act. One factor is that the types of CIDs and the uses of CIDs have become more complex exposing problems with a number of the original definitions and other provisions. A second factor is that experience and real life problems caused by different types of developments and the economic boom and bust cycles have exposed problems in the language of the Act that were not obvious then the Act was originally drafted. Another and more obvious factor is that the legislature has enacted a great deal of consumer protection and special interest legislation amending the Act, much of which was not especially well thought out or well drafted and often did not track well with the original Act and its defined terms. There is a good example of this last problem with the current *AB 1328* which passed the legislature and which has been sent to the governor. This very short bill uses the term "subdivider" in adding a new section 1353.9 to the Act, a term which is not used in the Act but is used in the Subdivided Lands Act. The combination of these factors has made the Act difficult to read, almost impossible to follow in practice in some cases and unable to answer some basic issues relating to CIDs.

The Commission has been trying to deal with the existing Act by a reorganization of structure of the Act without trying to change its content. However the Commission's staff in the process of its work and especially in its discussions of the non-residential CID issues has indicated an awareness of a more fundamental reorganization of the subjects covered by Act which I think the Commission should consider in any proposed legislation. In dealing with the non-residential exemptions, the working group proposing the changes and the staff worked to separate the so called "**foundational**" provisions of the Act from the "**operational**" provisions. I think this distinction important and one which should be incorporated into any reorganization. The original Act did two basic things. First, it defined and provided the procedures and documentation to create a CID and second, it provided for the operations of the owners' association including the rights and obligations of members, the powers and duties of the association and its governing body, and fundamental election and assessment procedures. Almost all of the amendment and legislative activity that have cluttered the Act have dealt solely with the operations of residential associations and the rights of owners as members of the association.

Based on the purposes of the Act and the focus of legislation it would seem to make sense to return the original concept of the drafters of the Act and to organize the Act along the lines already recognized by the Commission staff. An organization of this type could as an example separate the Act into the following divisions.

- Definitions for the Act.
- The fundamental requirements and procedures to form a CID and the nature and types of CIDs. This would be similar to these provisions in the original Act but clearly separated from the provisions dealing with association operations.
- The fundamental requirements of association operations including the powers and obligations of members, governing bodies, elections and assessments. Again this would be similar to the association operation provisions contained in the original Act but clearly separated from both the CID formation provisions and the bulk of the residential member protection provisions.
- The special protections and procedures required of residential associations. This would cover a variety of procedures for elections, assessments and other matters that apply to residential associations.
- Special provisions related to non-residential CIDs.
- Special provisions related to small CIDs (if these are ever developed).
- Miscellaneous provisions which apply to all types of CIDs.
- Special provisions related to the period of developer control (if these are developed).

The first three of these divisions would cover the matters covered in the original enactment of the Act. This type of organization would tend to protect the core provisions of the Act from being affected by legislative changes related to the protection of residential owners and other legislation designed only for residential CIDs. At the same time, this type of organization would allow for an easier way to provide special provisions for non-residential and small CIDs without having these provisions complicate the basic provisions of the Act.

As I indicated above, my major concern about the proposed reorganization is that it does not attempt to address many technical problems with the definitions and wording of the Act which are probably not controversial but which cause significant uncertainties. I think that it would be helpful if the Commission started an in depth review of the definitions and the provisions related to when a CID is formed and associated matters and solicited comments on these subjects from interested parties. Based on how the Commission has approached the revision of other areas of the law, I am surprised that this was not the first order of business when reviewing the Act.

Some of these matters have considerable significance especially in times like these when projects have not being fully completed by developers due to the economic downturn. This letter is not the place to try to list all of these items. However under any reorganization it should be possible to determine under the Act when a project is subject to the Act. At this time, this is often not possible. It should also be possible to understand what is a "conveyance" for the purposes of triggering the formation of a CID? This becomes particularly important when lenders take security interests in some or all of the lots and condominiums of project where no actual sales have taken place. What happens if a CID is formed but later all of the separate interests come under a single ownership – does the CID exist? It should also be clear what happens in a planned development when a development meets all of the criteria for a planned development but does not have an association. Is the development subject to the Act? Also if an association is required for a CID as is stated by Section 1363(a) why is this requirement separated from the requirements of

