Study H-855 January 24, 2013

Memorandum 2013-6

Common Interest Development: Statutory Clarification and Simplification of CID Law (Civil Code Section 4205)

In 2012, the Legislature enacted AB 805 (Torres) and AB 806 (Torres). 2012 Cal. Stat. chs. 180, 181. Those bills implemented the Commission's recommendation to recodify the Davis-Stirling Common Interest Development Act (hereafter, "Davis-Stirling Act"). See *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm'n Reports 235 (2010); Civ. Code § 4000 *et seq*.

At the December 2012 meeting, the Commission considered Memorandum 2012-49 and its First Supplement, presenting a staff draft of a final recommendation to make technical "clean-up" revisions to address problems that arose in enacting AB 805 and AB 806. The Commission approved the staff draft as a final recommendation, for publication and submission to the Legislature. See Minutes (Dec. 2012), p. 3; *Statutory Clarification and Simplification of CID Law (Clean-Up Legislation)*, 42 Cal. L. Revision Comm'n Reports 307 (2012).

At the meeting, the Commission deferred for future consideration whether to also recommend a technical revision to clarify the meaning of Civil Code Section 4205, which had been added to the recodified Davis-Stirling Act on the Commission's recommendation. Minutes (Dec. 2012), p. 3.

This memorandum revisits that issue. It also discusses public comment on Section 4205 that the Commission received from Art Bullock shortly before the December meeting. His letter, an exhibit attached to the First Supplement to Memorandum 2012-49, is again attached to this memorandum as an exhibit, for ease of reference. The Commission has also previously received informal comment on this issue from Marjorie Murray, of the California Alliance for Retired Americans.

In considering the issues discussed in this memorandum, the Commission should recall that the proposed clean-up legislation is intended to be purely technical and uncontroversial. It addresses legislative process problems, in order

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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.

to correctly implement already-settled Commission policy recommendations. It would not be an appropriate vehicle for new substantive reforms that have not been reviewed through the Commission's public deliberative process. **Consequently, the staff recommends against adding any new substantive reform proposals to the proposed clean-up legislation. Instead, those topics should be noted for possible future study.**

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

INTENDED EFFECT OF SECTION 4205

Section 4205, part of the recodified Davis-Stirling Act that will become operative on January 1, 2014, reads as follows:

> 4205. (a) To the extent of any inconsistency between the governing documents and the law, the law controls.
>
> (b) To the extent of any inconsistency between the articles of incorporation and the declaration, the declaration controls.
>
> (c) To the extent of any inconsistency between the bylaws and the articles of incorporation or declaration, the articles of incorporation or declaration control.
>
> (d) 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.

2012 Cal. Stat. ch. 180, § 2.

Section 4205 was added to the Davis-Stirling Act on Commission recommendation "to provide guidance on two fundamental aspects of CID governance that are not clearly addressed in the Davis-Stirling Act: (1) the general supremacy of the law over a CID's governing documents, and (2) the relative authority of different types of governing documents." *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm'n Reports 235, 249 (2010).

The Commission's intention was to provide guidance on the relative supremacy of different authorities. In other words, Section 4205 was intended to make clear which authority controls in the event of a conflict that needs to be reconciled. It was not the Commission's intention to codify a rule to determine when a conflict requires reconciliation. That latter issue is at the heart of the concern expressed by Marjorie Murray.

Use of the Word "Inconsistency"

As discussed at the December meeting, Ms. Murray has informally suggested to Commission staff that the use of the word "inconsistency" in Section 4205 could be problematic.

She is concerned that the term could be read too strictly, as invalidating any governing document provision that differs in *any* way from a statute that addresses the same subject. In effect, she is concerned that the term implies field preemption.

For example, a provision of Section 5550 requires that an association conduct a visual inspection of its major components every three years. Civ. Code § 5550(a). Would a governing document provision calling for *annual* inspections be "inconsistent" with the statute and therefore preempted? Ms. Murray is concerned that the term "inconsistency" might imply that the term could be read to have that effect.

As noted above, the Commission did not intend for Section 4205 to mandate a substantive standard for when a conflict between two authorities requires that the inferior authority be trumped. If use of the term "inconsistency" implies such a rule, that would be an unintended and problematic reading of the section.

Given that possibility, it would probably be prudent to make a clarifying revision, accompanied by a fuller explanation of the intended effect of the section in a Commission recommendation and Comment. Such a revision is discussed further below.

