

Memorandum 2007-55

**Statutory Clarification and Simplification of CID Law
(Comments on Tentative Recommendation)**

This memorandum continues the discussion, commenced in Memorandum 2007-47 and its supplements, of the comments received in response to the Commission's tentative recommendation on *Statutory Clarification and Simplification of CID Law* (June 2007).

The Commission has received more letters commenting on the tentative recommendation. They are attached in the Exhibit as follows:

	<i>Exhibit p.</i>
• Stephen W. Dyer, Monterey (11/9/07)	8
• Michael W. Rabkin, Community Associations Institute, California Legislative Action Committee ("CAI-CLAC") (10/31/07)	2
• John Raniseski & Jim Viele, Sun City Roseville (11/16/07).....	13
• Mel Standart (10/26/07)	1

In this memorandum, the staff has continued the general approach described in the First Supplement to CLRC Memorandum 2007-44:

- **The memorandum discusses comments that identify a substantive problem with the proposed law.**
- **Issues that clearly require Commission discussion are marked with the "☒" symbol.** All other issues are presumed to be noncontroversial "consent" items. The staff will not discuss consent items unless a Commissioner or a member of the public requests discussion at the meeting.
- Comments identifying a substantive problem with *existing* law are not discussed in the memorandum unless they are offered in response to a question asked by the Commission in the tentative recommendation. Substantive problems with existing law are being cataloged for possible later study.
- Comments pointing out technical problems or suggesting stylistic improvements will be evaluated by the staff and addressed in preparing the staff draft final recommendation (which will be presented in a later memorandum).

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.

- Comments in support of an element of the proposed law are not discussed unless we also received opposition to the element, in which case both views are discussed.

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

COMMENTS ON MATTERS DISCUSSED IN PRIOR MEMORANDUM

Some of the comments attached to this memorandum discuss matters that were discussed in the First Supplement to CLRC Memorandum 2007-47. Those comments are summarized below, with references to the related discussion in the earlier memorandum:

“Board Meeting”

CAI-CLAC believes that the term “board meeting” should not be expanded beyond the language of existing law. See Exhibit p. 2. That position is consistent with the staff’s recommendation. See First Supplement to CLRC Memorandum 2007-47, pp. 28-30.

“Member”

CAI-CLAC believes that the proposed definition of the term “member” should be expanded to include non-owners who qualify as a member under the governing documents. See Exhibit p. 2. The Commission considered that issue and made the change requested by CAI-CLAC. See First Supplement to CLRC Memorandum 2007-47, pp. 25-26; Minutes (Oct. 2007), p. 4.

Member Bill of Rights

CAI-CLAC believes that the heading reserved for the “Member Bill of Rights” in the proposed law should be deleted. “It is not necessary, would be redundant and would lead to frivolous litigation by owners.” See Exhibit p. 3. That issue is discussed in the First Supplement to CLRC Memorandum 2007-47, pp. 26-27.

☛ Limitation of Rights

CAI-CLAC believes that the scope of proposed Section 4420, which would provide that certain statutory rights cannot be limited by contract or the governing documents, should be narrowed to the scope that it has under existing law (i.e., it should only apply to record inspection rights). See Exhibit p. 3. Under the proposed law, the section also applies to provisions governing meetings, elections, record-keeping, and other miscellaneous governance provisions. The general issue of the scope of proposed Section 4420 is discussed in the First Supplement to CLRC Memorandum 2007-47, pp. 27-28.

CAI-CLAC’s main concern seems to be that the proposed provision might be construed as prohibiting a settlement agreement in which a member waives an individual right. See Exhibit p. 3. **If that is the concern, it might be possible to address it narrowly, by adding language along these lines:** “Nothing in this section precludes a member from expressly waiving an individual right provided in this chapter.”

The point of proposed Section 4420 should be to prevent an association from evading its statutory duties generally. It should not preclude the voluntary waiver of an individual right.

Executive Session

CAI-CLAC believes that proposed Sections 4525(a) and 4540(a) imply that an executive session may only be conducted as a part of a regular board meeting, rather than as a stand-alone meeting that is conducted entirely in closed session.

See Exhibit p. 4. Curtis Sproul has raised the same substantive concern. See CLRC Memorandum 2007-47, Exhibit p. 244.

That concern probably arises from the use of the word “adjourn” in proposed Section 4540 (e.g., “The board shall adjourn to executive session to consider....”). That implies adjourning *from* an open session *to* a closed session.

The word “adjourn” is used in existing Section 1363.05(b). However that provision also directs a board to *meet* in executive session in some circumstances. There is no uniformity in the existing terminology.

The staff sees no reason why a board should be required to meet in open session before meeting in closed session. **To avoid that implication, the staff recommends that proposed Section 4540 be revised as follows:**

4540. (a) The board may ~~adjourn to~~ meet in executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, an assessment dispute, or personnel matters.

(b) The board shall ~~adjourn to~~ meet in executive session to consider member discipline or an assessment dispute, if requested to do so by the member who is the subject of the matter to be considered.

(c) The board shall ~~adjourn to~~ meet in executive session to consider a request for a payment plan made under Section 5620 or to make a decision on whether to foreclose on a lien under Section 5655.

(d) Notwithstanding Section 4525, if the board meets in executive session to consider member discipline, an assessment dispute, or a request for a payment plan for overdue assessment debt, the member who is the subject of that matter may attend and speak during consideration of the matter.

CAI-CLAC also suggests that a member who is the subject of an executive session should be permitted to speak (as under proposed Section 4540(d)), but should not be allowed to observe deliberations. See Exhibit p. 3. That would appear to be a substantive change to existing law. See Section 1363.05(b) (“the member shall be entitled to attend the executive session.”). **The issue should be noted for possible future study.**

Minutes of Board Meeting

CAI-CLAC objects to proposed Section 4550(b), which would provide that the minutes of a meeting held in executive session shall “include *only* a general description of the matter considered in executive session.” See Exhibit p. 4 (emphasis in original).

CAI-CLAC makes a good point. Existing law does not use the word “only.” It requires a “general description” but does not expressly preclude other content relating to the executive session. It is possible that there is other content that could be usefully provided without abrogating the confidentiality that executive session is intended to preserve.

In order to avoid changing the law in a way that might cause problems for associations, the staff recommends that the word “only” be deleted from proposed Section 4550(b). That would be consistent with existing law.

Civil Action to Enforce Meeting Rules

Section 1363.09 provides for judicial enforcement of statutory duties relating to notice of a board meeting, open meeting requirements, executive session requirements, emergency meetings, and minutes. That section would be continued in proposed Section 4555, with one significant change. The scope of the provision would be widened to cover a small number of additional provisions governing board meetings. Specifically, the judicial remedy would also apply to a violation of proposed Section 4505 (convening or adjourning meeting), 4510 (quorum), 4515 (board action), 4530 (meeting location), 4535 (teleconferencing), and 4545 (action without meeting).

CAI-CLAC opposes that expansion. See Exhibit p. 4.

Do we really want members to be able to sue the association, and force a volunteer board to have to defend the association, because a member claims the meeting was not held as “close as practicable” to the association?

Id.

The staff sees no policy justification for providing a judicial remedy for some violations of the meeting statutes, but not others. To answer the specific question posed, there may well be circumstances in which a member should be able to sue to enforce the requirement that meetings be held within the association. Litigation may be the only way to enforce that rule.

What’s more, general law permits a petition for a writ of mandate to compel a corporation to perform a statutory duty. Code Civ. Proc. § 1084. For that reason, an association already faces the possibility of litigation over the matters that would be brought within the scope of proposed Section 4555.

The staff recommends that the scope of proposed Section 4555 be preserved as drafted. The change from existing law is modest and salutary.

Teleconference

Proposed Section 4590 authorizes the use of teleconferencing at a member meeting.

CAI-CLAC believes that the section is unclear as to whether a board *must* permit a member to participate by teleconference. See Exhibit p. 5.

This issue is discussed in the First Supplement to CLRC Memorandum 2007-47, pp. 43-44. In that discussion, the staff recommended that the Comment to Section 4590 be revised to emphasize that the use of teleconferencing is voluntary.

However, the repeated concerns regarding this issue suggest that the provision may not be sufficiently clear. **The staff now recommends that proposed Section 4590(a) be revised as follows:**

4590. (a) If all of the following conditions are satisfied, a board may elect to permit a member who is not physically present at the noticed location of a member meeting ~~may~~ to participate in the meeting by teleconference:

That should make clear that the choice is optional.

CAI-CLAC is also concerned that the proposed law would allow the votes of those who are participating by teleconference to be cast orally. See Exhibit p. 5. The Commission considered that question at an earlier meeting and concluded that a member who voluntarily chooses to participate in teleconferencing, knowing that his or her vote will be cast orally, is not harmed. Voter secrecy protects the person casting the vote. If a member is willing to waive secrecy in order to participate by teleconference, there is no obvious policy reason to prevent the member from doing so.

Finally, CAI-CLAC wonders whether “the entire membership” of an association could choose to participate in a meeting by teleconference, so as to avoid the secret voting rules. See Exhibit p. 4. The staff sees that as very unlikely.

Special Meeting of Members

Corporations Code Section 7511(c) requires that a board distribute notices of a properly called special member meeting, within 20 days after receipt of a request to do so. If the board fails to comply, the requesting member may set the meeting and distribute the notices. Alternatively, the member may petition the court for a summary order compelling the board to set the meeting and distribute notices.

The “self-help” portion of that rule would be continued in proposed Section 4600(c). In addition, the proposed law would require the association to reimburse a member for the cost of distributing notices under that section. That makes sense as a matter of policy. The cost should be borne by the association.

However, CAI-CLAC opposes that change in the law, arguing that it “will just result in disputes concerning the date of delivery of the notice.” See Exhibit p. 5. Perhaps that prediction will prove correct. It seems more likely that an association receiving a request for a special meeting would work closely with the members making the request to be sure that there is no miscommunication as to the distribution of notices. A 20-day window should provide enough time to accomplish that.

The staff believes that the proposed change in the law is salutary and should be preserved. An association should not be able to avoid the cost of notice distribution through intransigence. An association that acts in good faith should be able to avoid disputes.

Court Ordered Modification of Meeting Requirements

Proposed Section 4620 would allow for a petition for judicial modification of “any requirement of this part or the governing documents that governs the conduct of a member meeting or a written ballot.” That relief would be available where a meeting requirement is making it impractical or unduly difficult to make a decision and modification of the meeting requirement would be fair and equitable. The proposed section would combine elements of Section 1356 and Corporations Code Section 7515. It is discussed in the First Supplement to CLRC Memorandum 2007-47, pp. 46-49.

CAI-CLAC believes that the section should be revised to make clear whether the court can modify a “lender approval requirement” in the association’s governing documents. See Exhibit p. 5. An entity that lends money to an association may require, as a condition of the loan, that the lender approve certain types of association decisions. That safeguards the lender’s security.

It does not appear that proposed Section 4620(b) could be used to circumvent such a requirement. It would allow for court modification of meeting requirements if “the court determines that it would be impractical or unduly difficult for the association *to conduct a member meeting or otherwise obtain the consent of the members....*” (Emphasis added.) That provision does not seem to encompass difficulty in obtaining the consent of a *non-member* third party.

Nor should it. The typical problem involved in obtaining *member* consent is the lack of a quorum resulting from member apathy. Failure to obtain the consent of a lender or other third party whose consent is required is unlikely to be the result of apathy on the part of the third party. It is far more likely that the third party simply does not agree to the proposed action. In that situation, the court should not circumvent the third party approval requirement.

The staff recommends that the following language be added to the Comment to proposed Section 4620:

Subdivision (b) authorizes court modification of meeting requirements if it is impractical or unduly difficult to obtain the consent of the members. This section cannot be used to modify a provision of the governing documents or a contract that expressly requires the consent of a non-member in order to make a decision.

Counting Ballots

CAI-CLAC believes that the meeting held to count ballots in a member election should not be “open to the public.” See Exhibit p. 6. This issue is discussed in the First Supplement to CLRC Memorandum 2007-47, p. 58.

Scope of Secret Ballot Procedure

In the First Supplement to CLRC Memorandum 2007-47, at pages 55-56, the staff recommended adding language to proposed Section 4640 to make clear that any member vote that is *not* governed by the new secret ballot voting procedures is still covered by the relevant provision of the Corporations Code.

Sun City opposes that recommendation. They feel that every member election should be covered by a single statutory voting procedure. See Exhibit p. 14.

The staff agrees that it would make sense to use a single procedure. However, the staff also recommended that language be added to proposed Section 4640 to expressly authorize the use of the secret ballot procedure in any election, so long as the governing documents expressly provide for use of that procedure. First Supplement to CLRC Memorandum 2007-47, pp. 54-55. That change would allow any association to choose to use the statutory procedure in all elections, without requiring it. **The staff still recommends that approach as striking the best balance between preservation of existing law and enhancing association flexibility.**

Judicial Action to Challenge Election

CAI-CLAC asserts that the proposed law would extend the time for a judicial challenge to a member election, from 9 months to one year. See Exhibit p. 6.

That is incorrect. The one-year period for bringing such an action is drawn directly from Section 1363.09(a).

INSPECTION OF RECORDS

Existing law includes fairly extensive record inspection provisions. See generally Section 1365.2 Those provisions would be continued in proposed Sections 4700-4750.

Scope of Inspection Right

Proposed Section 4700 would define the scope of association records that are subject to inspection. We received comments on a number of issues relating to that section:

Governing Documents

Proposed Section 4700(a)(1) would provide for inspection of the “governing documents and any other document that governs the operation of the common interest development or its association.” Jeffrey Barnett questions the need for the catch-all language in that provision. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 52. It was added because the proposed law would delete an equivalent catch-all from the definition of “governing documents” in proposed Section 4150.