Section 1352? Does this mean that a CID can exist without an association? The reorganized Act attached to Memorandum 2009-33 continues this separation. There are also issues of when and how are assessments "levied" and whether the levy of regular assessments requires action by the governing body of the association? This issue is coming up in projects where the developer who controls the board of directors has stopped its participation or has improperly operating the association and has not had the board formally "levy" assessments. It is not even clear under the Act what "levy" means or when assessments are levied. These are only a few examples of this type of issue in the existing Act. It does not seem proper to move forward with a reorganization of the Act without dealing with as many of these fundamental definitional and other issues as possible. In addition to these more substantive issues any reorganization should make certain that the terms used throughout the act are consistent and are used with the same meanings. Many of the problems with definitions are simply the product of poor drafting of amendments to the Act such as has occurred in the current AB 1328.

Another issue that has not been discussed at all is the relationship of the developer to the association and to the independent members during the period of developer control. One of the curious aspects of some of the legislation that has been enacted in recent years to protect home owners is that it protects defaulting developers who can own hundreds of lots or condominiums just as much as the individual owner and these protections have much more impact on the association that was ever intended. Should a developer be able to exercise its special rights as a "declarant" while in substantive default of its assessment or other obligations? There has really been no thought as to the position of the independent members to the association for actions taken or not taken in the association's name. If a developer who controls an association refuses to have the association perform a required action such as the reconstruction a damaged unit (or if this has occurred because the developer has abandoned the association so it cannot act) should the independent owners end up having liability for damages based on this inaction? These are all just a few of the fundamental issues that have come up recently in distressed projects. They deserve analysis. While I recognize that issues such as the developer's relationship to the association will not be solved with any initial reorganization of the Act these are important issues that affect in the current economy many innocent buyers and these issues should be addressed.

It would be my suggestion that before any reorganization of the Act is proposed that there be a detailed review of the Act's definitions and formation provisions and an overall review of the use of defined terms Act so that any reorganization does not perpetuate known and correctable problems.

Very truly yours,

DUNCAN R. McPHERSON

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

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September 23, 2009

California Law Revision Commission
Attn: Brian Hebert (via email)

Dear Mr. Hebert and Commissioners,

In regard to the August 10, 2009 ***Memorandum 2009-33 Statutory Clarification and Simplification of CID Law (Staff Draft)****, I would like to offer my comment as an individual and volunteer attorney experienced in elder law issues, especially financial elder abuse matters.*

I applaud the massive effort undertaken to reorganize existing CID law, in a way that is more user friendly, ***so long as it does not erode any consumer protections provided therein****. Greater subdivision of the material is helpful, as is renumbering the statutes, even though it will require a cross-referencing table. It is the "simplification" in some areas that is of grave concern to me.*

OMISSIONS:

- ***A part of 1355(b) has been omitted and should be reinstated****, requiring a copy of any amendment to the declaration be distributed by individual delivery to all owners of a separate interest immediately upon its recordation. It is important CID residents be made immediately aware of any changes to the declaration, so fines cannot be imposed for violation of the amended declaration.*
- ***A part of 1365.1(a) has been omitted and should be reinstated****, requiring the notice of assessments and foreclosures be printed in at least 12 point type. This is a basic consumer protection, for those with sight disabilities.*
- ***A part of 1365(d) has been omitted and should be reinstated****, requiring written notice in 10 point bold type that the full annual budget is available upon request. This is a basic consumer protection, for those with sight disabilities.*

SUGGESTIONS/CONCERNS:

Below each statute, in small print, a cross reference should be given to the

former version of Davis-Stirling for ease of use, in addition to a comprehensive cross reference table.

New Section 4035 specifies the definition of "delivered to the association", but does not go far enough. ***It should include a subdivision making mandatory the acceptance of certified mail from a homeowner to the association****, for the following reasons -*

It is required the homeowner/other entities accept certified mail from the association throughout Davis-Stirling. See Sections 1367(a), 1367.1(a), 1367.1(d), 1375(b), 1375(e)(2), 1375.05(c)(5), 1375.05(e).

In some circumstances, the association must accept certified mail from the homeowner. See Section 1367.1(k) - "The owner's request [to send collection notices to a secondary address] shall be in writing and shall be mailed to the association in a manner that shall indicate the association has received it."