Alternative Statutory Language

In Memorandum 2012-49, the staff suggested that substituting the word "conflict" or "incompatibility" for the word "inconsistency" might avoid Section 4205 being read in the manner Ms. Murray describes. After further research and reflection, the staff believes that the word "conflict" would be the better of the two choices, for several reasons.

The strongest argument in favor of using "conflict" is that the term is used in a similar context in the California Constitution, relevant appellate decisions, and comparable statutes. That usage is discussed below.

Section 7 of Article XI of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." That provision

establishes the supremacy of "general laws." It is therefore analogous to the rules expressed in Section 4205, which addresses the supremacy of general law over an association's governing documents (and the supremacy of some types of governing documents over other types of governing documents). Section 7 does not define when a "conflict" exists.

There are also appellate decisions that expressly state the supremacy of law over a CID's governing documents. See *Cebular v. Cooper Arms Homeowners Assn*., 142 Cal. App. 4th 106, 119; 47 Cal. Rptr. 3d 666 (2006) ("If there is a conflict between the law and a declaration of covenants, conditions, and restrictions, the statutory and common law prevail."); *Thaler v. Household Finance Corporation*, 80 Cal. App. 4th 1093. 1102; 95 Cal. Rptr. 2d 779 (2000) ("In the event of a conflict between CC&Rs and the [Davis-Stirling Act], the Act prevails as a matter of law"). As indicated, those cases state that the law "prevails" in the event of a "conflict," but does not define when a "conflict" exists. Those statements are directly parallel to Section 4205(a), which states the same general principle.

Finally, there are a number of statutes providing that one statute "prevails" over another, "in the event of a conflict" between them. One of those statutes is in the Davis-Stirling Act itself. Section 5100(n) provides:

> In the event of a conflict between this section 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 section shall prevail.

Again, the provision states a rule of supremacy, without defining when a conflict triggering preemption would exist. Similarly structured rules exist in numerous other code sections. See, e.g., Bus. & Prof. Code § 4040; Civ. Code § 799.10; Educ. Code § 24953; Fin. Code § 32301; Fish & Game Code § 7090; Food & Agric. Code § 13169; Gov't Code § 11010; Health & Safety Code § 1241. Those provisions are not perfectly analogous to Section 4205, because they address conflicts between authorities of otherwise equal dignity. Nonetheless, they do help to establish an apparent norm as to the phrasing of supremacy rules.

In addition, the word "incompatibility" had some arguable disadvantages for our purposes. First of all, it is not a commonly used term in the statutes (only eight code sections use the word, none in a comparable context). Also, the term seems inherently more difficult to understand than "conflict." Recall that the Davis-Stirling Act is a statute that must be read and understood by millions of

lay property owners. It is generally better to use simpler and more straightforward terminology where possible.

For the reasons discussed above, the staff recommends that the term "conflict" be used in place of "inconsistency," if the Commission decides to recommend that Section 4205 be revised.

In addition, it probably makes sense to replace "controls" with "prevails," to more closely parallel the predominant statutory framing of provisions of this type. Thus:

> 4205. (a) To the extent of any ~~inconsistency~~ conflict between the governing documents and the law, the law ~~controls~~ shall prevail.
>
> (b) To the extent of any ~~inconsistency~~ conflict between the articles of incorporation and the declaration, the declaration ~~controls~~ shall prevail.
>
> (c) To the extent of any ~~inconsistency~~ conflict between the bylaws and the articles of incorporation or declaration, the articles of incorporation or declaration ~~control~~ shall prevail.
>
> (d) To the extent of any ~~inconsistency~~ conflict between the operating rules and the bylaws, articles of incorporation, or declaration, the bylaws, articles of incorporation, or declaration ~~control~~ shall prevail.

Inclusion of Statutory Definition

Mr. Bullock also suggests that Section 4205 include a definition of the term "conflict" (or whatever operative term the Commission decides to use in the section) to Section 4205. Exhibit pp. 1-2. He argues that an undefined term could be susceptible to more than one interpretation, which could create problems. Exhibit pp. 1-2.

The staff recommends against defining the term. As noted, none of the supremacy rules discussed above attempt to define when a "conflict" exists. Instead, the issue is left to judicial development.

