Study H-855 September 20, 2010

Memorandum 2010-48

Common Interest Development: Statutory Clarification and Simplification of CID Law (Comments on Governing Document Provisions)

This memorandum continues the analysis and discussion of the public comments received on the Commission's tentative recommendation on *Statutory Clarification and Simplification of CID Law* (Feb. 2010). It addresses comments on the governing document provisions of the proposed law.

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

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

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

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

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

☞ DOCUMENT AUTHORITY

Proposed Section 4200 is a new provision. (Note that this section would be renumbered as proposed Section 4205, pursuant to a recent decision to create a new chapter in the proposed law. See Minutes (Aug. 2010), p. 4.)

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

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

The new section would provide guidance on the relative authority of the main types of governing documents:

> 4205. (a) The articles of incorporation may not include a provision that is inconsistent with the declaration. To the extent of any inconsistency between the articles of incorporation and the declaration, the declaration controls.
>
> (b) The bylaws may not include a provision that is inconsistent with the declaration or the articles of incorporation. To the extent of any inconsistency between the bylaws and the articles of incorporation or declaration, the articles of incorporation or declaration control.
>
> (c) The operating rules may not include a provision that is inconsistent with the declaration, articles of incorporation, or bylaws. To the extent of any inconsistency between the operating rules and the bylaws, articles of incorporation, or declaration, the bylaws, articles of incorporation, or declaration control.
>
> (d) This section does not apply to a stock cooperative.

Comments on this provision are discussed below.

Stock Cooperatives

The California Association of Community Managers ("CACM"), objects to the inclusion of subdivision (d), exempting stock cooperatives from the application of proposed Section 4215:

> This section, which is new law, provides a priority amongst articles, bylaws, declaration and operating rules. Subsection (d) states that such priorities do not apply to a stock cooperative. Although most of us do not represent stock cooperatives, we still do not understand why the priority section does not apply to all common interest developments. Of the few stock cooperatives we do represent, many have a declaration, bylaws, articles of incorporation as well as operating rules, and we believe they too would benefit from the prioritization of the controlling documents as identified in Section 4200. As a result, we recommend that subsection (d) be removed.

See Memorandum 2010-36, Exhibit p. 207.

That provision was added because stock cooperatives do not necessarily have the same types of governing documents as other CIDs. Some do not have a declaration, and may instead rely on a proprietary lease to define and limit the ownership interests of members. Subdivision (d) was added as a precaution, to ensure that nothing in the proposed section would conflict with any unanticipated governing document configurations.

It now appears that the addition of subdivision (d) could itself cause problems, by creating uncertainty about the relative authority of governing documents in stock cooperatives that follow the more traditional model (i.e., declaration, articles, bylaws, operating rules).

On further analysis, the staff is not convinced that the precautionary provision is needed. If a stock cooperative has no declaration, then the provisions relating to declarations should have no effect. The other provisions of the section, stating that articles are superior to bylaws and that both articles and bylaws are superior to operating rules, are consistent with existing law on those points. See Section 1357.110 (continued in proposed Section 4350); Corp. Code § 7151(c). Thus, there would seem to be no need to exempt stock cooperatives from the proposed section. Even if a stock cooperative has a governing document structure that is inconsistent with the priority scheme stated in the proposed section, that would be a problem that already exists under current law. It would not be a good idea to add language to solve that existing problem, if the new language would create other problems.

The staff recommends that this issue be noted for future study as part of a separate study of formation issues. This would be consistent with a prior decision regarding a provision added to try to accommodate the special nature of stock cooperative governing documents. The Commission decided that the issue needed more study and should not be addressed in the proposed law. See Minutes (Aug. 2010), p. 6.

Supremacy of Law

Kazuko Artus welcomes the guidance provided by the proposed section. However, she suggests that the provision should also include a clear statement of the supremacy of law over an association's governing documents. See Memorandum 2010-36, Exhibit p. 55.

Duncan McPherson writes on a related point, on behalf of a group of attorneys who are expert in CID formation issues (the "McPherson Group"). The group renews a previous suggestion that the proposed law include an exception for an inconsistency between governing documents, where the inconsistency is required in order to comply with a legal requirement. For example, if a statute requires that a junior governing document contain a particular provision, that mandated provision should not be trumped by an inconsistent provision of a senior document.

The staff believes it would be helpful to address both of those issues. That could be done by revising proposed Section 4205 along the following lines:

> 4205. (a) The governing documents may not include a provision that is inconsistent with the law. To the extent of any inconsistency between the governing documents and the law, the law controls.
>
> (b) Notwithstanding any other provision of this section, if a provision of a governing document is required by law, with no discretion as to the specific content of the provision, that provision controls over any other inconsistent provision in the governing documents.
>
> (c) The articles of incorporation may not include a provision that is inconsistent with the declaration. To the extent of any inconsistency between the articles of incorporation and the declaration, the declaration controls.
>
> ~~(b)~~ (d) The bylaws may not include a provision that is inconsistent with the declaration or the articles of incorporation. To the extent of any inconsistency between the bylaws and the articles of incorporation or declaration, the articles of incorporation or declaration control.
>
> ~~(c)~~ (e) The operating rules may not include a provision that is inconsistent with the declaration, articles of incorporation, or bylaws. To the extent of any inconsistency between the operating rules and the bylaws, articles of incorporation, or declaration, the bylaws, articles of incorporation, or declaration control.
>
> ~~(d) This section does not apply to a stock cooperative.~~
>
> (f) For the purposes of this section, "law" means an applicable statute, agency regulation, ordinance, or final court decision.

Comment. Section 4205 is new.

Subdivision (b) makes clear that if a provision of a governing document is required by law, with no discretion as to its specific content, it is superior to any other inconsistent provision of the governing documents. For example, Section 5105(a)(3) requires that an association adopt an operating rule that permits self-nomination for election to the board. Under subdivision (b), an operating rule adopted in compliance with Section 5105(a)(3) would control over a provision, in any other governing document, that prohibits self-nomination.

Subdivision (b) does not apply if the law requires that an association adopt a provision on a specific topic, but does not specify the specific content of the provision. For example, Section 5105(a)(3) also requires that an association adopt an operating rule stating qualifications for voting in a member election, but does not mandate any specific voting qualifications. In that case, the required voting qualification provision would not be governed by subdivision (b). The provision would need to be consistent with provisions in superior governing documents, pursuant to subdivisions (c)-(e).

> Subdivision (d) is consistent with Corporations Code Section 7151(c), which provides that the bylaws shall be consistent with the articles of incorporation.
>
> Subdivision (e) is consistent with Section 4350(c), which provides that an operating rule may not be inconsistent with the declaration, articles of incorporation, or bylaws of the association.

This approach taken in subdivision (b) is conservative. The supremacy of senior documents would only be disturbed where it is strictly necessary to do so in order to effectuate the requirements of law. Where the requirements of law can be satisfied without disturbing the supremacy of senior documents, the supremacy of those documents would be left undisturbed.