In the First Supplement to CLRC Memorandum 2007-47, the staff recommended restoring the catch-all to Section 4150 and deleting it from Section 4700. **That would address Mr. Barnett’s concern.**

Disclosure of Email Addresses

Proposed Section 4700(a)(2) would provide for disclosure of the membership list, including any member email addresses that are in the association’s records.

Bob Sheppard suggests that a member email address should not be disclosed unless the member expressly consents to disclosure. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 8. CAI-CLAC makes the same point. See Exhibit p. 6.

That concern would be partially addressed by proposed Section 4715, which allows a member to opt out of the membership list entirely. Under that section, a member who does not want to receive communications directly from other members can simply opt out. That would also block access to the email address.

Sun City is concerned that a provision requiring maintenance of an email list would impose an expensive burden on a large association, given the volatility of email addresses. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 156.

Section 4700(a)(2) is not intended to mandate that certain records be created or kept. It merely lists the records that are subject to inspection, if they exist.

The staff recommends that language be added to the Comment to emphasize that point.

Written Correspondence

Proposed Section 4700(a)(13) would provide for disclosure of:

Written correspondence of the association, other than correspondence that relates to personnel matters, member discipline, an assessment dispute or a request for a payment plan for overdue assessments.

That would be a new provision.

Anthony Brown believes that the scope of the proposed provision is too broad. In particular, he is concerned about its application to email. Email inspection could cause problems, due to the casual way in which many people use the medium. Email often contains statements that would never be included in a more formal communication. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 34.

Beth Grimm also finds the provision to be problematically broad:

This is really not a good idea. What about letters to and from owners complaining about neighbors, letters about current address or location of a member, letters requesting personal information in case of emergency, and letters of complaint that may trigger retaliation if revealed. The association may receive communications of this nature that do not lead to any of the above, yet since they are received, must be retained in files. There are too many subjects that could be covered in written correspondence that would disclose personal information that other owners are not entitled to or lead to retaliatory conduct or be used for some improper purpose. This section (13) should be replaced with: "Written correspondence

relating to the member who is requesting information, limited to correspondence to and from said member.”

I think it better yet that the entitlement of owners be limited to FINANCIAL records and information and official business (limited to minutes and resolutions, etc.) of the HOA. Opening the door to other association records is way “out there” and can trigger additional unnecessary expense and battles. I believe that an owner can subpoena records related to any matter in any court proceeding, including small claims actions, that pertain to their particular dispute.

See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 112.

CAI-CLAC is concerned that a request for correspondence would be too burdensome.

It could take hours, if not days, to gather and, if necessary, redact all of the correspondence sent and received ... over the past 3 fiscal years, especially in a large association, and the most an association could charge to gather this information is \$200.00 ..., which seems unfair.

See Exhibit p. 6.

The Commission added proposed subdivision (a)(13) in response to a comment of a homeowner who claimed that his association had received notice from a county official of a flood risk but had not informed the membership or taken necessary precautions. A right to inspect general correspondence could have helped the homeowners in that case.

Nonetheless, the objections to the proposed rule are reasonable. Given the lack of support for the proposed rule, **the staff recommends that it be deleted from the proposed law.** The issue could be revisited as part of a separate study of record inspection issues.

Board Approval of Contract

Proposed Section 4700(a)(9) continues language providing for inspection of “written board approval of a vendor or contractor proposal or invoice.” The Commission was unsure of the purpose of that language. It seems likely that such an approval would be recorded in the minutes rather than in a separate writing. A note following proposed Section 4700 asked for comment.

The response was mixed. Some comments suggest that the language serves no purpose and could be deleted. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 136 (Trudy Morrison), 157 (Sun City).

Others believe that board approval of a contract might be expressed in a separate writing, and should be subject to inspection if it is. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 145 (Peter Wilke), 223 (Janet Shaban).

The staff recommends that the provision be kept. At worst it serves no purpose. If, on the other hand, it does sometimes serve a purpose, it should not be deleted.

Older Records

Proposed Section 4700(b)(1) would provide as follows:

Notwithstanding subdivision (a), a member may not inspect the following association records:

(1) A record that was prepared three or more fiscal years before the fiscal year in which the inspection request is delivered. This paragraph does not apply to the governing documents or the minutes of a member meeting, a board meeting, or a meeting of a committee that exercises a power of the board. The governing documents and meeting minutes must be made available for inspection permanently.

The provision continues existing law except that the governing documents would be permanently subject to inspection.

Bob Sheppard suggests that the three year time limit is unnecessary and should be deleted. Proposed Section 4775 would provide rules for how long documents must be retained. If an association actually has a document, either pursuant to Section 4775 or voluntarily, it should be subject to inspection. He sees no need for the separate three year limitation on inspection. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 8.

Sun City takes the opposite position, but does not explain why. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 158. The concern may be that it would be costly to keep more than three years worth of records on hand for inspection. The fact that an association may keep records longer than three years should not impose the additional burden of keeping those older records in easily accessible form.

The staff recommends that the existing limitation be retained, as in the proposed law.

☞ *Privileged Contracts*

Existing law generally exempts “privileged” records from member inspection. See Sections 1365.2(a)(1)(D) (providing for inspection of “executed contracts not otherwise privileged by law”); 1365.2(d)(1)(C) (authorizing redaction of information that is “privileged under law”); 1365.2(d)(1)(E)(iv) (authorizing redaction of information from executive sessions “except for executed contracts not otherwise privileged”). The proposed law continues the substance of those rules. See proposed Section 4700(b)(2).

Section 1365.2(d)(1)(E)(iv) goes on to provide: “Privileged contracts shall not include contracts for maintenance, management, or legal services.” The proposed law does not continue that language.

Kazuko Artus objects to that omission:

It should be expressly stated that contracts for maintenance, management, or legal services are not privileged, as done in § 1365.2(d)(1)(E)(iv), and therefore that the association must disclose such contracts.

See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 83.

The staff has doubts about whether Section 1365.2 was intended to override existing law on evidentiary privileges, but it could have that effect if a contract includes information that would ordinarily be privileged (as might be the case in a legal services contract). **That issue should be noted for possible future study.**

For now, the most conservative approach would be to add the existing language to proposed Section 4700(b)(2). However, the language should probably be narrowed in two ways, to limit any unintended effect on the general law of privileges. First, it should be limited to a contract involving an association. Second, it should be limited to the record inspection provisions. That would guarantee that a member could obtain a contract, but would not defeat the association’s privilege as to non-members who might have an interest in seeing the association’s contract.

The staff recommends that proposed Section 4700(b)(2) be revised as follows:

(b) Notwithstanding subdivision (a), a member may not inspect the following association records:

...
(2) A record that is protected from disclosure by an evidentiary privilege. Examples include documents subject to the attorney-client privilege or relating to litigation in which the association is or

may become involved. For the purposes of this section, a contract to provide maintenance, management, or legal services to an association is not privileged.

“Enhanced” Association Records

Section 1365.2 differentiates between “association records” and “enhanced association records.” The latter is described as follows:

“Enhanced association records” means invoices, receipts and canceled checks for payments made by the association, purchase orders approved by the association, credit card statements for credit cards issued in the name of the association, statements for services rendered, and reimbursement requests submitted to the association, provided that the person submitting the reimbursement request shall be solely responsible for removing all personal identification information from the request.

Section 1365.2(b)(2).

It appears that the only *intended* purpose for the distinction is that the law allows for the reimbursement of an association for the cost of redacting enhanced association records, but apparently does not allow for redaction costs incurred with respect to other “association records.” The policy justification for that rule is not clear. If a record needs redaction, the association will bear the expense of doing so, regardless of the nature of the record.

The proposed law would allow reimbursement for any redaction required under the statute. See proposed Section 4720. For that reason, the proposed law would not continue the distinction between “association records” and “enhanced association records.”

That simplification would provide other benefits. As currently drafted, the distinction is potentially confusing. Many provisions of the record inspection provisions apply by their terms to “association records” and do not reference “enhanced association records.” That could suggest that those provisions do not apply to enhanced association records, even though there would be no clear policy reason for drawing such a distinction. See, e.g., Section 1365.2(b)(2), (c)(1)-(3), (d)(1), (e)(1)-(2), (f), (i), (j). The proposed law would eliminate that point of potential confusion.

The Commission received some comments suggesting that the failure to continue the distinction between association records and enhanced association records would affect the scope of what records are subject to inspection. See, e.g., First Supplement to CLRC Memorandum 2007-47, Exhibit p. 65 (Jerome

Simonoff), 145 (Peter Wilke). **That concern is misplaced.** All of the types of records described as “enhanced” association records have been continued in proposed Section 4700 as records that are subject to member inspection. See proposed Section 4700(a)(6).

Inspection Procedure

We received a number of comments on proposed Section 4705, which would provide a general procedure for record inspection.

Statement of Purpose

Proposed Section 4705(a) would require that a member who requests records do so in writing. The member would be required to include a statement of “purpose for the inspection that is reasonably related to the member’s interest as a member.” Peter Wilke objects to that requirement. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 145.

Existing law requires a statement of purpose from a member requesting a copy of the membership list. See Section 1365.2(a)(1)(I)(ii); Corp. Code § 8330(a). Proposed Section 4705 merely extends that requirement to a person requesting other types of association records.

That expansion would not impose a new substantive limitation. Existing law already provides that accounting records and minutes may only be inspected for a purpose reasonably related to a member’s interest as a member. Corp. Code § 8333. The proposed law would merely provide a uniform procedure to implement that existing limitation.

If a statement of purpose were required only when requesting the membership list, as under existing law, members might erroneously infer that other records can be inspected and copied for any purpose. **The staff recommends that proposed Section 4705(a) be retained as drafted.**

Electronic Records

Existing law allows for the inspection or copying of association records in electronic form, so long as they can be provided in a format that allows redaction but “prevents the records from being altered.” Section 1365.2(h). That quoted language was not continued in the proposed law. A note following Section 1365.2 asked about the purpose of the limitation and whether it should be retained.

All of the comments received on that point recommend preserving the limitation. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 136 (Trudy Morrison), 158 (Sun City), 247 (Curtis Sproul).

Although the staff has doubts that any electronic format is immune to alteration, the commenters convincingly argue that the Acrobat “PDF” format can be used easily to comply with the spirit of the requirement. The requirement would help to prevent the alteration of records for improper purposes.

The staff recommends that the limitation in existing law be continued in proposed Section 4705(d):

(d) At the member’s request, a copy of a specifically identified record shall be delivered to the member by individual delivery (Section 4040). If the record exists in electronic form, the association shall comply with a member request that the record be provided in electronic form. Notwithstanding the other provisions of this subdivision, the association may not provide a record in electronic form if the form of the record prevents a necessary redaction or allows the record to be altered by the requesting member.

Association Without Business Office

Proposed Section 4705(c) would provide for inspection of records in the association’s business office, if there is one. If there is no business office, the association and the requesting member shall agree to a location for record inspection. As an alternative, the member may request *copies* of records. Proposed Section 4705(d). The member would bear the cost of providing the copies. Proposed Section 4720(a). A note following proposed Section 4705 invited comment on whether this arrangement could be improved on.

Peter Wilke suggests that associations should be required to maintain a detailed listing of all records, so that members can identify records of interest and request copies. If the association has no business office, the association should bear the cost of providing copies. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 145.

The staff recommends against that proposal. It would add significant costs to associations, especially small associations (which are less likely to have a dedicated business office).

Sun City is concerned that direct inspection of records involves unwanted costs. An association must supervise the inspection, in order to safeguard the records. Direct member access to association copying equipment could be disruptive. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 158.

The staff recommends against limiting direct inspection of records. That right is established in existing law. Nothing in the proposed law or existing law requires that an association allow a member to use the association's copying equipment.

Curtis Sproul sees no need to change the record inspection scheme. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 247. **The staff agrees.**

Redaction

Existing law provides for redaction of certain personal and privileged information before records may be inspected. That requirement would be restated in proposed Section 4710, with one substantive change. Under existing law, redaction appears to be *optional*. The proposed law would make it *mandatory*. That change makes sense in light of the provision expressly recognizing that a person may, in some circumstances, be liable for a failure to redact. See proposed Section 4745.

A note following Section 4710 asked for comment on whether redaction should be mandatory.

The Commission received a number of comments supporting mandatory redaction. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 124 (Ralph Cahn), 136 (Trudy Morrison), 185 (California Association of Realtors), 223 (Janet Shaban), 247 (Curtis Sproul).

There was no support for an optional redaction rule.

The staff recommends that the mandatory redaction language in the proposed law be retained.

Fees

Proposed Section 4720 continues existing rules for member reimbursement of an association's inspection-related costs. It would make one substantive change from existing law. A member would be required to reimburse an association for the required redaction of *any* requested document. Under existing law only the cost of reimbursing "enhanced association records" is reimbursable. Section 1365.2(c)(5). That distinction is discussed more fully above.

The Commission did not receive any comments objecting to that expansion of the reimbursement of redaction costs.

We did receive comments objecting that the limits on the reimbursement of redaction costs are unrealistically low and can leave the association with unreimbursed expenses. See First Supplement to CLRC Memorandum 2007-47,

Exhibit pp. 34 (Anthony Brown), 93 (Beth Grimm), 136 (Trudy Morrison), 158 (Sun City). The commenters may well be correct. However, the reimbursement limits only became operative on July 1, 2006. Section 1365.2(o). **The staff recommends against second-guessing such a recently approved legislative policy.**

CAI-CLAC suggests that the provision authorizing reimbursement for redaction should be expanded to include reimbursement for time spent *retrieving* records. See Exhibit p. 6. That would be a significant change in the substance of the recently enacted rule. **The staff recommends against making that change.**

CAI-CLAC also asks for clarification as to what constitutes a single “written request” for the purposes of the rule capping reimbursement at \$200 per written request. *Id.* A member might request different types of records in a single writing (e.g., the check register and all current contracts for services). Is that one written request or two?