That appears to be the best approach. Any attempt to codify a rule as to when a conflict between two authorities must be resolved could unduly restrict the issue. For example, Mr. Bullock argues that the term "conflict" has a well-defined legal meaning: "the absence of any known harmonizing interpretation." Exhibit p. 1. That does appear to be the rule when harmonizing two statutes of equal dignity. See, e.g., *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1387; 743 P.2d 1323; 241 Cal. Rptr. 67 (1987) ("[S]tatutes or statutory

sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.")

But Section 4205 is not concerned with authorities of equal dignity. Instead, it addresses issues of supremacy. In that context, the constitutional supremacy provision noted above is a better model. In construing that provision, courts have held that a "conflict" exists "if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897, 844 P.2d 534, 16 Cal. Rptr. 2d 215, (1993) (citations omitted).

As can be seen, if Section 4205 were to define "conflict" as Mr. Bullock proposes, the definition would exclude an important type of conflict recognized in *Sherwin-Williams*. That case holds that a local statute may not enter into "an area fully occupied by general law."

The staff believes that it would be very risky to try to comprehensively codify all aspects of supremacy doctrine. It seems very likely that any attempt to do so would somehow mischaracterize or narrow existing law.

For that reason, the staff recommends against defining "conflict" in Section 4205. Instead, the Commission's recommendation and Comment could carefully explain that Section 4205 is intended only as a rule of supremacy, for use when a conflict needs to be resolved, and is not intended to state a substantive rule on when such a conflict exists.

If the Commission agrees with that recommendation, the staff will draft explanatory language for inclusion in the narrative preliminary part of a recommendation and in the Comment to revised Section 4205. That language would be presented for Commission review at a future meeting.

SUBSTANTIVE SUGGESTIONS REGARDING SECTION 4205

Mr. Bullock suggests several other changes to the wording of Section 4205. Exhibit pp. 2-5. However, the staff believes that Mr. Bullock's suggestions would make substantive changes to existing law that would not be appropriate for inclusion in the proposed clean-up legislation. **As a general matter, the staff recommends that his suggestions be noted for possible future study, but not included in the proposed clean-up legislation.** The suggestions are briefly summarized below.

Undefined Governing Document Types

Subdivisions (b) through (d) of Section 4205 mention four specific types of governing documents typically relied on in a CID: the CID's declaration, articles of incorporation, bylaws, and operating rules. Mr. Bullock argues that two of these documents, the declaration and operating rules, should be more precisely defined. Exhibit pp. 3-4.

"Declaration"

The recodified Davis-Stirling Act includes a definition of the term "declaration." See Section 4135. However, Mr. Bullock argues that the definition is problematic, and needs to be revised. Exhibit pp. 3-4.

That issue would involve significant substantive changes to a foundational definition that governs the application of the Davis-Stirling Act. Moreover, the Commission had already noted the issues that Mr. Bullock raises and decided against addressing them in the recodification of the Davis-Stirling Act. Consequently, the issue should not be addressed as part of an expedited legislative clean-up proposal.

"Operating Rules"

The term "operating rules," referenced in subdivision (d) of Section 4205, is not generally defined in the Davis-Stirling Act. There is a special definition of the term in Section 4340, but that definition does not apply to the entire act (nor did it, prior to the enactment of AB 805).

Because the definition of "operating rules" does not apply to Section 4205, Mr. Bullock argues that the term should be specially defined for the purposes of that section. Exhibit p. 3.

Whatever the merits of Mr. Bullock's suggestion, it should be noted that the absence of a definition of "operating rules" was not an oversight. The Commission specifically decided to preserve the existing limited application of the definition of the term, leaving some uses of the term undefined. Thus, the issue is not a technical error of the type appropriately addressed in clean-up legislation. Instead, the issue would require new substantive study.

Omitted Governing Document Types

Mr. Bullock also notes that two other types of governing documents, "covenants, conditions and restrictions" (hereafter "CC&Rs") and "regulations,"

are not mentioned in Section 4205. He believes this gap in the section's coverage could cause problems. Exhibit pp. 2-3.

However, it was never the Commission's intention that Section 4205 address every possible type of governing document. Rather, the section was intended to provide guidance only as to the most common types.

Thus, the issue is not a technical defect or oversight in the recodification legislation. It is a substantive matter, involving a decision on which documents should be included in the provision, and with what relative authority.

Conflict with Other Davis-Stirling Act Provisions

Mr. Bullock also raises concerns about what he perceives to be conflicts between the language of Section 4205 and other provisions of the Davis-Stirling Act.