The staff invites comment on the merits of that approach. Should the proposed revisions be made?

Deference to Governing Documents

In many instances, a provision of the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act") expressly defers to the association's governing documents. In effect, these provisions establish default rules that an association can trump with a properly adopted provision of the governing documents.

Marion Russell is concerned that the language used to signal such deference (e.g., "unless the declaration provides otherwise"), should be clearer and easier to understand. See Memorandum 2010-36, Exhibit p. 44.

The staff is unsure how to make the meaning of such language clearer. It might be possible to use a less conventional framing of the concept, e.g., "this section does not apply to the extent it is inconsistent with the declaration." However, the staff is not sure that this would be any easier for laypersons to understand.

The staff welcomes suggestions on this issue.

(Ms. Russell also suggests adding language to make clear that all associations are governed by nonprofit corporation law. However, that is not the case. Existing law permits associations to be *unincorporated*. See proposed Section 4800. **The staff recommends against making any change to that existing rule.**)

RECORD NOTICE OF AGENT FOR RECEIPT OF PAYMENTS

Proposed Section 4205 would continue an existing provision that authorizes a board to record a statement naming its agent for receipt of payments. (Note that

this section would be renumbered as proposed Section 4210, pursuant to a recent decision to create a new chapter in the proposed law. See Minutes (Aug. 2010), p. 4.)

Proposed section 4210 would provide as follows:

> 4210. In order to facilitate the collection of regular assessments, special assessments, transfer fees, and similar charges, the board is authorized to record a statement or amended statement identifying relevant information for the association. This statement may include any or all of the following information:
>
> (a) The name of the association as shown in the conditions, covenants, and restrictions or the current name of the association, if different.
>
> (b) The name and address of a managing agent or treasurer of the association or other individual or entity authorized to receive assessments and fees imposed by the association.
>
> (c) A daytime telephone number of the authorized party identified in subdivision (b) if a telephone number is available.
>
> (d) A list of separate interests subject to assessment by the association, showing the assessor's parcel number or legal description, or both, of the separate interests.
>
> (e) The recording information identifying the declaration or declarations of covenants, conditions, and restrictions governing the association.
>
> (f) If an amended statement is being recorded, the recording information identifying the prior statement or statements which the amendment is superseding.

The McPherson Group suggests replacing undefined and non-standard language with the defined term "declaration," as follows:

> 4210. …
>
> (a) The name of the association as shown in the ~~conditions, covenants, and restrictions~~ declaration or the current name of the association, if different.
>
> …
>
> (e) The recording information identifying the declaration ~~or declarations of covenants, conditions, and restrictions~~ governing the association.
>
> …

The staff recommends that these changes be made. They should not have any effect on the meaning of the provision, but would improve the drafting by using standardized language.

A working group of the California State Bar Real Property Law Section ("RPLS Working Group") writes to suggest that proposed Section 4210 be moved

so that it is located with other provisions relating to assessments. See Memorandum 2010-36, Exhibit p. 131. They suggest moving it to the article governing assessment *setting* (commencing with Section 5600). *Id*.

If the provision were to be moved, it might be more appropriate to locate it in the article on assessment *payment* (commencing at proposed Section 5650).

However, there is also a good argument for keeping it where it is. The section does not relate solely to assessment payments. It also relates to the association's agent for the receipt of any payment (e.g., transfer fees). In fact, it may be more important for that purpose, as most established homeowners in the association will not need to consult property title records to determine where to deliver their assessment payments.

While there are advantages and disadvantages to either location, the staff does not find a strong enough reason to justify moving the provision.

LIBERAL CONSTRUCTION

Proposed Section 4215 would continue an existing rule of construction, without substantive change:

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

The RPLS Working Group suggests broadening the provision so that it applies to any type of governing document. See Memorandum 2010-36, Exhibit p. 131. **The staff recommends against making that substantive change without an opportunity for fuller study and public input.** It may be that liberal construction is appropriate for the foundational documents governed by this provision (all of which are typically recorded), but is not appropriate for documents of lesser dignity (e.g., board-adopted operating rules). Because there is nothing plainly wrong about the scope of the existing rule, a stronger case needs to be made to justify making a substantive change on this issue. **The matter should be noted for possible future study.**

Proposed Section 4220 would continue, without change, an existing presumption regarding the boundaries of condominium units that have been reconstructed or have undergone "settling or lateral movement":

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

The Commission has heard repeated concerns that the provision is not sufficiently flexible. For example, Duncan McPherson, speaking for himself, writes:

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

See Memorandum 2010-36, Exhibit p. 66.

We have heard similar concerns from the Community Associations Institute, California Legislative Action Committee ("CAI-CLAC"):

> We would like to see the following changes:
> a. Expand the definition of unit boundaries to include deviations from the original plans when:
> 1. The original plans are not available.
> 2. Allow for reconstruction to current building codes.
> 3. Allow use of currently available building materials.

> b. Older associations, such as Laguna Woods Village, have tried to introduce Bills to have this done, as the materials used in the original construction are not available, but the bill failed.

See Memorandum 2010-36, Exhibit p. 199.

The Commission has attempted to find a good answer for these concerns, without success. The comments from CAI-CLAC suggest that the Legislature has also grappled with the problem, without reaching a good solution. The issue is important, as it involves the fundamental definition of property rights. It is also thorny, as it requires flexibility in circumstances where strict adherence to established property boundaries should to some extent be excused. Mr. McPherson might be correct that the best solution would be to refer the matter to the courts. Such a change should not be made without considerable study and public input. **The staff recommends that this issue be noted for possible future study.**

UNLAWFUL DISCRIMINATORY RESTRICTIONS

Proposed Section 4225 would continue an existing provision that requires deletion of unlawful restrictions in an association's governing documents, but would add a provision (subdivision (c)), requiring that a revised declaration be re-recorded:

> 4225. (a) No declaration or other governing document shall include a restrictive covenant in violation of Section 12955 of the Government Code.
>
> (b) Notwithstanding any other provision of law or provision of the governing documents, the board, without approval of the members, shall amend any declaration or other governing document that includes a restrictive covenant prohibited by this section to delete the restrictive covenant, and shall restate the declaration or other governing document without the restrictive covenant but with no other change to the declaration or governing document.
>
> (c) If the declaration is amended under this section, the board shall record the restated declaration in each county in which the common interest development is located. If the articles of incorporation are amended under this section, the board shall file a certificate of amendment pursuant to Section 7814 of the Corporations Code.
>
> (d) If after providing written notice to an association (Section 4035) requesting that the association delete a restrictive covenant that violates subdivision (a), and the association fails to delete the restrictive covenant within 30 days of receiving the notice, the

> Department of Fair Employment and Housing, a city or county in which a common interest development is located, or any person may bring an action against the association for injunctive relief to enforce subdivision (a). The court may award attorney's fees to the prevailing party.