To require the association to accept certified mail would clear up the problem of associations/managers refusing acceptance of certified mail ***as a ploy to create plausible deniability of delivery****.*

I have seen cases of assessment payments/requests for dispute resolution from homeowners refused by management if sent certified mail. As a result, timely payments were deemed "delinquent" and sent to collections, or requests for dispute resolution ignored.

Homeowners resort to certified mail when trying to send something to the association not appearing to reach its destination via regular mail.

See: http://www.ktvu.com/news/20138028/detail.html.

New Section 4040 defines individual notice as including "personal delivery". What does "personal delivery" mean precisely? Can a Board member just leave something on the doorstep, for example, which can blow away on a windy day? This term needs to be better defined if it is going to be offered as an option for individual notice.

See 1366(d), which requires notice of increases in assessments to be sent ***solely by first class mail****, and* ***does not allow for "personal delivery"****.*

Distinguish "personal delivery" from "notice by ***personal service****" for notice of default as required in 1367.4(c)(3).*

New Section 4045, which defines "general notice", includes as a method "posting in a location that is ***accessible*** *to all members,* ***including on an Internet website****..." The problem here is twofold:*

"Accessible" means different things to different people - it is too loose a term. The handicapped don't necessarily consider a club room at the top of stairs as "accessible".

Many senior citizens do not have computers, so would not consider the Internet "accessible".

*See Section 1363.05(f) which states "Notice [of board meetings] shall be given by posting the notice in a **prominent** place(s) within the common area..."*

While it is true handicapped and seniors without computers can opt to require the association to give individual notice,

a) the statement allowing such an option is buried in voluminous documents;

b) the handicapped and seniors are singled out for disparate treatment.

*It would seem to me the posting requirement should have as a minimum, physical handicapped accessibility, otherwise the association should just post notice via mail or newsletter. Posting notice solely via the Internet is unacceptable as inaccessible to many senior citizens or low income folks who do not own a computer. Thus I would word the general notice posting requirement as follows: "**posting in a prominent location that is handicapped accessible**".*

*New Section 4065 states "If a provision of this part requires that an action be approved by a majority of all members, the action shall be approved or ratified by an affirmative vote of members representing more than 50 percent of **the total voting power of the association**..." This language seems murky - what exactly is the "voting power of the association"?. The old language seemed much clearer. See 1356(a)): "50 percent of **votes in the association**, in a single class voting structure..."*

*How about the following wording - "**votes in all the association**" or "**votes in the entire association**" or "**total votes in the association**"?*

*New Section 4070 states "If a provision of this part requires that an action be approved by a majority of a quorum of the members, the action shall be approved or ratified by an affirmative vote of members representing more than 50 percent of **the votes cast in an election at which a quorum is achieved**..." The language here seems unnecessarily wordy.*

*How about the following wording - "**votes cast at which a quorum is achieved**." If the action referred to is an affirmative VOTE, it is clear it is an election, which makes the words "in an election" superfluous.*

New Section 4700 states "This article includes provisions that limit the authority of an association to regulate the use of a member's separate interests. Nothing in the article is intended to affect the application of any other provision that limits the authority of an association to regulate the

use of a member's separate interest, including, but not limited to…" For ease of comprehension, I would suggest removing "that" so New Section 4700 would read "Nothing in the article is intended to affect the application of any other provision ***limiting*** *the authority of an association…"*

Comments to Section 4725, which replace former Section 1376 and refers to television and satellite dishes, indicates Section 1376 has largely been superseded by FCC regulation. There is a question as to whether the contents of Section 1376 should be continued as Section 4725. ***At the very least, Section 4725 should refer to the appropriate numbered FCC regulations.*** *Otherwise, a homeowner may not know where to look for guidance.*

Revised Section 4920(a) which refers to notice of board meetings, states "Notice shall be given by ***general delivery*** *(Section 4045)." See concerns in regard to general notice in Section 4045 above.*

Revised Section 4935(a), which replaces Section 1363.05(b), states "The board may meet in executive session to …meet with a member, upon the member's request, regarding the member's payment of assessments, ***as specified in Section 5665****." It would appear the reference to Section 5665 is incomplete.*

Section 1363.05(b) states "…when the board meets in executive session to…meet with a member, upon the member's request, regarding the member's payment of assessments, ***as specified in Section 1367 and 1367.1****."* ***Section 5665 replaces only Section 1367.1(c)(3).*** *I'm not sure I understand the reasoning behind such truncation to a much broader reference.*