While it might be fairer to establish some way of splitting requests so that very large requests are treated as multiple requests for the purposes of reimbursing costs, the staff does not believe that existing law supports that interpretation. It seems fairly clear that a single request for records is governed by the \$200 reimbursement cap regardless of the number and kind of records requested. The staff does not see a significant ambiguity on this issue. Any “clarification” would probably constitute a substantive change in the law. **The possibility of refining the reimbursement provisions so that they operate more consistently as applied to large and small requests should be noted for possible future study.**

Mailing List Opt-Out

Proposed Section 4715 authorizes any member to have his or her name and address removed from the membership list that is available to other members for inspection. A member who requests the membership list may also request that the association mail a document to those members who have opted out of the open membership list. Those provisions continue the substance of existing Section 1365.2(a)(1)(I)(iii).

The proposed law uses the term “redact” in describing the exclusion of information of those who have opted out of the list. That seems to have created a fair amount of confusion about the relationship between the opt-out provision

and the other rules governing redaction of records. See, e.g., First Supplement to CLRC Memorandum 2007-47, Exhibit p. 158.

In retrospect, use of the term “redact” was a poor choice. **The staff will revise proposed Sections 4710(b) and 4715 to remove the “redaction” language, without changing the substance of the provisions.**

Bob Sheppard suggests another clarification. The opt-out provision allows for the omission of a member’s “name and address” but does not specifically mention an email address, which might be included in the membership list. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 8. Nor does it reference a telephone number or other identifying information.

The staff sees no reason for distinguishing between different types of identifying information and recommends that the section be revised to reference the member’s “name and other information.” That would limit access to all information about a member that is included in the membership list.

Curtis Sproul suggests that an association should not be required to mail notices to those who have opted out of the membership list. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 247. The distribution requirement is drawn from existing Section 1365.2(a)(I)(iii), which incorporates the requirement from Corporations Code Section 8330(c). **The proposed change should be noted as a possible topic for future study.**

Permissible Use of Records

Proposed Section 4725(a) states the general limitations on the use of association records:

A member may only inspect and use an association record for a purpose that is reasonably related to the requesting member’s interest as a member. A member may not inspect or use an association record for a commercial purpose.

Curtis Sproul suggests that this general statement should be supplemented with the illustrative list of impermissible uses provided in Corporations Code Section 8338. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 249. The staff believes that this is a good suggestion. It would provide information without changing the substance of existing law. **The staff recommends that the following language be added to proposed Section 4725(a):**

Impermissible use of an association record includes, without limitation, the use of a record without association permission for any of the following purposes:

- (1) To solicit money or property unless such money or property will be used solely to solicit the vote of the members in an election to be held by the association.
- (2) Any purpose that the member does not reasonably and in good faith believe will benefit the association.
- (3) Any commercial purpose.
- (4) The sale of the record to any person.

Curtis Sproul also recommends that the option of mailing notices to the membership list, rather than providing the list to a requesting member, should be more prominently authorized. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 249. CAI-CLAC makes a similar suggestion. See Exhibit p. 6.

The staff believes that the proposed law would provide a balanced approach to protecting records against misuse.

If an association has reason to deny a record request (e.g., a reasonable good faith belief that the records will be used for an impermissible purpose), the association could deny the request for inspection of the records. See proposed Sections 4725(b), 4730. In that case, the association would need to offer to resolve the matter through internal dispute resolution and would be expressly authorized to offer an alternative proposal for achieving the member's purpose. Proposed Section 4715(b). An alternative proposal could include an offer to mail notices on behalf of the requesting member, though that option isn't expressly mentioned.

If the matter is not resolved informally, the member could file an action in court to enforce the record request. Proposed Section 4735. The court would then determine whether there was a good reason to deny the member's request. The court would be expressly authorized to order alternative relief, including an order that the association distribute notices to members on behalf of the requesting member. *Id.*

The staff recommends against adding a provision that would authorize an association, at its discretion, to distribute notices in lieu of giving the mailing list. That much discretion could cause problems in a severely dysfunctional association.

However, there would be no harm in adding language expressly recognizing that mailing of notices could be *offered* as an alternative to providing records

when an association has reason to deny a record request. **To that end, the staff recommends that proposed Section 4730(b)(2) be revised as follows:**

(b) The notice of denial shall include all of the following information:

(1) An explanation of the basis for the denial decision.

(2) An offer to attempt to resolve the matter through the association's internal dispute resolution procedure provided pursuant to Article 2 (commencing with Section 5050) of Chapter 4. The offer may include an alternative proposal for achieving the member's purpose, such as an offer to mail notices to the members on behalf of the requesting member.

Liability

Proposed Section 4745 would provide as follows:

An association, or an officer, director, employee, agent, or volunteer of an association, is not liable for damages that result from a failure to withhold or redact information pursuant to this article, unless the failure to withhold or redact the information was intentional, willful, or negligent.

That provision continues the substance of Section 1356.2(d)(3), without substantive change. A note following proposed Section 4745 asked whether it makes any sense to say that a person is not liable *unless negligent*. If a person can be liable for mere negligence, how is Section 4745 a limitation? In a way, the language could be read as *establishing* liability.

The public response on this issue was mixed. We received comments asserting that the section should be revised to remove negligence as a ground for liability, or deleted as meaningless. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 128-29 (Michael Hardy), 158 (Sun City), 186-87 (California Association of Realtors). Curtis Sproul told the staff informally that he also opposes liability for simple negligence (notwithstanding his written comment, which did not correctly reflect his views). *Id.* at 248.

We also received comments from those who believe that the provision should be continued without change. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 124 (Ralph Cahn), 136 (Trudy Morrison). Mr. Cahn suggested that the change from optional to mandatory redaction would eliminate most of the scope for negligence.

The staff has learned informally that the issue discussed above was expressly raised during the legislative process, but did not result in any change to the

language. This suggests that liability for mere negligence was specifically intended, despite the odd phrasing of the provision.

The staff recommends that the language be continued without change. There is no clear consensus for change, and the rule seems to reflect a deliberate policy choice by the Legislature.

Joint Association

Proposed Section 4750 governs the application of the record inspection provisions. The Commission received a number of comments regarding that provision.

Community Under Developer Control

Subdivision (b) of the proposed section continues a provision exempting some developer controlled associations from the record inspection provisions. A note following proposed Section 4750 asked for comment on the policy justification for the exemption.

The California Association of Realtors recommends that the exemption be deleted. Member interest in good governance isn't diminished during the period of developer control. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 187.

Curtis Sproul maintains that the exemption should be preserved. The record inspection provisions of the Nonprofit Mutual Benefit Corporation Law would still apply. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 248.

Given the lack of any strong consensus for substantive change, **the staff recommends that existing law be preserved.** However, Mr. Sproul's comment raises an important technical point. Under the proposed law, an exempt development would *not* be subject to the record inspection provisions of the Corporations Code. The proposed law expressly supersedes those provisions. See proposed Section 4025. To properly preserve the existing application of the Corporations Code to exempted associations, **the following language should be added to proposed Section 4750(b):**

Notwithstanding Section 4025, a common interest development that is exempt from the requirements of this article pursuant to this subdivision is governed by Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of the Corporations Code.

Joint Association

Proposed Section 4750(c) would provide for application of the record inspection provisions to a joint association:

If two or more associations have consolidated any of their functions under a joint neighborhood association or other joint organization, the members of each participating association shall have access to the records of the joint organization as if they were the records of the participating association.

Jerome Simonoff has raised concern about the phrasing of this section and other provisions relating to joint associations. His concern, and the proposed response to that concern, are discussed in the First Supplement to CLRC Memorandum 2007-47, pp. 39-40.

RECORD KEEPING

Record Retention

Proposed Sections 4775 and 4780 are new. Proposed Section 4775 would establish a statutory duty to maintain certain records. Proposed Section 4780 would provide rules for how long different types of records must be retained. We received a number of comments on those provisions.

Tax Records

Proposed Section 4780(b)(4) would require that tax records be maintained permanently. That requirement was based on information indicating that federal tax records must be retained while material to tax assessment and collection, and that such records can be material, under different fact situations, for three, six, or seven years (or in the case of a fraudulent or unfiled return, perpetually). See Internal Revenue Service, U.S. Department of the Treasury, Publication No. 583, *Starting a Business and Keeping Records 15* (2007).

Don Haney maintains that tax records are generally only required to be retained for three years. He further suggests that tax record retention rules should be set by the responsible agencies, and not in the Davis-Stirling Act. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 256. Others raise similar objections to the permanent retention of tax records. *Id.* at pp. 68 (Ross Snow), 158 (Sun City).

The staff is persuaded that the period for tax record retention should be left to agency rules, which may change over time. The language requiring

permanent retention of tax records should be deleted and the Comment to proposed Section 4750 should be revised as follows:

Comment. Section 4780 is new. Subdivision (a) states a default retention period of four years, but makes clear that other law or an association's governing documents may impose a longer retention period. Associations should determine whether administrative agencies, such as the Franchise Tax Board or Internal Revenue Service, impose longer retention requirements for some records.

Written Correspondence

Anthony Brown notes that proposed Section 4775 does not expressly require the retention of association correspondence. He suggests that it should, because the proposed law would provide for member inspection of association correspondence. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 35. That is a good point. **If the Commission decides to preserve the provision authorizing member inspection of correspondence, proposed Section 4775 should be revised to require the retention of correspondence. Note, however, that the staff has proposed deleting that provision.** See "Scope of Inspection Right" above.

Ballots

Proposed Section 4780 would provide, as a default rule, that records are to be retained for four years unless a longer period applies. Beth Grimm correctly points out that the application of this default rule would be inconsistent with proposed Section 4655(e), which requires the retention of ballots cast in a member election for one year. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 114.

The staff agrees that the shorter period should govern. Proposed Section 4780 should be revised to reflect that special rule for ballots.

Trigger for Four-Year Retention Period

Under Proposed Section 4780, the default four-year retention period is either measured from when a document is executed or, if the document "expires or becomes superseded, four years after the document has expired or been superseded."

Ralph Cahn asks what purpose the latter rule is intended to serve. "Why should a record ... that is superseded be kept longer than one that is still in effect." See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 124.

The intention had been to distinguish between ephemeral documents that do not have lasting legal or operational effect (such as a check) and documents that do have continuing effect until they expire, are superseded, or are otherwise terminated (such as a lease or other contract with a fixed term). The latter class of documents should be retained until their effect terminates, *and then for four years after that date*. The proposed language does not do an adequate job of capturing that concept.

The staff recommends that proposed Section 4780(a) and its Comment be revised to read:

4780. (a) Unless a longer period is required by law or by the governing documents, an association shall retain a record listed in Section 4775 for at least four years after its date of creation, except that a record with continuing legal or operational effect shall be retained during the period of its effect and for at least four years after the termination of its effect.

...

Comment. Section 4780 is new. Subdivision (a) states a default retention period, but makes clear that other law or an association's governing documents may impose a longer retention period. A special rule is provided for records that have "continuing legal or operational effect." Such records might include a lease or other contract with a fixed term.

Joint Neighborhood Association

As discussed above, proposed Section 4750(c) extends record inspection rights to the members of a "joint neighborhood association." Consequently, if two associations combine their operations in a joint entity, the members of each association may inspect the records of the joint organization.

Jerome Simonoff points out that there is no equivalent provision mandating record retention rules for a joint organization. He believes that there should be. He also suggests adding provisions extending other statutory duties to joint organizations, including open meeting requirements, annual reporting requirements, accounting requirements, and maintenance responsibilities. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 63.

Mr. Simonoff makes a good point. However, the staff recommends against making such widely sweeping substantive changes without further opportunity for analysis and public comment. The issue may be more complicated than it first appears. **The general question of the application of the Davis-Stirling Act to joint neighborhood associations should be noted for possible future study.**

Application Date

Proposed Section 4780(c) would provide that the record retention periods do not apply to a record that is discarded or destroyed before the operative date of the proposed law.

Jerome Simonoff is concerned that this will be viewed as a license to destroy records before that date, so as to prevent the operation of the new requirements. He recommends that the provision be revised to make clear that other requirements may govern the retention of a record that is destroyed before the operative date of the proposed law. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 65.

The Comment to proposed Section 4780 already addresses that point: “Subdivision (c) provides that the requirements of this section only apply to a record held by an association at the time that the section became operative. Note that other record retention requirements may govern documents that were held by the association before that date. ” **The staff believes that this language is sufficiently clear and recommends against revising proposed Section 4780.**

Director Inspection

Proposed Section 4785 would continue existing law giving a director an “absolute” right to inspect records and association property. See Corp. Code § 8334. A note following the section asked for comment on whether that right should be limited in any way (e.g., to protect privacy).

Misuse of Director’s Power

Beth Grimm is concerned that a new board member may abuse the inspection power, sharing confidential information with others in violation of the fiduciary duty owed to the association as a whole. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 114. She suggests narrowing the director’s inspection right, so that an individual director’s access to confidential or privileged information can be limited by a majority of the board.

The staff recommends against that approach. It would invite mischief in associations that have politically divided boards. The staff sees no justification for one director being denied information available to other directors. In an apparent example of the problem, Peter Wilke, a director of his association, reports that he has been denied access to association records. *Id.* at 145.

Curtis Sproul raises a concern that is similar to the concern raised by Beth Grimm. A legally unsophisticated person may be elected to a board as part of a political minority and might misuse association records for political purposes, without regard for the duty that a director owes to the association as a whole. *Id.* at 248. Mr. Sproul suggests that the director inspection provision be revised to conform more closely to its source and to add a cautionary caveat. *Id.*

The staff agrees with that suggestion and recommends that proposed Section 4785 and its Comment be revised as follows:

4785. A director shall have the absolute right at any reasonable time to inspect and copy all association books, records, and documents of every kind and to inspect the common area. This right shall be exercised pursuant to the standard provided in Section 7231 of the Corporations Code.

Comment. Section 4785 is comparable to Corporations Code Section 8334. The provision requiring compliance with Corporations Code Section 7231 is a specific expression of a general rule.