Comments on the provision are discussed below.

☞ **Scope of Recordation**

CACM suggests that proposed subdivision (c) be revised to permit recordation of only the amended provision of the declaration, rather than the entire declaration. See Memorandum 2010-36, Exhibit p. 207.

The suggestion seems sensible. It would reduce the cost of recordation, without diminishing the intended effect of the provision — that the public record reflect the deletion of the unlawful discriminatory restrictions. This could be implemented by revising subdivision (c) along the following lines:

> (c) If the declaration is amended under this section, the board shall record the restated declaration or an addendum to the declaration that sets out each amendment in full, 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.

Should a revision along those lines be made?

Drafting Suggestions

The RPLS Working Group makes a number of drafting suggestions. See Memorandum 2010-36, Exhibit pp. 131-32.

They propose revising subdivision (a) as follows:

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

Strictly speaking, that revision would eliminate superfluous language, without any change in meaning. As such, it would generally be the sort of revision we would make in cleaning up the language of the Act. However, in this instance, **the staff recommends against making the change.** The superfluous language should not cause any problems or confusion. What's more, it seems appropriate to give special emphasis to the declaration, as that is the document most likely to contain an illegal discriminatory restriction. Finally, deletion of the

language might create a mistaken impression that the Commission is proposing to narrow the scope of the existing provision.

The RPLS Working Group also proposes revising subdivision (b) along the following lines:

> (b) Notwithstanding any other provision of law or provision of the governing documents, the board, without approval of the members, shall amend any declaration or other governing document that includes a restrictive covenant prohibited by this section to delete the restrictive covenant~~, and shall restate the declaration or other governing document without the restrictive covenant but with no other change to the declaration or governing document~~.

The purpose of the revision would be to "avoid any implication that this section requires a restatement of the entire document." However, that would seem to be exactly what the existing provision requires. Thus, the proposed change would appear to be a substantive change (and likely a controversial one), rather than a technical clarification of the meaning of the provision. **As such, the staff recommends against making the change in the proposed law.**

The RPLS Working Group suggests revising subdivision (c) to add a reference to the Secretary of State:

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

That would provide greater guidance to nonlawyers who need to understand how to proceed under this section. This would likely be helpful and should not result in any change in meaning. **The staff recommends that the revision be made.**

The group also suggests adding procedures for amending documents other than the declaration or articles. **The staff doesn't see the need for additional procedure.** Subdivision (b) seems to already provides sufficient guidance on how to proceed. No member approval is required to delete the illegal provisions. The board simply restates the governing documents without the illegal restriction. The additional procedures provided in subdivision (c) are only needed for documents that are part of the public record.

DELETION OF DECLARANT PROVISIONS

Proposed Section 4230 would continue a special procedure that can be used to delete provisions of the governing documents that served to facilitate the declarant's construction and marketing activities, once those activities are completed.

The RPLS Working Group sees two problems with the existing provision.

Member Approval Requirement

The RPLS Working Group asserts that the existing requirement that an amendment be approved by a majority of a quorum of the members "eviscerates the beneficial purpose" of the provision. See Memorandum 2010-36, Exhibit p. 132. This is a reasonable criticism of the provision. So long as member approval is required, the process remains significantly burdensome. Given how narrowly the provision defines the types of amendments that can be made under the expedited process, there is a good argument for eliminating the member approval step.

The amendments would have little or no effect on member interests. This simultaneously diminishes the need for member input and decreases the likelihood that enough members will be interested enough to vote (making it difficult to achieve a quorum for the vote).

However, experience shows that any change that appears to diminish member authority in favor of board discretion is likely to be controversial. **For that reason, the staff believes that the proposed substantive change should not be included in the proposed law. Instead, it should be studied separately.**

Scope of Provision

The RPLS Working Group suggests clarification of the types of provisions that can be deleted under the simplified procedure. *Id*.

The staff agrees that this would be a beneficial change. However, this would require significant substantive changes that have not yet been thoroughly researched or exposed to public review. **The staff recommends that the issue be noted for possible future study.**

☞ CORRECTION OF STATUTORY REFERENCES

Proposed Section 4235 would be a new provision. It would provide a simplified procedure that could be used to correct a cross-reference, in the

governing documents, to a provision of the Davis-Stirling Act that is renumbered as a result of the proposed law:

> 4235. (a) Notwithstanding any other provision of law or provision of the governing documents, if the governing documents include a reference to a provision of the Davis Stirling Common Interest Development Act that was repealed and continued in a new provision by the act that added this section, the board may amend the governing documents, solely to correct the cross-reference, by adopting a board resolution that shows the correction.
>
> (b) A governing document that is corrected under this section may be restated in corrected form and recorded, provided that a copy of the board resolution authorizing the corrections is recorded along with the restated governing document.

CAI-CLAC supports the new provision. See Memorandum 2010-36, Exhibit p. 203. The RPLS Working Group agree that this new provision would be beneficial. However, they have some specific suggestions for improvement. See Memorandum 2010-36, Exhibit pp. 132-33.

Scope of Provision

The RPLS Working Group suggests that the scope of subdivision (a) could be clearer. They ask, "what is the meaning of 'continued in a new provision?'" The group suggests adding "without change" or "without substantive change" to the end of that clause. *Id*.

Requiring continuation "without change" would clearly be too restrictive. Many provisions continued in the proposed law would include nonsubstantive drafting changes. The existence of those purely technical changes should not preclude use of the simplified procedure for correction of statutory references.

Even requiring continuation "without substantive change" might be too restrictive. Bear in mind that governing documents cannot trump or modify statutory requirements. To the extent that a governing document includes a reference to a statutory provision, it is probably just to acknowledge the statute's existence and authority on a particular point.

For example, suppose that an association's bylaws provide that the association shall provide members with advance notice of a board meeting "as required by Section 1363.05(f) of the Civil Code." That provision would be continued in proposed Section 4920.

Plainly, it would be helpful if the association could use the simplified procedure to change the reference from Section 1363.05(f) to Section 4920.

Should the association be barred from doing so if Section 4920 makes a substantive change to Section 1363.05(f)? It would make a minor substantive change. The current provision specifies a fixed period for advance notice of a meeting "unless the bylaws provide for a longer period of notice." Proposed Section 4920 would modify that rule, so that the statutory period would yield to a longer period stated in *any* type of governing document (not just the bylaws).

Should that minor change bar the association from using the simplified procedure to update the reference in its governing documents? **The staff does not see the point of such a restriction.** Regardless of whether Section 4920 includes a substantive change, the association is still bound by it. An advisory statement that notice must be given pursuant to Section 4920 remains just as true and useful regardless of whether the substantive requirements of that provision have changed. **In the absence of any further comment on this point, the staff recommends against making either of the suggested revisions.**

Recordation Language

The RPLS Working Group is concerned that the language in subdivision (b), relating to recordation, is misplaced to the extent that it applies to a governing document that is not recorded.