New Section 5250 states "An association shall maintain at least one copy of the following association records, for the periods specified in Section 5255:…". It is not clear to me if this list is exhaustive, e.g. what about a utility agreement to reimburse a homeowner who is paying for electricity to the common area? I would suggest the following wording "An association shall maintain at least one copy of ***association records, including but not limited to the following,*** *for the periods specified in Section 5255:…"*

New Section 5255 requires association records to be retained for a minimum of ***4 years****. What was the rationale for selecting 4 years? Why not the general rule of thumb as in tax records of a* ***7 year retention period****?*

Revised Section 5305(b) would allow an association to distribute a ***summary of the review of the financial statement****, something not permissible under*

the current Davis-Stirling Act. This would allow board members to more carefully word a disinterested accountant's summary in a light most favorable to the association, so a homeowner will not even think to request the unedited version. ***Homeowners have a right to the unvarnished truth in its entirety in regard to a financial review - which is essentially an accountant's summary. Section 5305(b) should be discarded altogether.*** *To do otherwise is a substantive change to existing law.*

Revised Section 5310(a) ***should state it is NEW! There should be a requirement that the annual policy notice be printed in at least 12 point type, for those with sight disabilities.*** *The annual policy statement should also include*

Notice of the right to inspect records;

A statement describing the association's operating rules;

(9) A summary of alternative dispute resolution procedures, pursuant to Sections 5920 and 5965, ***including any available low cost community mediation services****.*

Revised Section 5310(c), ***which is NEW****, states "The annual policy statement shall be made available to the members pursuant to Section 5320." Section 5320(a) states "When a report is prepared pursuant to 5300, 5305, or 5310, the association shall deliver one of the following documents to all members, by individual delivery (Section 4040).* ***Thus no time frame is given for delivery of the annual policy! A time frame similar to the annual budget report (see Section 5300 "… 30 to 90 days before the end of its fiscal year") needs to be specified.***

Revised Section 5320(a)(2) states "A summary of the report…". It should read "A summary of the report, ***if permitted****." This will make it clear a summary of some documents, such as a review of the financial statement,* ***are not permitted****. See discussion of Section 5305(b) above.*

It should be noted that Revised Section 5320(a) talks about "delivery" of documents, but does not give any time frames for individual delivery of reports prepared pursuant to 5300, 5305, or 5310. Thus each section that describes the referenced reports needs to specify a time frame for delivery.

Revised Section 5320(b) omits two important consumer protections (see Section 1365(d)), which need to be reinstated -

If requested, delivery of the full annual budget report shall be within 5 days;

Written notice of the availability of the full annual budget report shall be in at least 10-point boldface type on the front page of the summary budget.

Revised Section 5580 asks two questions of the public -

What is meant by the requirement that the payees of administrative costs be identified "in a manner consistent with the provisions of Section 1365.2? I understand it to mean those payees/vendors/administrators charging costs in a manner consistent with Section 5200, which describes the types of documents considered records subject to inspection.

What is meant by "If the community service organization does not comply with the standards, the report shall disclose the noncompliance in detail."? What standards are being referenced here? I assume the standards of what records are subject to inspection, e.g. membership lists are something a homeowner's association would be expected to make available for inspection, whereas a community service organization may not want to divulge the contents of such lists and would have to give reasons for their reluctance.

Revised Section 5615, which replaces Section 1366(d), allows notice of assessment increases to be accomplished by "personal delivery" (see Section 4040). This removes two important consumer protections that need to be reinstated:

*"**The association shall provide notice by first class mail to the owners of the separate interests of any increase in the regular or special assessments of the association,"***

"not less than 30 nor more than 60 days prior to the increased assessment becoming due."