Pet Ownership Provision

Mr. Bullock points out that Section 4715, a provision of the Davis-Stirling Act providing that CID owners may not be prohibited from owning one pet, contains a definition of "governing documents" that is different from the governing document types addressed in Section 4205. He sees that as problematic. Exhibit p. 3.

Section 4715 reads as follows:

> 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. ….
>
> ….
>
> (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.

The staff does not see any problem that would result from the differences between Sections 4205 and 4715(d). The substantive effects of Sections 4205(a) and 4175(a) are fully compatible. Under either provision, the statute controls over the association's governing documents. If Section 4175 describes a type of governing document that is broader than those addressed in Section 4175, what is the harm? Under both sections, *all* governing documents are superseded by

applicable law. There does not seem to be any conflict between the two provisions.

Sections That Apply "Notwithstanding" Other Provisions

Mr. Bullock also cites 13 sections of the Davis-Stirling Act that begin by stating that the statutory rule contained in the section applies "notwithstanding" any provision to the contrary in an association's governing documents. See, e.g., Section 4230(a) ("Notwithstanding any provision of the governing documents to the contrary,…."). Mr. Bullock asserts that the opening clauses in these sections are redundant and confusing in light of the enactment of Section 4205, and suggests that they be either deleted or clarified. Exhibit p. 4.

Mr. Bullock has a point. Section 4205(a) would seem to make those "notwithstanding" clauses redundant. But again, what is the harm? Redundancy does not undermine the effect of the law, and it can sometimes provide helpful emphasis.

Moreover, the Commission intentionally adopted a conservative drafting approach in preparing the recodification recommendation. Existing language was preserved, except where it contained some plain defect. The retention of the redundant "notwithstanding" clauses was consistent with that general approach. Therefore, it was not an error and does not need to be addressed in clean-up legislation.

NEXT STEP

If the Commission provisionally decides to recommend a revision to Section 4205, for inclusion in clean-up legislation, the staff will prepare an implementing recommendation for review at a future meeting.

Respectfully submitted,

Steve Cohen
Staff Counsel

A Public Comment Response To MM12-49

December 10, 2012

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

Marjorie Murray of the California Alliance for Retired Americans has identified a significant problem with the current §4205 use of the word 'inconsistency'. This usage would likely lead to unintended consequences. The problem is exacerbated by H-858 and current phrases in Davis-Stirling (DS), as explained herein.

MM12-49, dated 2012Dec4, begins to address part of the problem and proposes a partial remedy.

This document is a Public Comment response to MM12-49. A quick overview is in the Summary And Conclusions section at the end. Section § references are to the Civil Code, using the new numbering.

1. Whether 'conflict' or 'inconsistency' is used, it would seem wise to put the definition in §4205 code.

While proposing 2 potential remedies, MM12-49 defended the use of 'inconsistency' as 'technically correct' based on a particular definition from an online dictionary. Online dictionaries can change at any time. That definition was not included in §4205 code, so Superior Court and Court of Appeal are not obliged to follow it or consider it. If they tried, the definition may no longer be online, or may have changed significantly.

The court could easily use a different definition, from a published dictionary, with opposite consequences. Court of Appeal may, for example, use Webster's Third New International Unabridged Dictionary, to define 'inconsistent' as '1: lacking consistency', where 'consistency' is defined as '3a: agreement or harmony of parts...'. Such a definition might lead to a very different conclusion than that intended by CLRC in MM12-49.

Resulting confusion among Owners and directors (which dictionary should we use?) would lead to unnecessary lawsuits to sort this out. Costs for both sides would be borne by people the law is designed to protect.

Thus, it would seem wise to put the intended definition in the §4205 code itself, rather than relying in a comment on an online dictionary that could change tomorrow.

2. Of the 2 MM12-49 partial remedy choices, 'conflict' is better because the definition and its required operations have been fully decided by 100+ years of California Supreme Court rulings.

There are few issues (if any) more settled in California law or used more frequently by appellate courts than the operations required to harmonize laws. It would seem wise to rely on this century-plus history, which is remarkably consistent, rather than using a new word like 'inconsistency' or 'incompatibility'.

California Supreme Court defines conflict in terms of the required harmonization. Laws claimed to be in conflict must be harmonized to make every provision applicable if possible. If there is even one interpretation, however strained, that makes every provision of multiple laws applicable, that interpretation must be used. A conflict occurs only if there is no known interpretation that allows harmonizing.