The group proposes new language to address its concern:

> (b) A governing document that is amended pursuant to this section shall be presented in a form that amends the governing document in its entirety, and the action of the board to approve the amendment shall be taken at a meeting of the board that is open to attendance by the members (Section 4925(a)) with the proposed amendment being provided to the members by general notice in the same manner as is required for adoption of an operating rule pursuant to Section 4360. Once adopted by the board, the amendment shall become effective upon its recordation with the county recorder (if the document that is being amended was recorded), or upon its filing with the Office of the Secretary of State (if the document that is being amended was filed in that Office), or upon adoption of a resolution of amendment by the board and inclusion of the restated document in the official records of the association if the document that is being amended was not required to be filed or recorded elsewhere.

See Memorandum 2010-36, Exhibit p. 133. As can be seen, that language would go beyond clarification of the recording requirement. It would add significant new procedural requirements.

The staff is unsure of the reason for the proposed procedural details, but is inclined to stick with the very simple procedure set out in subdivision (a) — amendment by board resolution. A board resolution must be adopted at a noticed meeting, open to the members, and is then memorialized in meeting minutes. That would seem to cover much the same ground as the language proposed by the RPLS Working Group, but much more simply.

Furthermore, the staff is not convinced that there is any problem with the proposed recordation language. Subdivision (b) is permissive. An association would never be *required* to record a corrected governing document, but would have the option of doing so where appropriate.

For the reasons stated above, the staff recommends against making any change to proposed Section 4235(b).

CONTENT OF DECLARATION

Proposed Section 4250 would continue an existing provision that states general requirements for the content of an association's declaration:

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

Subdivision (b) would make one minor substantive change to existing law. The existing provision, Section 1353(b), provides that the declaration may contain any other matters that the "original signator" considers appropriate. The proposed law broadens that provision to refer to the "declarant" rather than the "original signator." This reflects the fact that a declaration's contents may change over time, through amendment. In that circumstance, the views of the successor declarant are more relevant than those of the original signator. No one has objected to that change.

However, we did receive other comments, which are discussed below.

Name of the Association

Duncan McPherson, writing for himself, suggests that requiring the declaration to include the name of the governing association could create problems if the association is later required to change its name. That would seem to require a costly declaration amendment. He suggests revising the provision to require that a declaration state the *original* name of the association. See Memorandum 2010-36, Exhibit p. 66.

The staff is unsure whether it could cause problems if the association name stated in the declaration is not the current legal name of the association. Some purpose must be served by allowing a person to identify the governing association of a CID simply by reference to title records. If so, that purpose could be undermined or defeated if the information in the title records becomes unreliable through a subsequent, unrecorded name change.

Perhaps a better solution would be to provide a simplified procedure for recording a name change, which would not require going through the full procedure required for amendment of the declaration. This would remove a costly obstacle to such changes, but would preserve the benefit of having accurate information in the title records.

The staff believes this issue is too substantive and complex to be resolved in the current study. It should be studied separately.

Prohibited Content

The RPLS Working Group suggests that subdivision (b) be revised to add language making clear that only *lawful* material can be included in the declaration. See Memorandum 2010-36, Exhibit p. 133.

Presumably, this is intended as an acknowledgement of the fact that certain discriminatory restrictions are prohibited by law. See "Unlawful Discriminatory Restrictions" above.

The staff believes that this issue is already adequately handled by existing provisions and is inclined against adding new language.

Pre-1986 Declarations

As can be seen, the first sentence of subdivision (a) only applies to a declaration recorded on or after January 1, 1986. Although it is less clear, it appears that the second sentence of subdivision (a) is also inapplicable to a

declaration recorded before 1986. Under that reading, proposed Section 4250(a) would not state any content requirements for a pre-1986 declaration.

As discussed in a prior memorandum, this gap in proposed Section 4250 creates significant and problematic uncertainty. See Memorandum 2010-47, pp. 13-14.

The RPLS Working Group proposes to fill the gap by adding language to specify the minimum required content for a pre-1986 declaration. See Memorandum 2010-36, Exhibit pp. 119, 133.

As discussed in Memorandum 2010-47, the staff recommends that this issue be studied as part of a separate study of CID formation issues.

Scope of Content

The RPLS Working Group also asks whether the phrase "restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes" is broad enough to encompass all enforceable covenants. For example, the group wonders whether an obligation to pay assessments is a restriction on the use and enjoyment of the CID.

There may be an opportunity for improvement of the language. However, before making any changes, the Commission would need to review the law governing covenants that run with the land, to make sure that any changes to terminology would not inadvertently affect the enforceability of restrictions. **This issue should be addressed in connection with a study of formation issues.**

☞ SPECIAL CONTENT OF DECLARATION

Proposed Section 4255 would continue existing provisions that require special disclosures in the declaration of a CID that is within an "airport influence area" or within the jurisdiction of the San Francisco Bay Conservation and Development Commission. By their terms, the provisions only apply to "a declaration, recorded after January 1, 2004" or "after January 1, 2006," respectively.

The RPLS Working Group wonders whether these requirements would apply to a declaration that is merely *amended* after the relevant application date. See Memorandum 2010-36, Exhibit p. 134.

The existing language is conditioned on the date on which a "declaration" is recorded. Obviously, if the entire declaration is restated to incorporate an

amendment, and then recorded, the provision would apply. It is less clear whether recordation of an addendum to the declaration, setting out an amendment, would be sufficient to trigger the provision's requirements.

As a matter of general policy, it would seem to make sense to apply the new requirements to *any* new recorded document that affects the content of the declaration. In that circumstance, the association has already gone to the trouble and expense to amend its declaration, so compliance with the special disclosure requirements would not appear to impose much of an additional burden.

If that is correct, then it would be helpful to revise the trigger language in proposed Section 4255 to refer to the date of recordation of a "declaration or an amendment to the declaration."

The staff invites comment on whether that change would cause any problems in practice.

AUTHORITY TO AMEND DECLARATION

Proposed Section 4260 would continue, without substantive change, existing authority to amend a declaration (except where the declaration itself expressly prohibits amendment).

The McPherson Group suggests adding language to specify that the amendment must be made under the general procedure for amendment of a declaration, provided in proposed Section 4270. See Memorandum 2010-36, Exhibit p. 27.

The staff recommends against making this change. Although most declaration amendments will be made pursuant to proposed Section 4270, there are other procedures that can be used in special circumstances to amend a declaration. See, e.g., proposed Sections 4225 (deletion of unlawful restrictions), 4230 (deletion of declarant provisions), 4235 (correction of statutory references), 4275 (judicial amendment).

The proposed addition could cause confusion as to the authority to amend a declaration under those other procedures.