*Revised Section 5720(b), states "An association that seeks to collect delinquent regular or special assessments of an amount less than one thousand eight hundred dollars ($1,800), not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, **may not collect that debt through judicial or nonjudicial foreclosure**, but may attempt to collect or secure that debt in any of the following ways…"*

*Debt collectors are self-servingly interpreting this section to mean "may not collect that debt through **actually foreclosing (but can institute the foreclosure process)**…", racking up huge foreclosure procedure costs, including huge attorneys fees, long before the debt reaches the stated time/dollar limits.*

To clear up this ambiguity and make the stated law conform to legislative intent, I would reword this statute as follows: "An association that seeks to collect delinquent regular or special assessments of an amount less

than one thousand eight hundred dollars ($1,800), not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, ***may not collect that debt through THE INSTITUTION OF ANY judicial or nonjudicial foreclosure PROCEDURES****, but may attempt to collect or secure that debt in any of the following ways…"*

Revised 5720(b)(2) states "By recording a lien on the owner's separate interest upon which the association ***may not foreclose*** *until the amount of the delinquent assessments…" As in the previous discussion of Section 5720(a), I would reword Section 5720(b)(2) as follows: "By recording a lien on the owner's separate interest upon which the association may not* ***INITIATATE ANY foreclose PROCEEDINGS*** *until the amount of the delinquent assessments…"*

Revised Section 5730(a), which replaces Section 1365.1, states "The annual policy notice (Section 5310) shall include the following statement…".

Section 5310(a) states "Within 120 days after the end of the fiscal year, the board shall ***prepare*** *an annual policy statement…"*

Section 5310(c) states "The annual policy statement shall be made available to the members ***pursuant to Section 5320****."*

Section 5320(a) states "When a report is prepared pursuant to Section 5300, 5305, or 5310, the association ***shall deliver*** *one of the following documents to all members, by individual delivery (Section 4040)…".*

No time frame is given for distribution of the annual policy. *Thus, two consumer protection clauses from Section 1365.1(a) have been omitted and should be reinstated:*

*"****The association shall distribute the written notice [of Notice Assessments and Foreclosure]… to each member of the association during the 60 day period immediately preceding the beginning of the association's fiscal year****.";*

*"****The notice shall be printed in at least 12 point type****."*

Revised Section 5900(c) states "This article [Article 2 Internal Dispute Resolution] does not apply to a decision made pursuant to Section 5665 or 5855." I believe Section 5900(c) should be ***deleted****, because it is imperative Section 5900 apply to both Sections 5665 and 5855 for the following reasons:*

Section 5665(a) in pertinent part states "An owner…may submit a written request to ***meet*** ***with the board*** *to discuss a payment plan for the debt noticed…"* ***Such a meeting should conform to all the basic standards enumerated in Article 2 Internal Dispute Resolution****. For example, it must be fair, reasonable, and expeditious -*

The procedure may be invoked by either party;

The procedure shall provide a means by which the member and the association may explain their positions;

A member shall not be charged a fee to participate in the process.

If no process is in place, Section 5915 sets out a default meet and confer procedure that is fair and reasonable.

Section 5855(a) in pertinent part states "When the board of directors is to ***meet*** *to consider or impose discipline upon a member…" Such a meeting should conform to all the basic standards enumerated in Article 2 Internal Dispute Resolution. For example, it must be fair, reasonable, and expeditious -*

The procedure shall provide a means by which the member and the association may explain their positions;

A member shall not be charged a fee to participate in the process.

If no process is in place, Section 5915 sets out a default meet and confer procedure that is fair and reasonable.

STRONGLY APPROVE FOLLOWING REVISIONS:

Revised Section 4225(c), requiring a governing document in the public record to be publicly updated to reflect an amendment.

Revised Section 5685, providing for reversal of costs if a lien is recorded in error, not limiting it to ADR discovery.

Revised Section 5850, requiring the schedule of monetary penalties be distributed on an annual basis rather than just once.

Revised Section 5855, expanding scope of existing disciplinary process to encompass board action to assess member for damage to common area.

Revised Section 5980 allowing member to bring a civil action to enforce any requirement of Davis-Stirling Act. However, is it contradiction to Sections 5930(a) and (b)? They state:

"(a) An association or an owner or a member of a CID may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to ADR ...

(b) This section applies only to an enforcement action that is solely for declaratory, injunctive, or writ relief..."?

How do you reconcile the two?