The added language would reiterate, in general terms, the duty owed by a director to a corporation. See Corp. Code § 7231(a). It would serve as a reminder of that duty in a situation in which there is perceived to be a particularly high risk of breach. It would not impose any new substantive limitation on the director's powers.

Inspection of Common Area

Bob Sheppard is concerned that an absolute right to inspect the common area could imply a right to enter separate interests to inspect common area (e.g., an exclusive use common area patio that can only be reached through a separate interest). See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 235.

If that right is "absolute," it could trump reasonable restrictions established in the association's governing documents, which are intended to provide a member with advance notice before a director enters a separate interest. It is common for an association's governing documents to include such regulations. See C. Sproul and K. Rosenberry, *Advising California Common Interest Communities* § 7.33, at 471 (Cal. Cont. Ed. Bar, 2007).

Although it would seem to be a change in the law, **the staff recommends that the director's right of inspection be qualified, with the additional revision set out below:**

4785. A director shall have the absolute right at any reasonable time to inspect and copy all association books, records, and documents of every kind and, subject to reasonable limitations in the governing documents, to inspect the common area. This right shall be exercised pursuant to the standard provided in Section 7231 of the Corporations Code.

ANNUAL REPORTS

There are a number of reports that an association must prepare and distribute to the membership on an annual basis. Some of those duties derive from the Davis-Stirling Act, others from the Corporations Code. The proposed law would synthesize those requirements and generalize a cost-saving measure that currently applies to some, but not all, of those reports: An association can choose to deliver notice that a report is available at no cost, rather than delivering the report itself. That would reduce delivery costs by avoiding the need to mail bulky reports to those who have no interest in reading them. See generally, proposed Sections 4800-4830. The Commission received a number of comments on those provisions.

Model Report

Kazuko Artus suggests that a state agency should be required to publish a template that could be used in preparing the required reports. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 73. That would be helpful, but **the staff recommends that the idea be put on hold for now**. There is currently a legislative proposal pending for the creation of a state CID enforcement agency. xxxbill. That would be the natural home for such a duty.

Annual Budget Report

Proposed Section 4800 governs the preparation of the annual budget report.

Don Haney suggests that the budget report and annual financial report are too important for the mailing on demand approach to be used. All members should receive that information routinely.

The ritual of mailing these annual financial reports to all members should not be optional. While most association members may not have the financial literacy to understand the messages contained in these reports, they need them for sales and refinancing events. The associations need to send them to all members to protect themselves from “failing to communicate” assertions. These reports are all part of the “informed consent” chain of information

delivered to members. Members' access to financial information about their association should be transparent, unfettered and passive. The communication burden should lie with the association.

See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 15.

However, the on-demand mailing approach already applies to the annual budget and financial report. Section 1365(d) allows an association to distribute a "summary" of the pro forma operating budget, rather than the budget itself. The same approach is authorized for dissemination of the reserve funding plan. Section 1365(b). Members who would like a copy of the full budget can obtain it at no cost.

Similarly, Corporations Code Section 8321 provides for mailing of the corporate annual report on request, but does not require the mailing of the report to all members as a matter of course.

The staff is not aware of any problems that have arisen as a result of those practices. Nor is there reason to think that new problems would arise if the on-demand approach were extended to the report of insurance coverage required under Section 1365.2(f) (as would be the case under proposed Sections 4800 and 4820).

Don Haney may be correct that elimination of the existing on-demand dissemination method would be an improvement, but **the staff recommends against making that change as part of the proposed law.** It should be noted, along with other suggested improvements to association accounting provisions, for possible future study.

Annual Financial Statement

Proposed Section 4805 would continue requirements for the preparation of the association's annual financial statement.

Don Haney correctly points out that the source for those requirements, Corporations Code Section 8321, was recently amended. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 14; 2006 Cal. Stat. ch 214, § 6.

The staff recommends that proposed Section 4805 be revised to conform to that amendment, which reflects the Legislature's latest thinking as to what a nonprofit mutual benefit corporation should report in its annual statement.

Thus:

4805. (a) Within 120 days after the end of the fiscal year, the board of an association that receives ten thousand dollars (\$10,000)

or more in gross revenues or receipts during the fiscal year shall prepare an annual financial statement.

(b) If the association receives more than seventy-five thousand dollars (\$75,000) in a fiscal year, the annual financial statement shall be reviewed by a licensee of the California Board of Accountancy using generally accepted accounting principles.

(c) The annual financial statement shall include all of the following information:

(1) A balance sheet as of the end of ~~the~~ that fiscal year and an income statement and a statement of ~~changes in financial position for the~~ cashflows for that fiscal year.

(2) If the financial statement is reviewed by an independent accountant, a copy of the accountant's report.

(3) If the financial statement is not reviewed by an independent accountant, the certificate of an authorized officer of the association that the financial statement was prepared without audit from the books and records of the association.

(4) If the association is incorporated, a statement of any transaction or indemnification of a type described in Section 8322 of the Corporations Code.

(d) The board shall promptly deliver a copy of the current annual financial statement to any member who requests a copy, at no cost to the member.

(e) The type used in the annual financial statement shall be at least 12 points in size.

Mr. Haney also recommends other substantive changes to the financial reporting requirements. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 14. **Those suggestions should be noted for possible future study.**

Sun City suggests that the annual financial report provisions be moved to "Chapter 5. Finances." See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 158. That suggestion has merit. However, as is often the case, there is more than one logical location for a provision. In the proposed law, the financial report provisions are grouped with the other annual reports (including the annual budget report, which might also logically be moved to the finance chapter). **The staff is inclined to leave the financial report provisions where they are.**

Member Handbook Form

Bob Sheppard suggests ways in which the member handbook could be made more useful (e.g., require three-hole punching and regular updates). See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 8. Those are good ideas, but **the staff recommends against the proposed law mandating those sorts of**

details. Each association should be free to determine what methods work best for its needs.

Sun City notes that the language mandating that the reports be prepared in type that is at least 12 points in size is not very helpful unless a specific font is also mandated. Different fonts vary in size. (This is 12 point Times. This is 12 point Verdana.) See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 159.

The font size specification is derived from existing law and may help to ensure readability for those with vision problems. Presumably, the Legislature determined that even the smallest font would be sufficiently readable at 12 point size. **The staff recommends against designating a specific font.**

Trudy Morrison suggests that it would be confusing to call the report prepared under proposed Section 4800 a “member handbook.” She points out that many associations already have something that they call the member handbook. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 137.

The staff recommends against changing the name of the proposed “member handbook,” for three reasons: (1) The name fits well. (2) Nothing *requires* an association to use that name in describing the report. It is simply the descriptive term used in the statute. (3) An association could combine the content of its current handbook with the statutory content. That would provide a more complete resource.

Member Handbook Content

Sun City suggests that the handbook should also include a description of the association’s policies on disciplinary action under proposed Sections 5000-5005. See First Supplement to CLRC Memorandum 2007-47, Exhibit p.159. Bob Sheppard makes a similar suggestion. *Id.* at 8.

That is a good idea. The handbook would already include information on member rights relating to notices and meetings, lien collection procedures, alternative dispute resolution, and architectural review. Information on member discipline would round out the discussion. **The staff recommends that proposed Section 4810 be revised to include a statement of the association’s discipline policy and a schedule of fines for violations, if any.**

Notice of Availability

The Commission received two comments suggesting that an association could save costs by combining the mailing of various notices or reports. See First

Supplement to CLRC Memorandum 2007-47, Exhibit pp. 35 (Anthony Brown), 115 (Beth Grimm).

There is nothing in the proposed law that precludes combined mailing. **The staff will add language to the Comment to proposed Section 4820 to make that option clear.**

E. Howard Green suggests that the law should require the notice to include a “substantial summary” of the report it concerns. See Second Supplement to CLRC Memorandum 2007-47, Exhibit p. 2.

Proposed Section 4820(c) already requires that the notice include “a general description of the content of the report.” The staff believes that the difference between a “substantial summary” and a “general description of contents” is probably too subtle to worry about. The purpose of the provision would probably be served by either phrasing. **The staff recommends against tinkering with this language at this point in the study.**

DIRECTOR STANDARD OF CONDUCT

The proposed law includes an article titled “Director Standard of Conduct.” The complete content of that article is proposed Section 4855, which continues an existing provision incorporating director conflict of interest rules from Corporations Code Section 310.

Which Standard to Incorporate?

A note following proposed Section 4855 asked for comment on whether it makes sense to incorporate Section 310, which governs for-profit corporations, rather than the similar provisions from the Nonprofit Mutual Benefit Corporation Law (Corporations Code Sections 7233-7234).

Curtis Sproul recommends that the reference be changed. He believes that the existing reference is the product of simple error. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 249. CAI-CLAC also recommends that the reference be changed. See Exhibit p. 7.

By contrast, the California Association of Realtors suggests that the reference to Corporations Code Section 310 be retained. “There are substantial case law interpretations attached to Section 310. Not so for 7233-7234.” *Id.* at 189.

Given the lack of any consensus on the need for change, the staff recommends that existing law be retained on this issue.

Article Heading Misleading

Curtis Sproul also believes that the article heading (“Director Standard of Conduct”) is misleading. The heading was drafted to serve as a general placeholder for any provisions governing director conduct and conflicts of interest. **In order to avoid any confusion, the staff recommends that the heading be revised to read “Article 8. Conflict of Interest.”** If the content of the article expands in the future it could be revised at that time.

☞ Director Recusal Generally

CAI-CLAC suggests that the proposed law should require director recusal in other situations where the director would clearly have an interest in a decision (e.g., where the director or the director’s separate interest is the subject of a decision by the board). See Exhibit p. 6.

Full consideration of the issue of self-interested decision making is beyond the scope of this study. It is a complex issue. However, it might be possible to add a clear set of specific recusal rules without causing any controversy. Such rules would not cover all of the ground, but would be a significant improvement. Thus, proposed Section 4855 could be revised as follows:

4855. (a) Notwithstanding any other law, and regardless of whether an association is incorporated or unincorporated, the provisions of Section 310 of the Corporations Code shall apply to any contract or other transaction authorized, approved, or ratified by the board or a committee of the board.

(b) A director or member of a committee shall not vote or otherwise act on behalf of the association with respect to any of the following matters:

(1) Discipline of the director or member.

(2) An assessment against the director or member for damage to the common area or facilities.

(3) A request, by the director or member, for a payment plan for overdue assessments.

(4) A decision whether to foreclose on a lien on the separate interest of the director or member.

(5) Review of a proposed physical change to the separate interest of the director or member.

(6) A grant of exclusive use common area to the director or member.

That approach would provide clear guidance as to the matters it covers. The listed items should cover most of the situations in which an association might directly affect a director’s individual interests. However, there may be other

situations that have been overlooked. If so, this approach might create an implication that a director could participate in making those other sorts of decisions.

That problem could be avoided by drafting a general standard, rather than enumerating circumstances in which recusal is required. However, a general standard would necessarily require interpretation and application to novel facts. That problem could perhaps be ameliorated by adding language along the following lines to the Comment:

Nothing in Subdivision (b) limits any other provision of law or the governing documents that relates to a director conflict of interest.

The staff is inclined toward adding the statutory and Comment language set out above, but is concerned that it could cause new problems.

MANAGING AGENT

Disclosure by Prospective Managing Agent

Proposed Section 4900 would continue existing rules governing disclosures that must be made by a prospective managing agent to an association before entering into a contract with the association. It would provide in part:

(a) A prospective managing agent of a common interest development shall provide a written disclosure to the board before entering into a management agreement. The disclosure shall be provided as soon as is practicable after entering into negotiations, but in no event more than 90 days before entering into an agreement.

A note following that section asked for comment on whether the 90 day period would cause any problems. Unfortunately, the note contained an error suggesting that the required disclosure could not be given *less* than 90 days before entering into an agreement. In other words, every contract negotiation would involve a period of *at least* 90 days between the disclosure and execution of the contract. That is not the correct reading of subdivision (a). The disclosure could be given one day before contract formation (but not 91 days before contract formation).

The comments that the Commission received were responding to the *mischaracterized* effect of the proposed law. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 35, 124, 137, 249. None of those comments

suggest any problem with the effect of the proposed provision as it is properly understood. **No change should be made to the timing provision.** The staff regrets the confusion.

Trust Fund Account

Proposed Section 4905 continues existing rules for the management of association funds held by a managing agent.

Subdivision (h) of that section would provide a saving clause for a managing agent who commingled association funds prior to February 26, 1990. The managing agent can continue to do so if specified conditions are met. A note following the section asked for comment on whether subdivision (h) continues to serve a useful purpose or should be deleted as obsolete.

The only comments received on this issue favor deletion of subdivision (h). See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 124 (Ralph Cahn), 137 (Trudy Morrison), 190 (California Association of Realtors), 250 (Curtis Sproul).

The staff recommends that subdivision (h) be deleted as obsolete. This should not cause any hardship, because the proposed law would have a one-year deferred operative date. Any manager that is still commingling funds would have a year to separate them.

GOVERNMENT ASSISTANCE

Proposed Section 4960 would continue the provision that requires an association to register with the Secretary of State every two years.

The California Association of Realtors suggests that the section should be revised to delete obsolete transitional dates, which phased in the requirements over a span of years. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 191.

The staff agrees. Those dates no longer serve any purpose. They should be deleted.

DISCIPLINARY ACTION

Authority to Impose Fine

Proposed Section 5000 would continue limits on an association's ability to impose a disciplinary fine. A fine could only be imposed if fines are authorized by the governing documents and the governing documents include a schedule of

finer. A note following the section asked whether an association should be able to establish its authority to impose fines in any type of governing documents, including an operating rule (which can be adopted by the board unilaterally).