AMENDMENT TO EXTEND DECLARATION

Proposed Section 4265 would continue, without substantive change, existing authority to amend a declaration to extend its period of operation:

> 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 members to extend the term of the declaration. The Legislature further finds that covenants and restrictions, contained in the declaration, are an appropriate method for protecting the common plan of developments and to provide for a mechanism for financial support for the upkeep of common area including, but not limited to, roofs, roads, heating systems, and recreational facilities. If declarations terminate prematurely, common interest developments may deteriorate and the housing supply of affordable units could be impacted adversely. The Legislature further finds and declares that it is in the public interest to provide a vehicle for extending the term of the declaration if members having more than 50 percent of the votes in the association choose to do so.
>
> (b) A declaration that specifies a termination date, but that contains no provision for extension of the termination date, may be extended by the approval of members pursuant to Section 4270.
>
> (c) No single extension of the terms of the declaration made pursuant to this section shall exceed the initial term of the declaration or 20 years, whichever is less. However, more than one extension may occur pursuant to this section.

Comments on that provision are discussed below.

☞ **Perpetual Extension**

The McPherson Group believes that the rule stated in proposed Section 4265(c) is antiquated and should not be continued. Homeowners should be able to amend a declaration under this section so as to make its duration perpetual, if that is their wish. See Memorandum 2010-36, Exhibit pp. 27-28.

On its face, that suggestion seems reasonable. Expiration of a declaration could be disastrous to homeowners. If a sufficient number of homeowners vote to extend the term of the declaration, why limit the duration of the extension? However, the staff is unsure of the policy implications of making the proposed change. **Before making any decision on this point, the staff invites further public comment.**

Timing of Extension Amendment

The McPherson Group also suggests adding language that any amendment to extend the effect of the declaration must be completed before the declaration's termination date. *Id*.

This makes sense. Technically, once the legal effect of a document has terminated, it is arguably no longer susceptible to *amendment*. Instead, an entirely

new declaration would need to be adopted. More practically, if a terminated declaration could be revived by means of an amendment after its stated termination date, title records would become unreliable. A recorded declaration that has terminated pursuant to its own terms, might spring back into operation at a later date. This could cause problems for title insurers, who must be able to rely on title records.

The staff recommends that proposed Section 4265(b) be revised along the following lines:

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

Approval of Members

The last sentence of proposed Section 4265(a) declares: "The Legislature further finds and declares that it is in the public interest to provide a vehicle for extending the term of the declaration if members having more than 50 percent of the votes in the association choose to do so."

The RPLS Working Group points out that the reference to "members having more than 50 percent of the votes in the association" is not consistent with the terminology used in the proposed law. See Memorandum 2010-36, Exhibit p. 134.

To achieve greater consistency, the staff recommends that the last clause be revised to read "if approved by a majority of all members."

Grammatical Correction

In the first sentence of proposed Section 4265(a), "which" should be changed to "that." **The staff will make that change in the next version of the draft.**

GENERAL DECLARATION AMENDMENT PROCEDURE

Proposed Section 4270 would provide a general procedure to be used in amending a declaration. The provision is drawn from existing provisions of Sections 1355 and 1357. It would provide:

> 4270. (a) A declaration may be amended pursuant to the governing documents or this Act. Except as provided in Section 4275, an amendment is effective after (1) the approval of the percentage of members required by the governing documents has been given, (2) that fact has been certified in a writing executed and acknowledged by the officer designated in the declaration or by the

association for that purpose, or if no one is designated, by the president of the association, and (3) that writing has been recorded in each county in which a portion of the common interest development is located.

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

The Commission received a number of technical comments on the provision, which will be discussed below. **As indicated in that discussion, the staff agrees with many of the comments and recommends that the provision be revised as follows:**

4270. (a) A declaration may be amended pursuant to the ~~governing documents~~ declaration or this Act. Except as provided in Section 4275, an amendment is effective after (1) the approval of the percentage of members required by the ~~governing documents~~ declaration 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~~ the amendment has been recorded in each county in which a portion of the common interest development is located.

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

In addition, the staff recommends that subdivision (a) be restructured to set out separately numbered paragraphs (i.e., (a)(1)-(3)), rather than having the material set out as a single sentence. This would make the provision clearer and easier to reference.

"Percentage"

The McPherson Group suggests that it would be technically inaccurate to use the term "percentage" to refer to a majority approval requirement, because a majority is not a "percentage." See Memorandum 2010-36, Exhibit p. 28. The group suggests expunging the term from subdivision (b) as follows: "the ~~percentage of members who must~~ vote or consent required to approve an amendment…."

The staff sees the group's linguistic point. Majority approval requires 50% *plus one vote*, which is not a fixed percentage of the whole.

However, the issue can be framed another way. One could describe a majority approval requirement as requiring the approval of more than 50% (which would seem to be compatible with the existing use of the term "percentage"). It is therefore unclear whether there is a technical problem.

What's more, the staff sees very little practical scope for misunderstanding of the word "percentage" in this context. In the staff's view, the proposed revision would not be any easier to understand.

For those reasons, the staff recommends against making the suggested revision.

"Governing Documents"

Duncan McPherson, writing for himself, objects to the use of the term "governing documents" in proposed Section 4270. See Memorandum 2010-36, Exhibit p. 67. The RPLS Working Group has the same objection. See Memorandum 2010-36, Exhibit p. 134. Both groups suggest that the term be replaced with "declaration."

This is a good suggestion, for two reasons. First, it would be inappropriate for a governing document of lesser dignity to specify the procedure for amending a document of greater dignity. As drafted, the proposed Section would allow a board-made operating rule to specify the percentage of members who must approve a change to the declaration.

Second, most of the existing provisions from which this section is drawn use "declaration" rather than "governing documents." It would therefore be more consistent with existing law to use "declaration."

The staff recommends that the term "governing documents" be replaced with "declaration" throughout proposed Section 4270. This would be better policy and would be more consistent with the terminology used in existing law.

"Owner" v. "Member"

Duncan McPherson, writing for himself, suggests that the term "member" be replaced with "owner" throughout proposed Section 4270. He believes this would be appropriate given the character of the declaration as a real property document. See Memorandum 2010-36, Exhibit p. 67.

The staff recommends against making this change. The change is not strictly necessary. Under the proposed law, "member" means an owner. See proposed Section 4160(a). Consequently, there would be no substantive difference between using the term "owner" or "member" in this provision.

Furthermore, use of the term member in proposed Section 4270 would help to promote the uniformity of language in the proposed law (the proposed law uses "member" as a default, reserving "owner" only for those provisions where "member" would be confusing).

☞ **Non-Owner Consent**

Duncan McPherson, writing for himself, points out that some declarations require the approval of a specified non-owner in order to amend the declaration (e.g., a lender or government agency). He suggests possibly adding language to accommodate that practice.