COMMENTS:

The statement in Section 4010 acknowledges there are substantive changes to this "simplification/clarification" of Davis-Stirling. "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 to the previously existing provision* ***unless a contrary intent appears****.*

Respectfully,
Elaine Roberts Musser
Member Board of Directors, CA Center for Homeowners Association Law (CCHAL)
Vice Chair, Yolo County Commission on Aging & Adult Services
Chair, Davis Senior Citizens Commission
Volunteer Attorney, Yolo County Legal Clinic
Member, Yolo County Multi-Disciplinary Team

cc file

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San Francisco
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28 September 2009

Mr. Brian Hebert
Executive Secretary
California Law Revision Commission

Mr. Hebert:

Re: Statutory Clarification and Simplification of CID Law

I have read through the staff draft, finally, some parts with more interest than others. What I find problematic are drafting errors in the present Davis-Stirling Act that have been retained in the staff draft—words chosen not very carefully, phrases and sentences not well-crafted, and possible inconsistency among the existing provisions (perhaps attributable to the "process of unplanned development" you noted on page 3 of Memorandum 2009-33). Such problems, like organizational problems, make it difficult for a reader to understand the Davis-Stirling Act. They would create a trouble not only for non-lawyer homeowners but also for the court, because "[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." *Lungren v. Deukmejian* (1988) 45 Cal. 3d 727, 735. I believe that the Commission's direction, stated in the first paragraph of Memorandum 2009-33, extends to the correction of such inherited errors. My comments below are derived primarily from my recent experience with using some provisions of the present Davis-Stirling Act.

Provisions Regarding Board Meeting

Proposed Section 4090

The proposed change in the threshold from "a majority" to a quorum is very appropriate; it eliminates the unwarranted uncertainty the present text creates. But, the last phrase, "except those matters that may be discussed in executive session," inherited from § 1363.05(j), still leaves uncertainty. That phrase should be deleted unless its purpose can be made clear.

The proposed text, with that phrase, seems to say that a congregation of directors at the same time and place constituting a quorum may or may not be a board meting depending on whether the directors are considering matters that may be discussed in executive session. I do not believe that it is so intended because proposed

Section 4925(b) recognizes that some "meetings of the board" may be "held in executive session."

Proposed Section 4920(b)
This subdivision should be made an independent section with the heading "Emergency board meeting," so as to help directors locate it quickly when they have to call an emergency board meeting. The principal subject of this subdivision is emergency board meeting. The statement of exemption of emergency meetings from the meeting notice requirement should be left in, but it is a secondary subject.

The term "governing body" is used only once in the present Davis-Stirling Act, in § 1363.05(g), and is undefined. Could there be any CID association with a governing body which is not the board of directors? If so, the term may have to be used wherever the subject concerns the governing bodies of CID associations. If not, the term should be replaced by "the board" in the new law. The use of different terms for the same thing raises the unwarranted question whether those terms mean different things.

Digression: "Board"; "board of directors"; "board of directors of the association"
In many sections the governing body of an association is referred to as the "board" while in other sections as "the board of directors," and in some other sections as the "board of directors of the association" (all three terms appear in the same section or subdivision in some places, e.g., § 1363(h) and proposed Section 5855; § 1363.05(h) and proposed Section 4925(b)). I recommend that, with the possible exception of those associations in which the governing body is not the board, the governing body be referred to uniformly as the "board," unless the context calls for a longer form for clarity. While it may be clarifying to use "board of directors of the association" in proposed Section 6000 (6000(d) and (k)(1)(C)), I have found no other place where it would be beneficial to use "board of directors" or "board of directors of the association."

Proposed Section 4920(c)
It seems to me that the intended reference is to "subdivision (a) of Section 7211" rather than "Section 7211." Subdivisions (b) and (c) of Corporations Code § 7211 say nothing about notice of a board meeting.

Proposed Section 4925(b)
The only restriction that § 1363.05 permits the board to impose on members' speech at an open board meeting is "a reasonable time limit for all members of the association" in § 1363.05(h). I suggest that it be expressly stated in Section 4925(b), so as to let members and directors know that the board may not prevent members from commenting on a subject of board consideration before the board

makes a decision on the subject. It would introduce no substantive change in law; it would only make explicit what is implicit in § 1363.05.