Response was mixed. Ross Snow supports existing law, which would allow an operating rule to establish the authority to fine. He believes that the operating rule adoption procedures are adequately democratic for that purpose. He maintains that the procedures for amending other types of documents are too cumbersome. See First Supplement to CLRC Memorandum 2007-47, Exhibit p.68. Trudy Morrison also supports existing law on this point. *Id.* at 137.

Other commenters recommend eliminating the use of operating rules to establish the authority to fine. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 146 (Peter Wilke), 191 (California Association of Realtors), 224 (Janet Shaban).

The staff recommends that existing law be preserved on this issue. There is no clear consensus for a substantive change in the law.

Bob Sheppard suggests that proposed Section 5000 should be extended to restrict the authority to impose *non-monetary* penalties as well. *Id.* at 8. **That suggestion should be noted for possible future study.**

☞ Due Process Hearing

Proposed Section 5005 would continue a requirement that a member be given a board hearing before discipline is imposed for a violation of the governing documents. A note following the section asked whether the same procedure should be required before a board may assess a member for damage to the common area. In that case, there may be disputed issues of fact that need to be aired and resolved before an assessment is imposed.

All of the comments received in response to that note favor providing an opportunity for a hearing before imposing damage charges against a member. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 147 (Peter Wilke), 159 (Sun City), 224 (Janet Shaban).

Although it would be a substantive change, the staff believes that an opportunity to be heard before being assessed for damage to association property is consistent with the spirit of existing law and should be noncontroversial. **Proposed Section 5005 should be revised as follows:**

§ 5005. Due process hearing

5005. (a) The board shall only impose discipline on a member or assess a member for damage to the common area and facilities at a meeting of the board at which the ~~accused~~ member shall have an opportunity to be heard.

(b) At least 10 days before the meeting ~~to hear a disciplinary matter~~, the board shall deliver an individual notice to the ~~accused~~ member (Section 4040) that includes all of the following information:

(1) ~~The~~ If the member is alleged to have violated the governing documents, the provision of the governing documents that the member is alleged to have violated and, a brief summary of the facts constituting the alleged violation, ~~and the-~~

~~(2) The penalty that may be imposed for the violation.~~

(2) If the member is alleged to be liable for damage to the common area and facilities, a brief description of the facts giving rise to the allegation and the amount to be assessed against the member for the damage.

(3) The time, date, and location of the meeting at which the matter will be heard.

(4) A statement that the ~~accused~~ member has a right to attend the meeting, address the board, and request that the matter be considered in closed executive session.

(c) Within 15 days after ~~hearing a disciplinary matter~~ the meeting, the board shall deliver a written decision to the ~~accused~~ member, by individual notice (Section 4040). If the board imposes a penalty, the written decision shall state the provision of the governing documents violated and the penalty for the violation. If the board assesses the member for damage to the common area and facilities, the written decision shall state the basis for the member's liability and the amount assessed.

Comment. Section 5005 restates former Section 1363(h) without substantive change, with the following changes:

(1) Subdivision (a) is new. It states expressly what is clearly implied.

(2) Subdivision (b)(2) is new.

(3) The application of the section is extended to include an assessment against a member for damage to association property. See Section 5640(a) (assessment for damage to common area and facilities).

See also Sections 4085 (“board”), 4150 (“governing documents”), 4160 (“member”).

We received two comments suggesting that the existing hearing requirement is too burdensome when members are involved in minor or repeated offenses (e.g., a parking violation or the ongoing maintenance of a nuisance). See First

Supplement to CLRC Memorandum 2007-47, Exhibit pp. 115 (Beth Grimm), 124 (Ralph Cahn).

The staff recommends against making any change to the proposed law in response to those concerns, for two reasons: (1) The provision continues existing law. Any perceived diminution of procedural fairness in imposing discipline would undoubtedly be controversial. (2) The procedure is not too burdensome; the decision must be made at a board meeting, with notice and an opportunity for the member to speak.

Responsibility for Violation of Guest, Invitee, or Tenant

Proposed Section 5015 would continue an existing rule providing that a member is responsible for a rule violation by the member's guest or invitee. It would also extend that rule to include responsibility for a *tenant's* violation (consistent with the existing rule governing liability for damage to the common area). See Section 1367.1(d).

Most commenters support the extension of the provision to include a member's tenant. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 124 (Ralph Cahn), 137 (Trudy Morrison), 251 (Curtis Sproul).

However, Bob Sheppard believes that the entire rule should be subordinated to the association's governing documents. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 8.

Existing law clearly provides for liability for a violation by a guest or invitee. Section 1363(g). **The staff recommends preserving that rule and extending it to tenants.** Such an extension should not cause any serious problems. A member who leases a unit can always include a term in the lease requiring the tenant to pay any disciplinary fines that result from the tenant's violations.

INTERNAL DISPUTE RESOLUTION

As in existing law, the proposed law would require an association to provide a mechanism for informal dispute resolution within the association. That mechanism could be as simple as a meet and confer procedure. See, generally, proposed Sections 5050-5070.

Proposed Section 5050(c) makes clear that the IDR requirement does not apply to a decision made in a due process hearing (under proposed Section 5005). If a member has a formal hearing, the member would not get a second bite at the apple under the IDR procedure.

The staff has recommended that the due process hearing provided under proposed Section 5005 be expanded to govern not only member discipline, but also the assessment of a member for damage to the common area or facilities. See “Due Process Hearing” above. **If that change is made, Section 5050(c) should be revised so that it also precludes IDR for any property damage assessment decision made in a due process hearing:**

This article does not apply to a decision ~~to discipline a member that is~~ made pursuant to Section 5005.

The logic is the same. If a member facing a damage assessment has an opportunity to be heard at a board meeting, there is no need for a second bite at the apple through IDR.

On a related point, Beth Grimm suggests that IDR should not be used to give a second bite at the apple if the board denies a request for a payment plan for overdue assessments. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 118. Under proposed Section 5620, that hearing is to be made at a board meeting or the meeting of a committee of the board created for that purpose. Given the formality of that process, the staff sees no need to revisit the same issue under the less formal IDR procedure. **Proposed Section 5005 should also be revised to provide that the IDR article does not apply to a decision made under proposed Section 5620.**

CIVIL ACTIONS

Proposed Section 5130 would be a new section. It would provide as follows:

In addition to any other remedy provided by law, a member may bring an action in superior court to enforce a provision of this part.

The intention is to make clear that all of the requirements of the Davis-Stirling Act can be judicially enforced, regardless of whether there is a specific judicial remedy provided for a particular statutory duty. A note following that section asks for comment on whether it would cause any problems.

The California Association of Realtors comments that the provision would make a “very positive” change in the law. Curtis Sproul also writes in support of the provision. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 194, 251.

Carole Hochstatter and Norma Walker ask what form of relief could be granted and whether the action could be filed in the small claims division. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 165.

The most likely forms of relief would be a writ of mandate (to compel performance of a ministerial duty) or injunction (to prohibit an illegal practice). However, there may be circumstances in which other forms of relief might be appropriate (e.g., declaratory relief).

Proposed Section 5130 was intended as a backstop, providing a general right to enforce the Davis-Stirling Act even where the law does not currently provide a specific judicial remedy. The Commission intentionally declined to construct a fully elaborated procedure for such actions in the context of this study. There are too many details that would need to be harmonized across the Act as a whole.

The staff believes that was the correct choice. Any refinement of the proposed section could have unintended consequences and should not be made without an opportunity for further study. However, it would perhaps be helpful to provide some guidance in the Comment. **The staff recommends that the following language be added to the Comment:**

Relief under this section may include a writ of mandate, an injunction, or other appropriate relief.

That would be an accurate statement of the main remedies available, without implying any limitation.

ACCOUNTING

The Commission received a number of comments suggesting improvements to the accounting standards and terminology used in existing law. Those suggestions were discussed generally in the First Supplement to CLRC Memorandum 2007-47 at pp. 10-11. **The staff has noted the recommended changes for possible future study.**

RESERVE FUNDING

Existing law requires that an association prepare a reserve funding study every three years. The point of the study is to assess the cost of future repairs of common area property and to analyze whether the amount held in reserve to pay future repair and replacement costs is sufficient. See proposed Sections 5550-5555.

The association is then required to adopt a reserve funding plan to describe how the association will “contribute sufficient funds to the reserve account to meet the association’s obligation to repair and replace the major components included in the most recent reserve funding study.” Proposed Section 5560.

Existing law on this subject is a bit of a jumble. The requirements are distributed, in a confusing way, across multiple sections. The proposed law would provide a much simpler statement of the requirements.

The Commission received a number of comments on the reserve funding provisions, but most of them were suggestions for improvements of existing law, rather than complaints about the Commission’s reorganized statement of that law. **As such, they have been noted for possible future study.**

There were two suggestions that bear on our recodification of the statutory forms for the reserve funding study and plan. They are discussed below.

Variation as to Form and Content of Reports

Proposed Section 5555(c) would provide a form that must be used in preparing a summary of the reserve funding study, for distribution to the members. Subdivision (d) of that section would provide that the statutory form “may be supplemented or modified in order to make the information provided clearer or more complete, so long as the minimum information required by subdivision (c) is provided.” That gives an association some flexibility as to form, and allows *additional* information to be provided if warranted.

Sun City suggests that a similar provision be added to proposed Section 5560. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 159. That section would require that certain information relating to the association’s reserve funding plan be provided in a specified format. Sun City’s suggestion would be a clear improvement without any obvious disadvantages. It should be noncontroversial. **The staff recommends adding a subdivision (i) to the section, as follows:**

- (i) The reserve funding plan may be supplemented or modified in order to make the information provided clearer or more complete, so long as the minimum information required by this section is provided.

“Desired Amount” Terminology

Beth Grimm raises a concern about the terminology used in proposed Section 5555. She notes that the proposed law uses the terms “desired amount” and

“desired balance.” She objects that those terms might be ambiguous and open to more than one interpretation. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 117.

The term “desired balance” is defined in proposed Section 5555(b)(6), with respect to the *desired balance for each component described in the reserve study*. The amount is determined by multiplying the estimated average annual repair and replacement cost of a component times the number of years that the component has been in service. *Id.* It can also be calculated using alternative methods, so long as those methods are described in the report. That is all derived from existing law. See Section 1365.2.5(a)(6).

General references to the overall “desired amount” were meant as an aggregation of the desired balances for all of the components covered by the study.

The staff recommends two nonsubstantive changes to more closely track the language used in existing law. First, the term “desired balance” should be replaced with “required balance.” The term “required” is used as a modifier in existing law. Second, the term “desired amount” should be replaced with the phrase, “total required balance for all components included in the reserve funding study.” Those changes should improve clarity.

ASSESSMENTS

Existing law includes a number of procedures governing and limiting the raising and collection of assessments. Those provisions are fairly complicated and are also controversial. Not surprisingly, the Commission received a number of comments on the provisions continuing those rules. Most were suggestions for improvements to or criticisms of existing law. **As such, they have been noted for possible future study.**

Comments that reflect more directly on the proposed law are discussed below.

Assessment Increase

Proposed Section 5580 would continue existing limits on increasing the regular assessment or imposing a special assessment. In certain circumstances, such action requires the approval of “an affirmative majority of the votes cast at a meeting at which at least fifty percent of the voting power is represented.” Proposed Section 5580(b).

A number of commenters suggest that the reference to a “meeting” in that provision is now out of date. Under the recently enacted election rules, a vote may be conducted entirely by mail. The member approval provision should be amended to better reflect that fact. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 84 (Kazuko Artus), 129 (Michael Hardy), 251 (Curtis Sproul).

However, it has long been the rule that a vote can be conducted entirely by mail. Any action that can be taken at a meeting can be taken without a meeting if written ballots are distributed for voting by mail. See Corp. Code § 7513. Although the new election provisions make clear that an election can be conducted without a meeting, that is not a substantive change in the law. With that in mind, it is not clear that the reference to a meeting in proposed Section 5580 would cause any problems.

Nonetheless, the proposed law could be confusing. **Proposed Section 5580(b) should be revised to avoid any implication that voting by mail is precluded:**

(b) In the following circumstances, an assessment increase or special assessment may only be adopted with the approval of an affirmative majority of the votes cast at a meeting in an election at which at least fifty percent of the voting power is represented:

...

Assignment of Debt

Proposed Section 5610 would continue limits on the ability of an association to assign assessment debt to a third person:

5610. (a) Except as otherwise provided in this section, an association may not voluntarily assign or pledge to a third party the association’s right to collect a payment or assessment, or to enforce or foreclose a lien.

(b) An association may assign or pledge the association’s right to collect a payment or assessment, or to enforce or foreclose a lien, to a financial institution or lender chartered or licensed under federal or state law, when acting within the scope of that charter or license, as security for a loan obtained by the association.

(c) Nothing in this section affects the right or ability of an association to assign an unpaid obligation of a former member to a third party for purposes of collection.

Bob Sheppard wonders whether subdivisions (a) and (c) contradict one another. If not, he asks that the section be revised to be clearer. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 9.

There is no inconsistency. Subdivision (a) limits assignment, *except as otherwise provided in the section*. Subdivisions (b) and (c) then describe situations in which assignment is permitted. That might be more easily understood if subdivision (c) were revised to better parallel the structure of subdivision (b), as follows:

(c) ~~Nothing in this section affects the right or ability of an~~ An association ~~to~~ may assign an unpaid obligation of a former member to a third party for purposes of collection.

There is no need for the disclaimer clause in subdivision (c), as subdivision (a) already expressly disclaims any intent to trump subdivision (c). **The staff recommends that this change be made.**

Overnight Payment of Assessment

Proposed Section 5600 would provide in part: “The association shall provide a mailing address for the overnight payment of an assessment.” The meaning of that requirement is not entirely clear. A note following the section asked whether it requires that an address be designated for the receipt of a payment sent by overnight delivery.

Sun City affirms the staff’s reading of the provision. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 160.

With that confirmation in mind, the staff recommends that the provision be revised to express the concept more clearly, thus:

The association shall provide a mailing address for receipt of an assessment payment that is sent by overnight delivery.