One way to implement that suggestion would be to revise proposed Section 4270(a) along the following lines (for clarity, the proposed revisions set out earlier have been incorporated into the language below):

> 4270. (a) A declaration may be amended pursuant to the declaration or this Act. Except as provided in Section 4275, an amendment is effective after (1) the approval of the percentage of members required by the declaration ~~has been given,~~ and of any other person whose approval is required by the declaration, (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) the amendment has been recorded in each county in which a portion of the common interest development is located.

The staff believes that a change of this type would be beneficial and shouldn't cause any problems, as it would merely accommodate whatever requirements are already expressed in an association's declaration. The question is whether the proposed revision would be adequate to address the issue. **The staff invites comment on that point.**

"The Writing"

The third numbered clause of proposed Section 4270(a) would require that "the writing" be recorded. In context, that would seem to refer to the writing described in the second numbered clause — the writing that certifies approval of the amendment.

The RPLS Working Group suggests that this should be made clearer, by replacing "writing" with "certification and acknowledgement." See Memorandum 2010-36, Exhibit p. 134.

However, on reviewing this suggestion, the staff discovered a drafting error in the proposed provision. Rather than requiring recordation of the certification and acknowledgement of the requisite approval of the amendment, existing law requires recordation of the "amendment" itself. See Sections 1355(b), 1357(c). **The staff regrets the error and recommends that it be corrected by replacing "writing" with "amendment."**

JUDICIAL ACTION TO AMEND DECLARATION

Proposed Section 4275 would continue, without change, an existing provision that authorizes the court to override a supermajority voting requirement for amendment of an association's declaration. The court may do so where at least half of the members voted for the amendment, the amendment was reasonable, and other specified requirements are met.

The RPLS Working Group offers some technical suggestions, which are discussed below.

Compliance with Law

One of the requirements for judicial approval of an amendment is a finding that the voting on the amendment "was conducted in accordance with all applicable provisions of the governing documents." See proposed Section 4275(c)(2).

The RPLS Working Group suggests that this provision be revised to also require a finding that the voting was conducted in compliance with the election provisions of the Davis-Stirling Act. See Memorandum 2010-36, Exhibit p. 134.

The staff agrees with the general concept of that suggestion, but would broaden the scope of the revision to also require compliance with the Corporations Code. That code also imposes some election requirements, which are not entirely superseded by the Davis-Stirling Act. **The staff recommends revising proposed Section 4275(c)(2) as follows:**

> (2) Balloting on the proposed amendment was conducted in accordance with all applicable provisions of the governing documents<u>, this Act, and the Corporations Code</u>.

Delivery of "Recorded Copy"

The RPLS Working Group suggests that subdivision (b) should be revised to require that members be provided with a "recorded copy" of the document. See Memorandum 2010-36, Exhibit pp. 134-35.

The reference to subdivision (b) seems to be erroneous. That subdivision does not require delivery of a document. It is possible that the group was intending to refer to proposed Section 4275(g), which provides:

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

The staff is not sure what delivery of a "recorded copy" would mean in this context. Subdivision (g) requires recordation before copies are delivered and also requires a statement that the amendment was recorded. **In the absence of further clarification of this suggestion, the staff recommends against making the revision.**

Typographical Error in Comment

The RPLS Working Group points out a typographical error in the Comment to proposed Section 4275. The reference to Corporations Code Section 7511 should have been to Section 7515. **That error will be corrected.**

Grammar Suggestion

The RPLS Working Group suggests a possible grammar correction in proposed Section 4275(f), as follows:

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

The staff recommends against making that change. The use of "were" in that sentence appears to be correct, because the sentence is in the subjunctive mood, rather than the indicative.

Unincorporated Association

Corporations Code Section 7515 provides a judicial remedy similar to the remedy provided in proposed Section 4725. A significant difference is that Corporations Code Section 7515 can be used to facilitate any vote of the membership, not just a vote to approve a declaration amendment.

The RPLS Working Group suggests adding language to proposed Section 4805 (association powers) to make clear that Corporations Code Section 7515 can be used by an unincorporated homeowner association. See Memorandum 2010-36, Exhibit p. 135.

That issue will be discussed in a later memorandum, discussing association governance.

CONTENT OF ARTICLES

Proposed Section 4280 would continue an existing provision that prescribes the content of an association's articles of incorporation:

> 4280. (a) The articles of incorporation of a common interest development association filed with the Secretary of State on or after January 1, 1995, shall include a statement, which shall be in addition to the statement of purposes of the corporation, that does all of the following:
>
> (1) Identifies the corporation as an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act.
>
> (2) States the business or corporate office of the association, if any, and, if the office is not on the site of the common interest development, states the nine-digit ZIP Code, front street, and nearest cross street for the physical location of the common interest development.
>
> (3) States the name and address of the association's managing agent, if any.
>
> (b) The statement of principal business activity contained in the annual statement filed by an incorporated association with the Secretary of State pursuant to Section 1502 of the Corporations Code shall also contain the statement specified in subdivision (a).

Comments on this provision are discussed below.

☞ Managing Agent

Duncan McPherson, writing for himself, suggests deleting subdivision (a)(3), which requires that the name and address of the managing agent be included in

the articles. He points out that the information is transitory. See Memorandum 2010-36, Exhibit p. 67.

This is a reasonable point. If associations change managing agents more frequently than they file new articles (as seems likely), the information on record with the Secretary of State will often be incorrect. The requirement, in subdivision (a)(2), that the articles state the business office of the association would often serve an equivalent purpose to naming the address of the managing agent.

Before making any decision on this suggestion, the staff invites public comment on the issue.

Technical Revision

The RPLS Working Group suggests revising the first clause of proposed Section 4280(a) as follows: "The articles of incorporation of ~~a common interest development~~ an association…." **The staff recommends that this change be made, to further uniformity of language in the proposed law.**

BYLAWS

The RPLS Working Group notes that the organization of the proposed law does not reserve any space for the addition of provisions governing the bylaws of an association. They suggest revising the heading of the proposed article on articles of incorporation, as follows:

> Article 3. Articles of Incorporation and Bylaws

See Memorandum 2010-36, Exhibit p. 135.

Initially, the article would not actually contain any provisions governing bylaws. That might be confusing. A layperson might look in vain for bylaw related content, or misconstrue the article-related provisions as having some application to bylaws. **For that reason, the staff recommends against making the change.** If bylaw provisions are added to the Davis-Stirling Act in the future, the Legislature could insert a new article or rename an existing one (along the lines of what the RPLS Working Group has suggested).