Conflict is thus defined negatively. Conflict is the absence of any known harmonizing interpretation. (This is not precisely the same as the explanation that conflict requires that laws 'cannot be' harmonized.)

MM12-49 described the situation accurately and powerfully.

> "CID law must be read and understood by millions of nonlawyers who own homes in CIDs. If those readers interpret "inconsistency" as encompassing any degree of difference, then {a} statutory...rule might be considered inconsistent with {a governing document} rule, therefore invalidating {the governing document rule}. ¶That was not the Commission's intention{.} ... However, if the term might be misconstrued in practice, then it could lead to unnecessary confusion and disputes. If that problem can be avoided by replacing "inconsistency" with a word that is less likely to be misunderstood, it might be worth including such a clarification in the cleanup legislation."

Using and defining the word 'conflict' would indeed reduce unnecessary confusion and lawsuits.

For over 100 years, California Supreme Court has set a high standard for what constitutes a conflict between 2 laws, following the U.S. Supreme Court. Most CID Owners and directors do not understand the high standard required to harmonize laws. Nor do they understand that 'conflict' is defined in the negative.

Governing documents provisions tend to be more restrictive on the association than statutory provisions. Directors operating under DS jurisdiction for Common Interest Developments (CIDs) are often quick to use a perceived conflict between 2 laws as justification for not following the inconvenient one, which is often in

governing documents passed by Owners. Advised by attorneys whose financial interests are advanced by filing lawsuits, boards too quickly find a conflict where none exists, and create unnecessary lawsuits.

To prevent unnecessary lawsuits targeting the people DS is designed to protect, §4205 needs more than the right word. It needs a defining explanation, possibly even a 1-sentence explanation from California Supreme Court cases, of what it means to harmonize laws before concluding a conflict exists.

3. §4205 wording does not include CC&Rs or recognize differences between declarations and CC&Rs.

An unnoticed provision of proposed H-858 Final Recommendation, on the same 2012Dec13 agenda, requires for the first time that all DS CIDs have CC&Rs and that all CC&Rs have new requirements, else the CID is automatically reclassified as nonresidential and exempted from 31 key Davis-Stirling sections (3 in part). Because of H-858's new heightened and vague CC&R requirements, some housing CIDs that are more than a half-century old would be reclassified as nonresidential. This would occur even if Court of Appeal has already determined the CID is subject to Davis-Stirling. Court of Appeal held that CC&Rs are not required for pre-1986 CIDs. (See the 2012Dec7 response to MM12-48s1 for a detailed explanation.)

Beyond this problem, some DS provisions articulate CC&Rs as a document, though not in §4205. Other sections describe covenants, conditions, and restrictions as components in other governing documents. Attorneys so inclined would use either approach in lawsuits against Owners.

For example, the only governing document required by §4202 exception language is a "declaration of covenants, conditions, and restrictions". §4715(d) defines "conditions, covenants, and restrictions of the common interest development" as a governing document, without mentioning the word 'declaration'.

Five DS sections might be used to claim CC&Rs are components and not a governing document under §4205. (1) §4225 specifies that a 'restrictive covenant' can be in a document other than a declaration: "No declaration or other governing document shall include a restrictive covenant..." (2) In §4715(d) 'covenants' is the second 'C' in 'CC&Rs', whereas in §4202, it is the first, which some attorneys would argue makes one and not the other a governing document. (3) §4265 specifies "covenants and restrictions contained in the declaration" without mentioning conditions. (4) §4725 specifies that a "deed, contract, security instrument, or other instrument" can contain "covenant, condition, or restriction". (5) §4745 specifies that the same instruments can contain "covenant, restriction, or condition", the same items in a different order.

CC&Rs, whether as Conditions, Covenants, And Restrictions, or Covenants, Conditions, And Restrictions, are noticeably absent from §4205's precedence hierarchy. Since a declaration need not be CC&Rs, or include CC&Rs, where would non-declaration CC&Rs fall in the precedence hierarchy? §4205 does not say.

H-855 should be redone so §4205 harmonizes with case law and H-858. The 2012Dec7 response to MM12-48s1 explains the parallel H-858 changes needed. §4205 should explain where CC&Rs occur in the precedence hierarchy, or explain why DS references to CC&Rs as a governing document are incorrect.