Proposed Section 4930(b)

The text of neither § 1363.05(i)(2) nor proposed Section 4930(b) authorizes an association's managing agent or other agents or any member of the association's staff to do anything described in paragraphs (1) and (2) of proposed Section 4930(b) in the situation described in the first sentence of proposed Section 4930(a). It is obvious that the phrase "a managing agent or other agent of the board of directors" (underline added) and "the staff of the board of directors" (underline added) in § 1363.05(i)(2) represent drafting errors and that they are intended to mean, respectively, agents of the association and the staff of the association. These errors should be corrected at this time. I am aware of no CID association which provides the board with any agent or staff. However, I would revise "a managing agent or other agent of the board of directors" to read "a managing agent or other agent of the association or of its board" and "the staff of the board of directors" to read "the staff of the association or of its board," to provide for the remote possibility that the boards of some CID associations may have their own agent or staff.

Proposed Section 4930(c)

The word "its" in paragraphs (1), (2) and (3) are even more problematic than "a managing agent or other agent of the board of directors" because it relates to "the board of directors or a member of the board of directors" (underline added). I would revise "its managing agent or other agents or staff" to read "a managing agent or other agents or staff of the association and/or of the board."

Proposed Section 4935

This section misses the requirement of § 1363.05(b) for the board to adjourn to executive session. I do not believe that the phrase "except when the board adjourns to executive session" in a separate section (proposed Section 4925) is sufficient to give notice of the requirement. In order to prevent accidental violations of law, I would add a subdivision mandating the board to hold an open meeting first and adjourn to executive session. Please keep in mind that very few directors would take the time to look for constraints or requirements which might be stated in another section.

It is unfortunate that § 1363.05(b) uses the word "litigation," which is not widely understood. While serving on the board of my association, I was alarmed by my fellow directors' view that the "litigation" exception to the open meeting rule permitted the board to discuss in executive session any legal issues including such a question as whether former directors were entitled to inspect the records of

executive session. In light of the plain meaning rule of statutory construction, I suggest replacing "litigation" by "lawsuit," which is far better understood. This would be no substantive change since "litigation" means "A lawsuit. Legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest, a judicial controversy, a suit at law." BLACK'S LAW DICTIONARY 934 (6th ed. 1990).

I would prefer that the Davis-Stirling Act permit the board to consider in executive session those matters which the Ralph M. Brown Act allows public agencies to consider in closed session under Government Code § 54956.9. However, such a deviation from the present text of the Davis-Stirling Act would constitute a substantive change in policy and hence would exceed the scope of the present project.

Proposed Section 4950(b)

I recommend retaining "how and where" which is in § 1363.05(e) rather than changing it to "the procedure" because the former is sufficient and more concrete than the latter.

Proposed Section 4955(a)

It would be a mistake to delete entirely the second sentence of § 1363.09(a). As I explained earlier while commenting on proposed Article 5 of Chapter 2, I believe that the Legislature meant board's elections as well as members' elections by the word "election" in the second sentence of § 1363.09(a). The authorization for the court to void any results of election by the board on account of improper procedures used (e.g., a decision in executive session on a matter the board is not permitted to consider in executive session) should be retained.

Provisions Regarding Operating Rules

Proposed Section 4360(a)

The term "rule change," when first used in proposed Section 4360(a), should be followed by a reference to proposed Section 4180, as done for "general notice." The reference might be added also to proposed Section 4355(b). But it is far more important to include it in Section 4360(a), which is operative, than in proposed Section 4355(b), which is not.

Proposed Section 4360(b)

This section should be reworded to make it clear that the board is required to consider members' comments on a proposed rule change in an open meeting as well as to make its decision on a rule change in an open meeting, e.g., "A decision on a proposed rule change shall be made at an open meeting of the board, after consideration at the meeting of all comments made by association members

including comments made at the meeting." A member of my association claimed that it was not clear whether the board was required to consider members' comments at an open board meeting, presumably because the member read only § 1357.130(b). That the board is required to consider members' comments at an open meeting would be obvious to anyone who has read §§ 1357.130(b) and 1363.05(b) together. But, since very few directors would look for rules on executive session when looking for procedural requirements for rule changes, this subdivision should explicitly require the comments to be considered in an open board meeting.

Proposed Section 4365(b)

The words "the president or secretary of the board of directors," inherited from § 1357.140(b), should be replaced by "the president or secretary of the association." I believe that the words in § 1357.140(b) represent a drafting error. Corp. Code § 7213(a) provides:

> A corporation shall have a chairman of the board or a president or both, a secretary, a chief financial officer and such other officers with such titles and duties as shall be stated in the bylaws or determined by the board and as may be necessary to enable it to sign instruments. The president, or if there is no president the chairman of the board, is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles or bylaws. Any number of offices may be held by the same person unless the articles or bylaws provide otherwise.