AMENDMENT OF CONDOMINIUM PLAN

Proposed Section 4295 would restate, with clarification, an existing rule governing amendment of a condominium plan. The accompanying Comment

would explain the nature of the clarification. The section and its Comment would read:

> 4295. A condominium plan may be amended or revoked by a recorded instrument that is acknowledged and signed by all the persons who, at the time of amendment or revocation, are persons whose signatures are required under Section 4290.
>
> **Comment**. Section 4295 continues the last paragraph of former Section 1351(e) without change, except that language is added to make clear that the persons whose signatures are required for amendment or revocation of a condominium plan are the persons who fall within the groups described in Section 4290 at the time of amendment or revocation.
>
> See also Sections 4120 ("condominium plan"), 4170 ("person").

Under the existing provision, it is not entirely clear whether the persons who must sign the amendment were the original signers, or those who stand in the same relationship to the property at the time of the amendment. See Section 1351(e). Proposed Section 4295 would make clear that the latter is true.

This provision is consistent with comments made by the McPherson Group and CAI-CLAC. See Memorandum 2010-36, Exhibit pp. 16, 202.

☞ Multiple Projects

The purpose of a condominium plan is to establish a recorded description of the property boundaries of a condominium project. As discussed in a prior memorandum, the Commission has been informed that a single condominium plan may describe the property boundaries of *more than one* condominium project. See Memorandum 2010-47, p. 16.

In that case, what would be required to amend a condominium plan, if the amendment only relates to one of the described projects? Must the amendment be signed by the property owners in *every* project described in the plan? Or would it be sufficient to obtain the signatures of property owners in the project affected by the amendment?

The McPherson Group suggests that the proposed law be revised to state the latter rule. See Memorandum 2010-36, Exhibit p. 16.

That would seem to be the better approach. It seems clear that the requirement that an amendment be signed by property owners is intended to ensure that their interests are not affected without their assent.

If a condominium plan describes two entirely separate condominium projects, "Project A" and "Project B," the interests of Project A owners would not

be affected by the amendment of provisions that only relate to Project B. Thus, there is no good policy reason to require Project A owners to sign an amendment of the Project B plan provisions.

The proposed reform could be implemented by revising proposed Section 4295 along these lines:

> 4295. (a) A condominium plan may be amended or revoked by a recorded instrument that is acknowledged and signed by all the persons who, at the time of amendment or revocation, are persons whose signatures are required under Section 4290.
>
> (b) If a condominium plan describes more than one condominium project, an amendment of a provision that only affects one of the described condominium projects need only be acknowledged and signed by persons who hold an interest in the affected condominium project.

The staff believes that revision would be a helpful substantive reform. However, it would be good to receive public comment before making any decision on this point.

If that change is made, it might also be appropriate to amend the definition of "condominium plan" as discussed in Memorandum 2010-47 (i.e., to state expressly that a condominium plan can describe more than one condominium project).

Simplified Procedure

The RPLS Working Group suggests a possible future Commission study topic: Could the procedure for amendment of a condominium plan be simplified without compromising property owner interests? See Memorandum 2010-36, Exhibit p. 136. **This will be added to the list of possible future study topics.**

Relationship of Condominium Plan to Declaration

The RPLS Working Group also suggests that the Commission study the issue of conflicting definitions in a condominium plan and declaration. The group suggests that such conflicts are fairly common and can cause problems. According to the group, it might be helpful to adopt a statute declaring that the definitions in one or the other document are controlling. *Id.*

The staff is not sure why inconsistent definitions between these types of documents would cause problems. If each document is defining terms only for its own purposes, then there is no need for a particular term to have the same meaning in both documents. In fact, a statutory rule requiring that result could

well cause an unintended change in meaning. For example, if the declaration and condominium plan define "unit" differently, and a statute declares that the declaration controls, then the meaning of "unit" in the condominium plan would be changed. That could easily have unintended consequences.

It would obviously be awkward to have a single term mean different things in different documents, but that would perhaps be less of a problem than changing the meaning in one of those documents, without regard for how that might affect the substantive meaning of its provisions. **The staff recommends against pursuing this topic.**

VALIDITY OF OPERATING RULES

Proposed Section 4350 would continue an existing provision stating substantive and procedural limitations on the validity of an operating rule.

The RPLS Working Group suggests revising subdivision (b), as follows:

> 4350. An operating rule is valid and enforceable only if all of the following requirements are satisfied:
>
> …
>
> (b) The rule is within the authority of the board conferred by law or by the ~~declaration, articles of incorporation or association, or bylaws of the association~~ governing documents.

See Memorandum 2010-36, Exhibit p. 136.

The staff recommends against making that revision. The provision, which was originally drafted by the Commission, intentionally omits operating rules from the list of governing documents that can authorize the adoption of an operating rule. That omission was intended to avoid any confusion or dispute about whether an operating rule could be used to boot-strap authority to adopt rules on a particular topic.

APPLICATION OF RULEMAKING PROCEDURE

Proposed Section 4355 would continue an existing provision that states the types of operating rules that are subject to the statutory rulemaking procedure.

The RPLS Working Group suggests adding an exception to that provision for operating rules that are adopted by the developer prior to the sale of the first unit. See Memorandum 2010-36, Exhibit p. 137.

In concept, this makes sense. The original developer has authority to draft much weightier governing documents than operating rules, including the

original declaration, articles, and bylaws. If the developer, in establishing the original plan for the CID, can draft those foundational documents without any input from future owners (as must be the case), then the developer should also be able to draft the original operating rules for the CID.

However, a developer does not have an entirely free hand in drafting the declaration. The contents of the declaration must be consistent with regulatory requirements of the Department of Real Estate ("DRE") and must be reviewed and approved by DRE as part of the development process. See Bus. & Prof. Code § 11010.10. The staff is not aware of any requirement that DRE review the original operating rules of a proposed CID.

The staff believes that this suggestion requires more analysis and public input than is practical in the current study. **It should be noted for possible inclusion in a broader study of CID formation issues.**

RULE CHANGE PROCEDURE

Proposed Section 4360 would continue the existing procedure for making a "rule change" (i.e., the adoption, amendment, or repeal of an operating rule). Comments on the provision are discussed below.

Consideration of Member Comments

Proposed Section 4360(b) would provide:

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

Ms. Artus notes a possible ambiguity in that provision, relating to when the board may consider member comments. It is clear from the statutory language that comments must be considered before the board makes its decision. It is also clear that the decision must be made at a board meeting. What is not clear is whether the board must consider member comments at a board meeting. See Memorandum 2010-36, Exhibit p. 55.

Consider two alternative scenarios:

- **Scenario 1:** The board is mailed a packet containing all written member comments on a proposed rule change. The directors read those comments before the meeting at which they will vote on the proposed rule change. At that meeting, the board does not discuss any of the written comments before voting.

- **Scenario 2:** Same as Scenario 1, except that the board discusses the written comments before voting.

Does the law require the second scenario? Considering that Ms. Artus suggests she may soon be involved in litigation on this issue, the staff will refrain from offering any opinion on how the provision should be construed. For present purposes it is sufficient to acknowledge that an ambiguity may exist.