4. Similarly, §4205 wording is unclear given other DS provisions regarding 'regulations'.

Another unintended consequence of §4205 wording relates to 'regulations' as a governing document.

§4340(a) defines "Operating rule" as "a regulation...". §4715(a) addresses "rules and regulations of the association". §4715(b) then distinguishes them, using "rules or regulations relating to pets". §4715(c) distinguishes them further: "If the association implements a rule or regulation". §4715(d) then elevates "regulations" to be an independent governing document. "For the purposes of this section, "governing documents" shall include...the bylaws, rules, and regulations of the association.".

Given the "everything-but-the-kitchen-sink" approach by associations and attorney firms that aggressively sue Owners (see the 2012Dec7 response to MM12-48s1), those so inclined would claim that regulations are apart from rules and are a separate form of governing document. They would point to the definition of operating rules in §4340: "For the purposes of this article: (a) "Operating rule means a regulation adopted by the board that applies generally to the management and operation of the common interest development or the conduct of the business and affairs of the association." They would then argue that since operating rules are a subset of regulations, regulations are a superset and thus higher in the precedence hierarchy. They would then argue their version of where the new governing document category of 'regulations' fits into the precedence hierarchy. Those covered by DS and targeted by such lawsuits would be forced to spend time and money as individuals to defend themselves against these needless arguments.

Given that H-855 is cleanup legislation, this needs to be cleaned up. The definition cleanup would make §4025 a mutually exhaustive list of governing document types as defined in §4075, and each component of the list mutually exclusive, so no document can be in 2 different categories, as now.

5. §4205 cleanup is complicated by the mixed scope of prior DS amendments without text integration.

§4715 establishes a different definition of governing documents that apply only to that section. That 'definition' is given as a list of 4 types of documents, 2 of which are not in §4205's precedence hierarchy--CC&Rs (see #3 above) and regulations (see #4 above). An attorney firm so inclined would argue that since §4715 has its own includes-and-is-not-limited-to list, half of which are not in the precedence hierarchy, that §4715 is more specific and thus controls, and that §4205 does not. The literal wording of the law, which Courts are obliged to use if not ambiguous, might be judged as requiring a separate precedence hierarchy, just for pets.

This too needs to be cleaned up as unintended. §4715 does not claim its list is mutually exhaustive, so a cleanup could merge that list and definitions into §4205 and §4075 *et seq.*, which govern the entire Act.

6. A similar cleanup problem occurs with 'operating rules' as a governing document.

The §4205 precedence hierarchy lists 'operating rules' as a precedence category. Chapter 1 Article 2 Definitions (§4075-§4190), which applies to the entire DS act, does not define 'operating rules'. §4150 does include it as an example of governing documents. §4340 defines "operating rule" only for that article (Chapter 1, Article 5. Operating Rules). Outside that article (§4340-4370) 'operating rules' is undefined, again forcing interpreting parties (Owners, board, courts) to define common-usage definitions from one of the many dictionaries, or possibly a particular legal usage. An attorney firm so inclined would argue that the §4340 definition is not controlling because it defines a rule, not a document, as used in §4205 and §4150.

To clean up this lawsuit-prone inconsistency, which is worsened by the §4205 hierarchy, the definition of 'operating rules' as a document (and any other governing document in the hierarchy) should be explicitly defined for the entire act in Chapter 1, Article 2 so everyone knows what is meant. There is consensus in practice about what these documents mean, so these cleanup definitions should be uncontroversial.

7. A major cleanup problem is the highest-ranking hierarchy category, 'declaration'.

> **§4135.** "Declaration" means the document, however denominated, that contains the information required by Sections 4250 and 4255.

§4250 and §4255 have no requirements for any information for any pre-1986 declaration. §4250(a) specifies declaration requirements for post-1985 declarations. §4255(a) requires declarations filed after 2004Jan1 to contain a specified statement, if in an airport influence zone. §4255(c) requires post-2005 declarations to contain a specified statement if in San Francisco Bay Conservation and Development Commission jurisdiction §4250(b) specifies that "The declaration may contain any other matters the declarant or the members consider appropriate.", though it requires nothing.

Thus there are literally no statutory content requirements for a pre-1986 declaration, though DS applies to these CIDs. (See the 2012Dec7 response to MM12-48s1.)