Payment Plan

Proposed Section 5620 would authorize an association to adopt a payment plan for a member that has delinquent assessments. As under existing law, late payment penalties do not accrue during the payment plan period. See proposed Section 5620(c). A note following the section asks whether *interest* on the overdue assessments should accrue during the payment plan period. The existing tolling of penalties suggests that the same rule might be applied to interest.

Response was mixed. Some commenters believe that interest should continue to accrue during the payment plan period, unless the interest is waived by the association or its governing documents. There should be no statutory waiver. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 35 (Anthony Brown), 125 (Ralph Cahn), 198 (California Association of Realtors).

Two commenters favored a statutory waiver of interest. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 148 (Peter Wilke), 224 (Janet Shaban).

On balance, the staff recommends against creating a statutory waiver of interest. The commenters make a good point that the matter should be left to the individual association to decide.

Lien Release

Proposed Section 5635 would provide that an association shall record a lien release or notice of rescission within 21 days after a “determination that a notice of delinquent assessment was recorded in error.” A note following the section asked who would make the determination that the notice was recorded in error.

The commenters agreed that it would be the association that would make that determination. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 148 (Peter Wilke), 199 (California Association of Realtors). **No revision is required as a result of that input.**

Foreclosure

Proposed Section 5650(a) would limit an association’s ability to foreclose on a lien for unpaid assessments:

(a) An association may not foreclose on a lien, judicially or nonjudicially, if the debt is less than twelve months overdue and the amount owed, excluding any accelerated assessment, collection cost, late charge, or interest, is less than one thousand eight hundred dollars (\$1,800).

Anthony Brown finds that formulation of the rule confusing and suggests that it be revised for clarity. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 35.

The staff sees how the negative construction of the sentence could be confusing. **The provision should be revised to state its rule affirmatively, thus:**

(a) An association may only foreclose on a lien, judicially or nonjudicially, if the debt is twelve months or more overdue or the amount owed, excluding any accelerated assessment, collection cost, late charge, or interest, is one thousand eight hundred dollars (\$1,800) or more.

Ross Snow complains that existing law contains a loophole of sorts. A member can run assessment debt up to just under \$1,800 and keep it there, paying down the debt whenever it risks exceeding \$1,800. So long as the oldest

outstanding debt is not more than 12 months old, the member avoids foreclosure. See First Supplement to CLRC Memorandum 2007-47, Exhibit p.69. **That issue has been noted for possible future study.**

MAINTENANCE

Terminology

Proposed Section 5700 would restate the general rules governing responsibility for maintenance and repair:

5700. Unless the declaration provides otherwise, the responsibility for repair, replacement, and maintenance is as follows:

(a) The association is responsible for the repair, replacement, and maintenance of the common area, other than exclusive use common area.

(b) The owner of a separate interest is responsible for the maintenance of the separate interest and any exclusive use common area appurtenant to the separate interest.

A note following the section asked for comment on whether the omission of the words “repair” and “replacement” in subdivision (b) reflects an intentional substantive distinction in the law, or is just a drafting oddity. If the latter, then the two subdivisions should probably be parallel, so as to avoid any dispute over whether there is a substantive difference.

Kazuko Artus does not see a problem with the inconsistency. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 85.

Beth Grimm suggests that, in a condominium, exclusive use common area may be integral to the structure of the building (e.g., an attached balcony or exterior paint). *Id.* at 118. That may suggest one rationale for the inconsistency in existing law. It is reasonable to expect that a member will “maintain” an exclusive use common area balcony, keeping it clean and orderly. But it could be unreasonable to expect the member to “replace” or “repair” the balcony if it fails structurally.

Trudy Morrison and Curtis Sproul believe that the two subdivisions should be parallel. *Id.* at 137, 252. Mr. Sproul points out that the declaration can always limit a member’s obligations regarding exclusive use common area. However, the declaration is not easily amended, and a stock cooperative may not have a declaration. It may not be simple for an association to “draft around” any expansion of member maintenance obligations made in the proposed law.

The staff recommends that the inconsistent language be left alone.

Wood Destroying Pests

Proposed Section 5705 would continue existing rules relating to responsibility for dealing with damage caused by pests. The proposed law would continue an oddity of existing law:

- Subdivision (a)(1) states that the *association* is responsible for maintenance of the *common area* in a *community apartment project, condominium, or stock cooperative*. It says nothing about responsibility for maintenance of a separate interest.
- Subdivision (a)(2) states that a *member* is responsible for maintenance of a *separate interest* in a *planned unit development*. That responsibility can be delegated to the association, on a majority vote of the members. The subdivision says nothing about responsibility for the common area.

With one exception, these rules do not contradict or add anything to the general rules on maintenance responsibilities provided in proposed Section 5700. The exception is the provision authorizing delegation of responsibility for maintenance of separate interests in a planned unit development.

It seems likely that the Legislature intended to draw some sort of distinction based on whether the units in the development share common walls, floors, and ceilings. If so, it was done improperly. Not all condominiums, stock cooperatives, and community apartment projects have such shared structures. Nor are all planned unit developments comprised of detached units.

A note following proposed Section 5705 asked whether the provisions served any useful purpose.

The California Association of Realtors suggests that the entire section is redundant. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 201. The staff disagrees. Subdivisions (b) through (e) establish and regulate an association's power to relocate a member temporarily in order to conduct pest abatement. Those are important substantive provisions that should be preserved.

The staff recommends that proposed Section 5705 be revised to eliminate the superfluous language and generalize the remainder:

~~5705. (a) Unless the declaration provides otherwise, the responsibility for repair, replacement, and maintenance occasioned by the presence of wood destroying pests or organisms is as follows:~~

~~(1) In a community apartment project, condominium, or stock cooperative, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms.~~

~~(2) In a planned development, the owner of a separate interest is responsible for the repair and maintenance of the separate interest occasioned by the presence of wood-destroying pests or organisms. Upon approval of the majority of all members (Section 4065), this responsibility for the repair and maintenance of the separate interests occasioned by the presence of wood-destroying pests or organisms may be delegated to the association, which may recover its costs through a special assessment.~~

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

(c) The association shall give individual notice (Section 4040) of the need to temporarily vacate a separate interest to the occupant and, if the owner is different from the occupant, to the owner. Notice shall be given not less than 15 days nor more than 30 days prior to the date of the temporary relocation. The notice shall state the reason for the temporary relocation, the date and time of the beginning of treatment, the anticipated date and time of termination of treatment, and that the occupants will be responsible for their own accommodations during the temporary relocation.

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

(e) The costs of temporary relocation of an occupant pursuant to this section shall be borne by the owner of the separate interest affected.

Comment. Section 5705 continues former Section 1364(b)-(e) without substantive change, except for the following changes:

(1) The specific notice delivery provisions of former Section 1364(d)(3) have not been continued. Rules for delivery of notice are generalized in Sections 4035-4055.

(2) Former Section 1364(c), governing the cost of relocation, has been restated in subdivision (e) so as to make clear that it only applies to a relocation involving wood destroying organisms.

(3) Redundant language on the responsibility for maintenance and repair has not been continued.

(4) Subdivision (a) generalizes a rule that was limited to planned unit developments.

See also Sections 4080 ("association"), 4095 ("common area"), 4100 ("common interest development"), 4105 ("community apartment project"), 4115 ("condominium"), 4135 ("declaration"), 4160 ("member"), 4170 ("person"), 4175 ("planned development"), 4185 ("separate interest"), 4190 ("stock cooperative").

LIMITATION OF ASSOCIATION AUTHORITY TO REGULATE PROPERTY USE

The proposed law would aggregate a number of provisions that limit an association's authority to restrict the use of a separate interest. The Commission received a number of suggestions for substantive changes to existing law (e.g., changes to the provision guaranteeing the right to own one pet). **Those suggestions have been noted for possible future study.**

Comments that bear more directly on the proposed law are discussed below.

Television Antenna or Satellite Dish

Proposed Section 5745 continues existing law limiting the authority of an association to restrict the installation of a television antenna or satellite dish:

5745. (a) Except as otherwise provided in this section, a provision of the governing documents is void to the extent that it would prohibit or restrict the use or installation of an antenna.

(b) The following restrictions on the use or installation of an antenna are not void pursuant to this section:

(1) A restriction or prohibition that is consistent with a provision of law that imposes the same restriction or prohibition.

(2) A requirement that the antenna not be visible from a street or from the common area.

(3) A restriction that does not significantly increase the cost of the antenna, including all related equipment, or significantly decrease its efficiency or performance.

(4) A requirement that the association approve the installation before installation takes place.

(5) A requirement that an association approve the installation of an antenna on the separate interest of a member other than the member seeking to install the antenna.

(6) A provision for the maintenance, repair, or replacement of roofs or other building components.

(7) A requirement that the installer indemnify or reimburse the association or a member for loss or damage caused by the installation, maintenance, or use of the antenna.

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

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

(e) For the purposes of this section "antenna" means a video or television antenna, including a satellite dish, of less than 36 inches in diameter or diagonal measurement.

A note following the proposed section asked several questions about its provisions. The note acknowledged that there is an FCC regulation that also limits restrictions on antenna installation. See 47 C.F.R. § 1.4000.

We received a number of suggestions for changes to the existing law. Most were suggestions for substantive improvements to existing law. For example, Bob Sheppard suggests that an association should be able to prohibit installation of an antenna in the common area. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 20. That would be a significant substantive change. Section 1376 does not include such a limitation. In a multi-unit structure, the common area (e.g., the roof) might be the only space suitable for installation of an antenna. **The staff recommends against making that change.**

Beth Grimm and Bob Sheppard both suggest that the statute should be eliminated in deference to the federal regulation. *Id.* at 119, 235. That too would be a significant substantive change in the law. The FCC regulation only governs the installation of an antenna on “property within the exclusive use or control of the antenna user....” 47 C.F.R. § 1.4000(a)(1). The protections of that provision would not encompass the installation of an antenna in the common area. As noted above, existing Section 1376 does apply to the installation of an antenna in the common area. Although it may be confusing to have both state and federal provisions on the same issue, the Commission can do nothing about the federal provision and **should not narrow the scope of the California provision.**

The note following proposed Section 5745 asked whether some of the provisions of the section were necessary. We received comments from one person suggesting that the specified provisions were not necessary and should be deleted. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 137 (Trudy Morrison). That single response does not give the staff sufficient confidence to make what might be a substantive change.

The note also asked whether the definition of “antenna” should be broadened beyond its current scope (“video or television antenna”) to include audio and data reception antennas within the specified size limitation (36 inch diameter or diagonal). Trudy Morrison supports that change. *Id.* While the staff believes that the current provision is subject to technical obsolescence, the proposed change could expand the number of devices installed in the common area. That result would probably be objectionable to some owners. **For that reason, the staff recommends against making that change.**

However, the general topic of antenna regulation should be noted for possible future study.

TRANSFER DISCLOSURE AND TRANSFER FEE

Proposed Sections 5825-5880 would continue rules governing (1) the disclosure that an owner of a separate interest must make to a prospective buyer of the separate interest, and (2) transfer fees charged as a consequence of a change of ownership of a separate interest.

The documents that a member needs to provide to a prospective buyer are often in the custody of the association. If the member asks for a copy of those documents, the association is required to provide them, but may charge a fee to recover its “actual cost to procure, prepare, and reproduce the requested documents.” Proposed Section 5830. The association is also allowed to charge a transfer fee to recover “the association’s actual costs to change its records” in connection with the transfer of title. Proposed Section 5875.

Fee Charged by Management Company

Carole Hochstatter and Norma Walker wonder whether these provisions need to be adjusted in light of the recent decisions in *Berryman v. Merit Property Management, Inc.*, 152 Cal. App. 4th 1544, 62 Cal. Rptr. 3d 177 (2007), and *Brown v. Professional Community Management, Inc.*, 127 Cal. App. 4th 532, 25 Cal. Rptr. 3d 617 (2005).

Both cases addressed the same general question: Do provisions of the Davis-Stirling Act that limit an association fee to the actual cost of a service also limit what can be charged by a private for-profit management company that provides the same service under contract to the association? The answer is no. A private contractor is allowed to charge more than the private contractor’s own cost to provide the service. “The costs incurred by the association, for which it levies an assessment or charges a fee, necessarily include the fees and profit the vendor charges for its services.” *Berryman*, 152 Cal. App. 4th at 1552 (quoting *Brown*, 127 Cal. App. 4th at 539)

Those holdings are consistent with the language in the proposed law. **The staff sees no need for a revision to reflect those cases.**

Reference to Community Manager as “Agent”

Proposed Section 5850 would provide as follows:

5850. For the purposes of this section, a person who acts as a community association manager is an agent, as defined in Section 2297, of the association.

There are a number of problems with that section. First, the reference to “this section” should have been broadened to include all of proposed Sections 5825-5880. That would properly express the scope of application of the existing provision that it would continue. See Section 1368(g).

Second, the reference to Section 2297 seems misplaced. It is Section 2295 that defines “agent.” Section 2297 differentiates between general and special agents. The meaning of the reference to Section 2297 is unclear.

Finally, there is no obvious reason for the provision’s existence. The terms “agent” and “agency” are not used anywhere else in Section 1368. Nor is there anything in the Davis-Stirling Act that would limit the application of general agency law. There appears to be no need for proposed Section 5850.

A note following proposed Section 5850 asked whether the section serves any purpose. We received one comment in response. The California Association of Realtors suggests that the section is neither helpful nor necessary. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 204.

The staff recommends that the section be deleted from the proposed law. General agency law is sufficient to govern the agency relationship that exists between an association and a community management company.

RESTRICTIONS ON TRANSFERS

Grant of Exclusive Use

Proposed Section 5900 continues existing rules governing the grant of exclusive use common area to a member. “Exclusive use common area” is common area that is dedicated for the exclusive use of a member. Examples may include a parking space, patio, balcony, or the like.