Given that possibility, the Commission should decide whether to revise proposed Section 4360 to expressly state a rule one way or the other.

The staff is of a mixed mind on the issue. While it is generally beneficial that boards act in open meetings (except when addressing executive session matters), the staff is reluctant to micromanage association governance, especially if a proposed requirement could be satisfied through token compliance. For example, if the law were to require consideration of comments at the board meeting, would that requirement be satisfied if (1) the board president asks board members whether they have anything to say about member comments, and (2) all of the board members state that they have nothing to say?

If the requirement could be avoided so easily, it would be largely illusory. Any attempt to add "teeth" to the law, in order to require that the board *meaningfully* consider member comments at the meeting, would likely be unduly burdensome and would undoubtedly lead to a proliferation of unproductive line-drawing disputes.

For that reason, the staff recommends against revising the proposed law to address the issue raised by Ms. Artus. Doing so could be seen as a substantive change, which would likely be controversial. Instead, the staff recommends that the issue be noted for possible future study.

Notice "To the Members"

The RPLS Working Group notes an inconsistency between the language used in proposed Section 4360(a) and (c), as shown in italics below:

> (a) The board shall provide *general notice pursuant to Section 4045* of a proposed rule change *to the members* at least 30 days before making the rule change. …
>
> …
>
> (c) As soon as possible after making a rule change, but not more than 15 days after making the rule change, the board shall deliver *general notice pursuant to Section 4045* of the rule change. …

As can be seen, subdivision (a) includes the words "to the members" and subdivision (c) does not. The staff agrees that it would be better to be uniform in this regard.

The RPLS Working Group suggests that the inconsistency be resolved by adding "to the members" in subdivision (c). See Memorandum 2010-36, Exhibit p. 137.

The staff recommends that the issue instead be addressed by deleting "to the members" from subdivision (a).

The words are unnecessary, as Section 4045 is very specific in stating the delivery requirements for a general notice. Furthermore, other provisions of the proposed law that refer to general notice do not include the words "to the members."

☞ RULEMAKING REFERENDUM

Proposed Section 4365 would continue an existing procedure that homeowners can use to reverse a recent rule change. It provides that members representing 5% or more of the voting power of the association may call a special member meeting to vote on whether or not to reverse the contested rule change.

Most of the comments on proposed Section 4365 relate to the procedure specified for conducting a member vote on reversal of a rule change. See Memorandum 2010-36, Exhibit p. 137 (RPLS Working Group); see also Exhibit pp. 43 (Sun City Roseville), 56 (Kazuko Artus).

The RPLS Working Group points out that the election language in proposed Section 4365 was drafted before the enactment of Section 1363.03, which added detailed election rules to the Davis-Stirling Act. Consequently, proposed Section 4365 refers to the election rules provided in the Corporations Code, rather than in Section 1363.03.

This is a good point. The requirements of Section 1363.03 reflect the Legislature's most recent and specific judgment about how elections in a homeowners association should be conducted. By its terms, Section 1363.03 applies to a member vote on amendment of a governing document (which would seem to include a vote on whether to reverse a rule change). It would be good policy to modernize proposed Section 4365 to reflect the current election provisions.

It would also be appropriate to update proposed Section 4365 to reflect recent developments in the Davis-Stirling Act relating to record inspection.

The staff recommends that proposed Section 4365 be revised as follows:

> 4365. (a) Members of an association owning five percent or more of the separate interests may call a special ~~meeting~~ vote of the members to reverse a rule change.
>
> (b) A special ~~meeting~~ vote of the members may be called by delivering a written request to the president or secretary of the board~~, after which the board shall deliver individual notice of the meeting to the association's members, pursuant to Section 4040, and hold the meeting in conformity with Section 7511 of the Corporations Code~~. Not less than 35 days nor more than 90 days after receipt of a proper request, the association shall hold a vote of the members on whether to reverse the rule change, pursuant to Article 4 (commencing with Section 5100) of Chapter 5. The written request may not be delivered more than 30 days after the members of the association are notified of the rule change. Members are deemed to have been notified of a rule change on delivery of notice of the rule change, or on enforcement of the resulting rule, whichever is sooner.
>
> (c) For the purposes of Section 5225 of this code and Section 8330 of the Corporations Code, collection of signatures to call a special meeting under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list solely for that purpose may not be denied on the grounds that the purpose is not reasonably related to the member's interests as a member.
>
> (d) The rule change may be reversed by the affirmative vote of a majority of a quorum of the members, pursuant to Section 4070, or if the declaration or bylaws require a greater proportion, by the affirmative vote ~~or written ballot~~ of the proportion required. ~~In lieu of calling the meeting described in this section, the board may distribute a written ballot pursuant to Article 4 (commencing with Section 5100) of Chapter 6.~~
>
> (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 6 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and 7613 of, the Corporations Code.~~
>
> ~~(g)~~ A rule change reversed under this section may not be readopted for one year after the date of the meeting reversing the rule change. Nothing in this section precludes the board from adopting a different rule on the same subject as the rule change that has been reversed.
>
> ~~(h)~~ (g) 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 pursuant to Section 4045 of the results of the member vote.

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

The proposed revisions would:

(1) Revise subdivisions (a), (b), (d), and (f) to replace references to a "meeting" with references to a "vote." This would accommodate Section 1363.03, which is geared toward (but does not mandate) voting by mail, rather than at a meeting. See proposed Section 5115(d).

(2) Revise subdivision (b) to state expressly that the vote is governed by the Davis-Stirling Act election provisions.

(3) Revise subdivision (b) to add a timing provision, consistent with the effect of existing law. The current section authorizes a special meeting pursuant to Corporations Code Section 7511. Subdivision (c) of that section requires that the special meeting be held within 35 to 90 days after receipt of a proper request. This important right should be preserved.

(4) Revise subdivision (c) to make clear that members may request the membership list in order to solicit signatures to hold a referendum vote. The current provision states that principle with respect to Corporations Code Section 8330, which requires a proper purpose when requesting the corporate membership list. The added language would extend the same treatment to proposed Section 5225, which requires a proper purpose when requesting a CID's membership list.

The staff believes that these changes would make the existing rules much clearer, without significantly changing the existing policy. **However, before the Commission makes any decision on this issue, it would be helpful to receive public comment on the proposed changes.**

PROSPECTIVE APPLICATION OF RULEMAKING PROVISIONS

Proposed Section 4370 would continue an existing provision limiting the application of the rulemaking procedure to rule changes initiated on or after the operative date of the bill adding the rulemaking procedure (i.e., January 1, 2004):

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

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

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

The RPLS Working Group questions whether the provision is still necessary, given the passage of time. See Memorandum 2010-36, Exhibit p. 138.

The staff believes that the section probably has continued relevance. It seems quite likely that there are still some operating rules in existence that were adopted before 2004. **The provision should be retained.**

Respectfully submitted,

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Executive Secretary