Nor is this problem solved by §4250 mention of a 'declarant'. §4130 allows the signator of the 'declaration' to be the declarant, if there is no stated 'declarant' in the filing. §4200 requires a declaration be filed, so any filed document with a signature would satisfy the literal §4135 definition of a 'declaration' for pre-1986 CIDs.

By placing this unknown document at the top of the precedence hierarchy, §4205 exposes Owners in pre-1986 CIDs to unnecessary lawsuits. An aggressive attorney firm would use the definition gap in uncleaned §4205 to provoke lawsuits against Owners. Any filed and signed letter, notice, statement of water rights, deed, etc. would be argued to qualify as a 'declaration' and trump all other governing documents.

For cleanup purposes, note that under the statutory definition of 'declaration' for pre-1986 CIDs, other signed and filed documents quality. 'Bylaws' qualify. 'Rules' qualify. 'Regulations' qualify. 'Articles Of Incorporation' qualify. An attorney firm so inclined would argue that via §4205, filed bylaws or regulations (as 'declarations') trump CC&Rs, which are not mentioned in §4205.

Also note that §4265 specifies that CIDs can be "created with deed restrictions". An attorney firm so inclined would use that wording to argue that a deed with restrictions created the CID, and serves as the statutory-required declaration. The firm would then argue that the deed and whatever restrictions it has takes

precedence over Articles Of Incorporation/Association, CC&Rs, Bylaws, Operating Rules, and Regulations.

A firm would claim that per §5975, equitable servitudes can no longer be enforced by Owners. ("Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest....")

Similarly, an attorney firm so inclined would argue that since all signed and filed governing documents qualify as a declaration, no documents satisfy §5975(b) requirements for 'a governing document other than a declaration' for Owners to have power to enforce the governing documents. ("A governing document other than the declaration may be enforced...by an owner of a separate interest against the association.")

To preserve sanity, prevent lawsuits, and allow Owners and courts to use the intended hierarchy, H-855 should define for pre-1986 CIDs what §4205 means by the word 'declaration' at the top of the ladder.

8. Unclean §4205 exposes Owners to lawsuits under other DS sections using incompatible wording.

Properly interpreting §4205's hierarchy is further obscured by the phrases "Notwithstanding a {or 'any'} contrary provision in {or 'of'} the governing documents" (§5300, §4765, §5100(c)) and "Notwithstanding any provision{...}of the governing documents to the contrary" (§4230, §5625, §5710(c), §5715, §5720).

How are Owners or appellate courts to interpret the combination of §4205 with these sections? The court would be required to give literal meaning to each word if possible. An attorney firm so inclined would argue that §4205 is general and other provisions are specific, because 'contrary' is a specific type of 'conflict'. Thus the word 'contrary', not 'conflict', controls. Under that 'legal theory', conflicting governing document provisions would override DS if they are not 'contrary', relying on a hand-picked dictionary to define 'contrary'.

Cleaning up §4205 to the point that Owners and courts interprets §4205 as intended requires that 'conflict' (or 'inconsistency') be explained in the context of the 'contrary' phrases. Are the 'contrary' phrases merely surplusage? If they are, cleanup should remove them as redundant, to avoid lawsuits. If not surplusage, what does 'conflict' mean that is different from 'contrary'? Code and comments should explain that.

9. A similar, though less extreme, problem occurs in the phrase, with variations, "Notwithstanding any...provision of the governing documents" (§4225, §4235, §5100).

Is this phrase surplusage? If so, cleanup legislation should remove it. If not, cleanup should explain how those phrases differ from what 'controls' in §4205.

10. A more extreme version is "Notwithstanding the provisions of the declaration" (§4790, §4145).

§4790 and §4145, relating to telephone wiring in the common area, introduced a new limitation of conflict to only be with the declaration. As with #8 above, firms with a financial interest in doing so would argue that this wording variation is 'more specific' and thus controls over 'the more general' §4205.

Owners might argue that this section applies by extension and context to other separate-interest-specific resources, like RV parking spaces in a housing complex, common area storage lockers in vacation CIDs, and food in common area freezers in recreation CIDs. Since any signed and filed document arguably qualifies for a pre-1986 'declaration', cleanup language should clarify what is intended by the 'declaration' in §4205 and how that definition differs, if it does, from §4790 and §4145.

Summary and Conclusions.

MM12-49 begins and does not complete the cleanup of §4205.