Proposed Section 5900(a) would provide:

Unless the governing documents provide otherwise, the affirmative vote of members owning at least 67 percent of the separate interests in the common interest development shall be required before the board of directors may grant exclusive use of any portion of the common area to a member.

That general rule is then qualified by a number of exceptions.

A note following proposed Section 5900 asked whether there were circumstances in which a person other than the board and members should be able to grant exclusive use common area.

Bob Sheppard suggests that the membership, acting alone, should have that power. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 20. He also suggests that the provision should be revised to validate any grants of exclusive use common area that were completed before the member approval requirement was added to the law. *Id.* at 235. **Those substantive changes from existing law have been noted for possible future study.**

The California Association of Realtors comments that the authority to grant exclusive use common area should not be expanded beyond what is authorized under existing law. *Id.* at 205.

Finally, Mel Standart asks whether proposed Section 5900 correctly continues the substance of Section 1363.07. See Exhibit p. 1.

The existing section provides that: “unless the governing documents *specify a different percentage*,” a 67% vote of the members is required to grant exclusive use common area. (Emphasis added.) By contrast, proposed Section 5900 would provide that “unless the governing documents *provide otherwise*,” a 67% vote of the member is required to grant exclusive use common area. (Emphasis added.)

Mr. Standart makes a good point. The existing language requires that *some* percentage of the members approve a grant of exclusive use common area. The proposed language could be read as allowing the governing documents to dispense with the member approval requirement entirely. That would be a loosening of the existing requirement. **The staff recommends that proposed Section 5900(a) be revised to restore existing language, as follows:**

Unless the governing documents ~~provide otherwise~~ specify a different percentage, the affirmative vote of members owning at least 67 percent of the separate interests in the common interest development shall be required before the board of directors may grant exclusive use of any portion of the common area to a member.

Mr. Standart also suggests that the existing language should be tightened along these lines: “Unless the governing documents specify a different percentage *for approval of a grant of exclusive use common area...*” (Emphasis added). The staff believes that change might be problematic. Suppose an association has a general requirement that all actions requiring member approval

can be approved by a simple majority. With the language proposed by Mr. Standart, there might be uncertainty about whether that general provision is sufficient to override the statutory supermajority requirement. **The staff recommends against making any further change to the provision.**

Mechanics Lien in Condominium Project

Proposed Section 5910 would continue special rules for a mechanics lien for work provided in a condominium project. The main question addressed by the section is the extent to which a mechanics lien recorded against the common area burdens the title of all owners, through their undivided co-ownership of the common area.

A note following the proposed section asked whether similar rules should be provided for other types of CIDs. In particular, a planned unit development can be structured so that the members share undivided ownership of the common areas. See proposed Section 4175(a). In such a development, the same issues would seem to be present.

The responses were varied. Bob Sheppard does not want the section to apply to a stock cooperative. He is concerned that it would authorize the recording of a lien against the cooperative for work authorized by a member who lacks the authority to do so. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 20.

The California Association of Realtors believes that the provision should be expanded to govern all CIDs. *Id.* at 205-06.

Beth Grimm sees “no harm” in expanding the provision to govern a planned development. *Id.* at 120. Trudy Morrison believes that expansion might make sense for planned developments that are comprised of attached units. *Id.* at 120.

The staff believes that the lien limitation provision should probably be expanded to included planned unit developments where the members own the common area in undivided interests. That is the functional equivalent of a condominium in this context. However, the staff is concerned that such a change could have unexpected substantive consequences. None of the input from commenters gives comfort on that point. **Out of caution, the staff recommends against making any change to the provision.**

GOVERNING DOCUMENTS

☛ Declaration as Prerequisite to Creation of CID

As has been previously discussed, proposed Section 6000 requires the recording of a declaration as a precondition to the creation of a CID. This could suggest that a CID without a declaration (i.e., many stock cooperatives) is not a CID and is therefore not governed by the Davis-Stirling Act. See First Supplement to CLRC Memorandum 2007-47, pp. 8-9.

The staff has generally recommended that the Commission study problems relating to stock cooperatives separately and not attempt to solve them in the context of the current project. However, the problem arising under Section 6000 seems serious enough to justify a “quick fix.”

To that end, the Commission should consider revising proposed Section 6000 as follows:

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

(a) (1) A declaration.

(b) (2) A condominium plan, if any exists.

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

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

That is an inelegant solution to the problem, but it should work. The staff expects that a more complete treatment of stock cooperative issues would eventually obviate the need for that stop-gap solution.

Governing Document Authority

Proposed Section 6005 is new. It would provide rules for the relationships between the main types of governing documents:

6005. (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.

Bob Sheppard finds this provision to be problematic for a stock cooperative, because a stock cooperative typically does not have a declaration. He suggests that, in a stock cooperative, the dominant document should be the proprietary lease. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 233.

The staff does not recommend that change. Not all stock cooperatives use proprietary leases to establish separate interest rights. A stock certificate can also be used for that purpose. As with the other suggested changes to adjust the Davis-Stirling Act to the nature of stock cooperatives, the necessary changes are not fully understood and should be studied separately.

However, considering that proposed Section 6005 is a new section, the Commission should take care that the section does not create any *new* problems for stock cooperatives. That can be avoided by adding another subdivision to proposed Section 6005:

(d) This section does not apply to a stock cooperative.

That would avoid changing the relative dominance of a cooperative's governing documents in unexpected ways. **The staff recommends that addition to the proposed law.**

DECLARATION

Declaration Amendment Authority

Proposed Section 6040 would continue general rules for the amendment of a declaration. Subdivision (a) would provide that a declaration may be amended unless the declaration itself provides that it cannot be amended. Even if a declaration is nonamendable, subdivisions (c) and (d) provide a partial override. Under that provision, any declaration can be amended *to extend its term*.

A note following proposed Section 6040 asks:

Existing law acknowledges that a declaration may be drafted so as to limit or prohibit its amendment. That could result in permanent restrictions that become inappropriate over time, due to changed circumstances or the changed desires of the property

owners. The common law recognizes a defense to the enforcement of an equitable servitude where “the original purpose for the restrictions has become obsolete and continued enforcement of the restrictions would be oppressive and inequitable.” H. Miller & M. Starr, *California Real Estate* § 24:20 (3d ed. 2004). As a matter of policy, should there be a procedure for amendment of a declaration by the members of a homeowner association, even if the declaration prohibits its own amendment?

We received three responses to that inquiry. Trudy Morrison and the California Association of Realtors believe that there should be a way to amend any declaration. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 138, 207.

Curtis Sproul disagrees. He supports the statute as drafted. *Id.* at 254.

It is clear that a nonamendable declaration can cause problems as circumstances change. However, those who purchase a home in a development with a nonamendable declaration may be relying on the permanence of the rules. That expectation should be respected and should not be defeated without serious need.

If an obsolete restriction is causing a problem, existing law already provides a way to avoid its effect. As described in the note quoted above, the court can excuse compliance with a restriction that has become oppressive and inequitable. That remedy should solve serious problems without opening the door to broader changes that may not be strictly necessary.

What’s more, it is clear that the Legislature had the problem of obsolete restrictions squarely in mind in drafting the provisions that allow for the extension of the term of a nonamendable declaration. Proposed Section 6040(c)-(d), which continues existing Section 1357, would provide as follows:

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

declaration if owners having more than 50 percent of the votes in the association choose to do so.

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

Despite that clearly demonstrated understanding of the problem of obsolete nonamendable declaration provisions, the Legislature chose to override the declaration only with respect to the *term* of the declaration.

The staff is reluctant to go farther than the Legislature in addressing the same problem. It may be that a carefully balanced and limited override procedure could be crafted, perhaps involving court approval of the necessity of a proposed amendment, but that step should not be taken without more thorough study and public comment. **It should be noted for possible future study.**

Declaration Amendment Approval

Proposed Section 6045 would provide general rules for the amendment of the declaration:

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

(b) If the governing documents do not provide a procedure for approval of an amendment of the declaration, an amendment may be approved by a majority of all members (Section 4065).

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

A note following the section asked, in part:

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

Curtis Sproul wrote in support of expressly recognizing those sorts of third party or class voting requirements:

Class and third party amendment approval requirements ought to be honored and protected. It is becoming increasingly common for Counties to require that certain provisions be included in a declaration to implement project conditions of approval that have a life behind the filing of the final subdivision map (such as minimum parking requirements). Also, provisions in the bylaws or the declaration that are for the express benefit of a minority class of members (or any class for that matter) ought to be amendable only with the consent of at least a majority of the protected class.

See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 253.

The staff agrees that any special approval requirement should be respected. The question is whether the language in proposed Section 6045 is sufficient for that purpose. Any such requirement would necessarily be expressed in the governing documents. The proposed section already recognizes the supremacy of the governing documents in determining the approval procedure. Thus, in principle, the section is already in accord with the principle discussed above.

Also, proposed Section 4065 already addresses the question of approval in an association where the members are divided into different classes for the purposes of voting:

4065. If a provision of this part requires that an action be approved by a majority of all members, the action shall be approved or ratified by an affirmative vote of members representing more than 50 percent of the total voting power of the association, or if the governing documents of an association divide the members into two or more classes for the purposes of voting, by an affirmative vote of members representing more than 50 percent of the voting power in each class that is required to approve the action.

However, it might help to be more specific as to third party approval requirements. **To that end, the staff recommends that proposed Section 6045 be revised as follows:**

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

(b) If the governing documents do not provide a procedure for approval of an amendment of the declaration, an amendment may be approved by a majority of all members (Section 4065) and by

any person whose approval of a declaration amendment is specifically required under the governing documents.

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

Deletion of Obsolete Marketing Provisions

Proposed Section 6050 would continue a special procedure for the deletion of declaration provisions that relate to completed construction or marketing activities.

Beth Grimm maintains that the section is not useful or necessary. She feels that the member approval required under that section would make the procedure too burdensome to be beneficial. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 121.

That is a criticism of existing law, which the proposed law would continue. The staff does not believe that a sufficiently strong case has been made for elimination of the provision. At worst, it may not be broadly useful. There is no suggestion it would cause any harm. **Ms. Grimm's suggestion has been noted for possible future study.**

DISCRIMINATORY RESTRICTION

Proposed Section 6150 would continue an existing requirement that an association delete an unlawful "restrictive covenant" (e.g., a racially restrictive covenant). A note following the section asks whether the language should be generalized to more clearly indicate that *any* unlawful restriction in the governing documents must be repealed (and not just a "covenant" in the declaration).

We received three comments supporting that change. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 121 (Beth Grimm), 138 (Trudy Morrison), 209 (California Association of Realtors).

The staff believes that the proposed change would be beneficial and noncontroversial. **The staff recommends that proposed Section 6150 be revised as follows:**

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

(b) Notwithstanding any other provision of law or provision of the governing documents, the board shall amend the governing documents to delete the unlawful restrictive ~~covenant~~ provision

and to restate the governing document without the deleted restrictive ~~covenant~~ provision. No other person is required to approve the amendment.

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

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

OPERATING RULES

Proposed Section 6120 would continue existing law authorizing the membership of an association to reverse a recent board-approved change to the operating rules. Subdivision (d) of that section would provide:

(d) A decision to reverse a rule change may be approved by a majority of a quorum of the members (Section 4070), or if the declaration or bylaws require a greater proportion, by the affirmative vote or written ballot of the proportion required. In lieu of calling the meeting described in this section, the board may distribute a written ballot to every member of the association.

Sun City points out that this language could be better conformed to the recently enacted secret ballot voting provisions. Sun City is particularly concerned that the separate authorization of the use of a "written ballot" might be read as an alternative to the general voting rules, which can also be conducted by written ballot. See First Supplement to CLRC Memorandum 2007-47, Exhibit p. 160; see Exhibit p. 14.

The staff recommends the following nonsubstantive revision of proposed Section 6120(d):

(d) A decision to reverse a rule change may be approved by a majority of a quorum of the members (Section 4070), or if the declaration or bylaws require a greater proportion, by the affirmative vote ~~or written ballot~~ of the proportion required. In lieu of calling the meeting described in this section, the board may

distribute a written ballot to every member of the association pursuant to Section 4640.

CONSTRUCTION DEFECT LITIGATION

Proposed Sections 6200 to 6215 continue existing provisions governing construction defect litigation. As a note preceding Section 6200 in the tentative recommendation indicates: “The proposed law continues Sections 1375, 1375.05, and 1375.1 without any change other than to correct cross-references.”

That consciously conservative approach reflects concern that the construction defect provisions are politically sensitive and should be disturbed as little as possible in the context of a proposal that is intended to be noncontroversial.

The California Association of Realtors observes that the sections are long and hard to follow. They suggest that the sections be broken up into a number of much smaller sections. See First Supplement to CLRC Memorandum 2007-47, Exhibit pp. 210-20. That would be a good idea in general, but the staff is inclined to leave these sections alone to the extent possible. What’s more, the two main sections are set to repeal by their own terms on January 1, 2010. That would be the operative date of the proposed law. It seems unwise to borrow trouble by tinkering with a provision that may not exist when the proposed law takes effect.

With respect to the sunset provisions, the California Association of Realtors suggests that they be repealed. *Id.* **The staff recommends against making that change.** That would be a very significant policy decision and is beyond the scope of the current project.

Finally, the California Association of Realtors suggests that two operative date provisions be deleted as obsolete. *Id.* See proposed Sections 6200(r) (“This section shall become operative on July 1, 2002, however it shall not apply to any pending suit or claim for which notice has previously been given.”), 6205(h) (“This section is operative on July 1, 2002, but does not apply to any action or proceeding pending on that date.”). It seems likely that any action pending on July 1, 2002, would have been resolved by January 1, 2010. If so, the operative date provisions would be superfluous. **However, in an abundance of caution, the staff recommends that the language be preserved.** Strictly speaking, there is no pressing need to delete superfluous language. Given the conservative approach that the Commission is taking toward the construction defect provisions, the language should be left alone.