I am aware of neither any statutory provision for officer(s) of the board nor any corporation having an officer of the board.

Incidentally, do unincorporated CID associations necessarily have a president and/or a secretary? If there is any uncertainty, the phrase should be adjusted to provide for the absence of such officers.

Proposed Section 4365

I wonder whether § 1357.140 is fully consistent with § 1363.03(b), and therefore, whether proposed Section 4365 is fully consistent with proposed Sections 5100 and 5115. The key issue is whether reversal of a rule change by members constitutes an amendment to an operating rule by members. I am inclined to believe that it does since by reversal members would remove the force and effect of an operating rule already adopted.

If reversal by members of a rule change is an amendment to an operating rule, it would constitute an amendment by members of the governing documents because operating rules are governing documents by § 1351(j) and proposed Section 4150. Member elections regarding amendments to the governing documents are required

by § 1363.03(b) and proposed Section 5100(a) to be held by secret ballots, "[n]otwithstanding any other law or provision of the governing documents" (unlike board elections regarding the adoption, amendment, or repeal of an operating rule, the procedures for which are set forth in §§ 1357.110-1357.130). Therefore, some provisions of § 1357.140 would be inconsistent with § 1363.03(b), and some provisions of proposed Section 4365, with proposed Sections 5100 and 5115. Since § 1363.03(b) was enacted after § 1357.140, its provisions would supersede conflicting provisions of the latter.

Provisions Regarding Record Inspection

Proposed Section 5200(a)(3)(D)

I believe that the word "journal" is left out of § 1365.2(a)(1)(C)(iv) by mistake, and that it should be corrected by revising "General ledger" in proposed Section 5200(a)(3)(D) to "General ledger and the accompanying journal."

A journal is "The place where transactions are recorded as they occur. The book of original entry." BLACK'S LAW DICTIONARY 840 (6th ed. 1990). Professor Fiflis described it as follows:

> [A]s a matter of theory and real practice, *nothing* reaches the accounts except by first having a journal entry showing all accounting aspects of a transaction in one place, from which the information is posted into the accounts; and *nothing* is recorded in journal entries that does not then get posted into the accounts.

TED J. FIFLIS, ACCOUNTING ISSUES FOR LAWYERS 25 (4th ed. 1991). It is my understanding that a ledger and the accompanying journal contain identical information presented in two different formats, so that if one is lost (in a computer disaster, for example) but the other survives, then the lost one can be reconstructed from the entries in the surviving one.

It would, however, be much easier for a reviewer to spot book-keeping errors in a journal than in a ledger (it is for me, with only an elementary understanding of accounting gained in a law and accounting course). A mandate to disclose journals in addition to ledgers would entail no disclosure of any additional information because associations are already required to disclose ledgers; it would entail no additional expense for associations, either, because journals, being the raw material for ledgers and other financial reports, have to be produced anyway. Therefore, the revision of "General ledger" to "General ledger and the accompanying journal" would not constitute a substantive change.

Proposed Section 5200(a)(4) and proposed Section 5215(a)(5)(D)

The meaning of the term "executed contract" in proposed Section 5200(a)(4), inherited from § 1365.2(a)(1)(D), should be clarified. In some context the term

means "Contract which has been fully performed by the parties." BLACK'S LAW DICTIONARY 567 (6th ed. 1990). But the context strongly suggests that it is intended to mean "contract signed by the parties"; it would be absurd to allow a CID association to withhold from members a contract into which the association has entered until the contract has been fully performed.

The second sentence of proposed Section 5215(a)(5)(D), "Privileged contracts shall not include contracts for maintenance, management, or legal services," which originates in § 1365.2(d)(1)(E)(iv), should be relocated to, or at least repeated in, proposed Section 5200(a)(4). I suspect that the sentence was placed in § 1365.2(d)(1)(E)(iv) by a clerical error because § 1365.2(a)(1)(D) says "Executed contracts not otherwise privileged under law" and the first sentence of § 1365.2(d)(1)(E)(iv) ends with "executed contracts not otherwise privileged."

Sincerely,

Kazuko K. Artus