Replacing 'inconsistency' with 'conflict' improves clarity and reduces lawsuits, though only in part.

The 'harmonize' and 'conflict' definitions of 100+ years of Supreme Court cases should be included.

§4205 identifies the 'trump' order (precedence hierarchy) for 4 governing documents. Some would exploit the lack of complete definitions to argue that Davis-Stirling identifies 6 types, not 4. The master definition article (Chapter 1, Article 2, §4075-§4190) is incomplete for these 4 documents. Other DS provisions define governing documents indirectly or for an isolated section or article, not for the entire act, as in §4075-§4190. §4205 cleanup legislation should include definitions to reflect its apparent intent to put all governing documents in a mutually exhaustive list of 4, so no documents fall through the cracks and invite lawsuits.

The vaguest document in the §4025 list, a 'declaration', is on the top rung of the hierarchy ladder. As reviewed in my 2012Dec7 response to MM12-48s1, Davis-Stirling has no content requirements for any pre-1986 declaration. That ambiguity could be the basis for lawsuits claiming an unrelated filed and signed

document is a 'declaration' and thus trumps all other governing documents. This is clearly not the intent. §4205 cleanup should define for pre-1986 CIDs the critical document on the top rung of the ladder.

Proposed H-855 needs to be made consistent with proposed H-858. Though inconsistent, both are on the 2012Dec13 agenda for final approval. §4205 in H-855 does not recognize CC&Rs as a governing document, though H-858 in MM12-48 requires CC&Rs, which have never been required for pre-1986 DS CIDs.

The word 'controls' needs to be reconciled with DS wording for 'Notwithstanding contrary provisions in governing documents' and similar phrases, which occur with frequency in many lawsuit-provoking variations.

The cleanup needed is not to change any substance, merely to define what is already meant to prevent lawsuits, and reconcile differences in wording produced by the patches-on-patches character of current DS.

There may be a natural reluctance to do this cleanup work. This same reluctance has led to patches that needlessly introduce new and inconsistent wording, special definitions of governing documents for one section or one article, and open the door to more lawsuits against the people the law was designed to protect.

Attorney firms who exploit ambiguities are unlikely to place the ambiguities in the public record in advance, where the ambiguities can be removed. It is not in their financial interest to do so. How many of the above ambiguities were clear to Commissioners prior to this document? If the record is any indication, few, if any.

Would there be significant controversy on this needed cleanup? Probably not. There is much agreement in practice about what constitutes CID governing documents and how they are distinguished. Even with current ambiguities, most attorney firms operate ethically, using consensus practice to settle association-member disputes without lawsuits. Fewer law firms maximize revenue by using ambiguities to fan neighborhood squabbles into needless lawsuits over governing documents.

Is the wording cleanup of Davis-Stirling inconsistencies worth the trouble? Let's consider.

Cleaning up §4205 and its 'inconsistent' neighboring provisions does more than reduce court cases that clog courts and waste society's resources. It implements America's founding ideals.

Of all laws passed by the legislature, which law are people most likely to read? The Davis-Stirling Act.

Why? Because it directly affects them, their families, their monthly budget, their cat, their neighbors, and the amount of stress in their lives.

Of all the laws passed by the legislature, on which law are people most likely to be required to make legal judgments? The Davis-Stirling Act.

Why? Because they are most likely to serve on the board of directors of their community association.

It is here that they are required, with a fiduciary duty, to read the law and follow it to resolve disputes.

It is under Davis-Stirling that everyday Americans, untrained in the law, must make legal judgments to apply the law as written, not as they would like it to be.

It is under Davis-Stirling that everyday Americans face the need as elected representatives to make legal judgments about differences of opinion and dissent, and to put into daily practice America's democratic strength as a nation to operate in a free and respectful marketplace of ideas and ideals.

America's founders envisioned a lawmaking and law-abiding process where everyday Americans elect citizen representatives like themselves to write and implement laws leading to better lives and better society.

Congress exited this vision to become a venue of wealthy career politicians who bear little resemblance to the people they represent. Davis-Stirling associations have not.

Here everyday Americans 'take a turn' at being a volunteer director and representing others.

It is a worthy cleanup goal to make existing DS law so clear that those protected by the law can read it, understand it, and apply it confidently and correctly, without lawsuits to resolve unintended ambiguities.

In that context, is it worth the work required to clean up §4205 and its neighboring provisions? Yes.

Respectfully submitted,

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