CONCLUSION

With the resolution of the issues described in this memorandum and in prior memoranda, the Commission should be in a position to approve a final recommendation. A draft recommendation will be presented in a separate memorandum for consideration at the December meeting.

If it appears that the staff has not addressed a comment, the commenter should first consider whether the comment is a suggestion for improvement to existing law, in which case the comment would not necessarily have been included in this memorandum, or is a technical correction or stylistic suggestion, in which case it will be considered in preparing the draft.

The staff wishes to express its appreciation to all of those who took the considerable time required to review the lengthy and complex proposal and offer constructive criticism. That public input was very helpful.

Respectfully submitted,

Brian Hebert
Executive Secretary

EMAIL FROM MEL STANDART
(OCTOBER 26, 2007)

If it is not too late to submit comments on the proposed overhaul of Davis-Stirling, I'd like to add one comment. I am not an attorney so please bear with me in this analysis

Reference is made to the proposed substitute for Davis-Stirling 1363.07 which I believe is now proposed section 5900 et seq. The introductory phrase as proposed will make a bad situation worse. (See *Italicized Areas Below*)

§ 5900. Grant of exclusive use

5900. (a) *Unless the governing documents provide otherwise*, the affirmative vote of members owning at least 67 percent of the separate interests in the common interest development shall be required before the board of directors may grant exclusive use of any portion of the common area to a member.

The existing language says "...unless the association's governing documents specify a different percentage..."

I can tell you from personal experience that the existing language above is causing problems. Following what was AB 1098 (Jones) in 2005 through the legislative process, I conclude it was the intent of the legislature to take the granting of Exclusive Uses Common Area (EUCA) out of the hands of Boards of Directors and put it in the hands of the members/residents. However, even with the existing language, alternative interpretations have arisen over whether or not the "different percentage" was meant to apply to the granting of EUCAs, per se, or to the declaration in the whole.

THE PROPOSED NEW LANGUAGE LOOSENS THE REQUIREMENT FURTHER AND MAKES IT EASIER FOR BOARDS TO CONTINUE GRANTING EXCLUSIVE USES.

So the real issue is: What did the legislature intend? If 1363.07 was intended to insure member involvement in the decision to grant EUCAs, then it left a loophole and the proposed revised language widens that loophole.

In my opinion, that introductory phrase should read be more specific like:

"...unless the association's governing documents specify a different percentage *for the granting of exclusive use leases*,..."

That would remove all doubt if the intent of the legislature was what I believe it was.

Conversely, if the intent was to continue to let Boards decide the fate of common areas, then leave it the way it is.

Nothing in this correspondence is intended to reflect more than my personal opinion and does not necessarily represent the position of the other individual directors or of the Board of Directors upon which I sit.

Mel Standart



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File No.
81016-002

October 31, 2007

VIA E-MAIL: caiclac@aol.com
and FIRST CLASS U.S. MAIL

Mr. Skip Daum
CAI-CLAC
5355 Parkford Circle
Granite Bay, California 95746

Re: California Law Review Commission ("CLRC")/Proposed Restatement
of Davis-Stirling Common Interest Development Act ("Act")

Dear Skip:

As we discussed, I have reviewed the CLRC's proposed restatement of the Act. I appreciate the CLRC's attempts to better organize and consolidate the relevant portions of laws which govern common interest developments, but, as explained below in more detail, I am opposed to some of the new provisions added by the CLRC, and I believe that the CLRC should address certain existing problems with the Act.

My main concerns are as follows:

§4090. "Board meetings"

I think the change in the definition of a board meeting (from a congregation of a majority of the board at the same time and place to hear, discuss or deliberate upon any item of business "scheduled to be heard by the board" to any item that "is within the authority of the board") is ill-advised. Any issue remotely relating to the association is "within the authority of the board" so it would turn even the most innocuous gatherings into an official board meeting requiring notice and an opportunity for members to be heard.

§4160. "Member"

This Section defines members as the "owner of a separate interest." This is too narrow a definition. Deference should be given to how a member is defined in the association's

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governing documents. For example, some governing documents define a member as the owner of record of a separate interest or a contract purchasers of a separate interest.

Chapter 2. - Member Bill of Rights [Reserved].

This should be deleted. It is not necessary, would be redundant and would lead to frivolous litigation by owners.

§4420. No limitation of rights

Corporations Code Section 8313 currently provides that a member's rights under the Corporations Code to inspect a corporation's accounting books and records and membership records cannot be limited by contract or the corporation's governing documents. Proposed Section 4420 expands the list of members' rights which cannot be limited by contract or a corporation's governing documents. Under the new law, the rights of members under all of Chapter 3 of the revised Davis-Stirling Act cannot be limited by contract or by governing documents, which means that members' rights with respect to the inspection of records as well as provisions relating to board meetings, member meetings, elections, record keeping, managing agents, annual disclosures and Attorney General complaints cannot be limited by contract or the association's governing documents.

The expansive application is problematic because, among other things, it calls into question whether a member could enter into a settlement agreement (i.e., a contract) waiving his or her right to, for example, file an action for declaratory or equitable relief pursuant to Section 4555 or file a complaint with the Attorney General's office pursuant to Section 4955, both of which a member has the right to do under Chapter 3 of the revised Davis-Stirling Act. in connection with a dispute over a matter covered by Chapter 3 of the revised Davis-Stirling Act such as the inspection of records or elections. Associations need to have certainty that they can enter into binding settlement agreements with their members.

§4525. Board meeting open; §4540. Executive session

§4525(a) states that any member may attend a board meeting, except for any part of a meeting held in executive session, and §4540(a) states that the "board may adjourn to executive session." These subsections imply that there must be an open board meeting prior to any executive session meeting. These subsections should be revised to delete this inference. Members cannot attend executive session meetings (except in limited circumstances) and executive session board meetings may be held offsite (e.g., an attorney's office), as such, it

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makes no sense to suggest that they must be preceded by, for example, a 30-second open meeting.

Also, in §4540(d) which states that if the board meets in executive session to “consider member discipline” the member who is the subject of that matter “may attend and speak during the consideration of the matter” I recommend adding a sentence which clarifies that the member does not have a right to be present during the board’s deliberations.

§4550. Minutes

§4540(b) would limit what could be contained in executive session meeting minutes: “The minutes for any part of a board meeting held in executive session shall include only a general description of the matter considered in executive session.” (emphasis added). This is very problematic in that it would prevent executive session minutes from detailing the reasons for a board’s decisions in a particular matter which written record may be necessary at a later date to help defend against a challenge to a board’s business judgment decision.

§4555. Civil action to enforce article

I recommend against the expanded rights granted to members under §4555. Pursuant to Civil Code §1363.09, a member may bring a civil action for declaratory relief or equitable relief for violation of those portions of the Act governing elections and election rules, use of funds for campaign purposes, notice of board meetings, executive session board meetings, availability of minutes and granting owners the exclusive right to use part of the common area. A member challenging a board’s actions with respect to these issues is entitled to reasonable attorneys’ fees and costs and can be awarded a civil penalty of up to \$500 per violation.

Proposed §4555 greatly expands the topics which can be challenged by a member in this manner to include action taken by a board outside of a meeting, board teleconferencing, board meeting locations, calling of board meetings, quorum requirements for a board meeting, and the number of directors needed to take action. While there are some “bad apples” most boards and managers do their very best to follow all of the rules. Do we really want members to be able to sue the association, and force a volunteer board to have to defend the association, because a member claims the meeting was not held as “close as practicable” to the association?

§4590. Teleconference

I believe that this Section needs to be revised for two reasons. First, it is not clear from proposed §4590 whether an association must permit a member to participate in a members' meeting via teleconference if, for example, the member arranges and pays for the expense associated with the teleconference, or whether the decision to permit a member to teleconference rests exclusively with the board. Second, I believe it is problematic to let a member who is participating via teleconference to cast his or her vote "orally" even if the matter is required to be voted on by secret ballot. There is no procedure for how the "oral" vote would be documented and by whom. Furthermore, the concept seems contrary to the Legislature's recent efforts to protect the secrecy of each owner's vote. Also, it begs the question as to whether the entire membership could decide to participate via teleconference and avoid altogether the secret ballot voting requirements?

§4595. Notice of regular meeting

Under proposed §4595, if the board has made arrangements for participation in the members' meeting by teleconference, the notice must include instructions on how to do so.

§4600. Special meetings of members

Existing law provides that if a board does not respond to a member's request for a special meeting of the members within twenty days after the petition is received, the member may set the date, time and place of the special meeting and send out the notice of such meeting. Proposed §4600(c) requires the association to reimburse the member for the cost of the notice. We do not think this change is warranted because it will just result in disputes concerning the date of delivery of the notice.

§4620. Court-ordered modification of meeting requirements

Proposed §4620 creates a procedure for directors, officers or members of an association to petition the superior court to modify any requirement in the Act or an association's governing documents governing the conduct of a members' meeting or written ballot including, but not limited to, any quorum requirement or provision requiring that a specified number or percentage of members' votes approve such a matter. However, left unanswered by proposed §4620 is whether the court-ordered modification supersedes or is in addition to any lender approval requirement set forth in an association's governing documents. This issue should be resolved one way or another so that boards can have certainty that they have followed the appropriate procedure.

§4650. Counting ballots

The phrase “open to the public” needs to be replaced with “open to all members.” Members of the public should have no right to attend meetings to count ballots.

§4685. Judicial enforcement

The CLRC does not provide any compelling reason to extend the statute of limitations to bring an action to challenge election results from 9 months to 1 year. I recommend staying with the 9-month statute of limitations set forth in the Corporations Code, or, if anything shorten the time-frame.

§4700. Inspection of Records

The expansion of the types of documents a member is entitled to inspect to include other members’ email addresses and any written correspondence of the association is problematic for privacy reasons and for administrative reasons. Why should a member be entitled to another member’s email address and correspondence sent to the association about a water damage claim in that owner’s unit. It could take hours, if not days, to gather and, if necessary, redact all of the correspondence sent and received (because §4700 does not make a distinction) over the past 3 fiscal years, especially in a large association, and the most an association could charge to gather this information is \$200.00 (see comments to §4720 below), which seems unfair.

§4705. Inspection procedure

The provisions in Corporations Code Section 8330(c) for providing a reasonable alternative in lieu of providing a member a copy of the membership list should be incorporated into this Section.

§4720. Fees

§4720(b) permits an association to charge a fee of up to \$10.00 per hour up to \$200.00 “for the time actually and reasonably spent to retrieve and redact a record.” This Section should be revised to state that the fee can be charged to “retrieve and/or redact a record.” Also, perhaps the term “written request” should be clarified. If an owner’s letter contains a list of 20 types of items to inspect, is this one written request or twenty written requests?

Mr. Skip Daum
CAI-CLAC
October 31, 2007
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§4855. Transaction involving incorporated association and director or officer

First, the title to this Section should be changed because it applies to both incorporated and unincorporated associations. Second, the reference to Corporations Code §310 should be changed to Corporations Code Sections 7233 and 7234. Finally, because the provisions of the Corporation Code apply only to contracts or other transactions where a director has a material financial interest, I would suggest expanding this Section to clarify that a board member has a duty to recuse himself or herself when he or she has a vested interest in the outcome (whether financial or not) e.g., the approval of an architectural request or a decision to impose a fine against a member when the director is the person involved.

§5015. Responsibility for guest, invitee or tenant

In addition to being responsible for the acts of his or her guest, invitee or tenant, a member should be responsible for the member's household members.

§6000. Creation of a common interest development

There has always been some ambiguity as to whether the Act applies to stock cooperatives because of the language of this Section (and former Section 1352). A stock cooperative does not have a declaration and may not have a document that satisfies the criteria for a declaration set forth in §6025, it does not have a condominium plan, and it may not have a final map or a parcel map. There are also problems with certain other provisions of the Act (e.g., relating to the collection of assessments) which are also largely incompatible to the operation of a stock cooperative. Some effort should be a made to take these differences into account and make clear that the provisions of the Act apply to stock cooperatives.

I hope that you find this information useful in seeking revisions to this important piece of proposed legislation.

Very truly yours,

WOLF, RIFKIN, SHAPIRO & SCHULMAN, LLP



MICHAEL W. RABKIN

MWR:mhe

cc: Daniel C. Shapiro, Esq.
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EX 7

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November 9, 2007

sdyer@horanlegal.com

OUR FILE NO.

Via Electronic & Regular Mail

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

Re: Study of the Legislation Relating to Common Interest Developments

Dear Mr. Hebert:

I understand the Law Revision Commission is studying the legislation that governs common interest developments. I have a personal interest in this subject because for almost 30 years I have lived in subdivision consisting of 178 freestanding single family residences that became a "planned development" when the Davis-Stirling Common Interest Development Act went into effect.

During the last thirty years I have also represented clients on common interest development matters including: drafting governing documents for condominium and planned development projects; preparing applications to the California Department of Real Estate for a public report; advising owners and homeowners associations; and serving as a mediator to resolve disputes that have arisen under the Davis-Stirling Act.

I understand the Commission is considering a recodification of the existing Common Interest Development law and renumbering of the existing statutes. Accomplishing that could be helpful but if the scope of the Commission's recommendations is broader than that then I have a number of comments about the impact on the Davis-Stirling Act on small developments and associations that carry out limited functions for their members, and a particular problem - which is applicable to all common interest developments regardless of their size - with respect to rental restrictions.

EX 8

499 VAN BUREN STREET
MONTEREY, CALIFORNIA 93940

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To be more specific, I believe it would be beneficial if the Commission looked at the existing legislation and made a recommendation on whether all of its provisions should be applied to very small projects - be they residential, industrial or commercial. I also wonder whether it is beneficial to apply the Davis-Stirling Act to associations of owners which are established for a very limited purpose (e.g. to maintain a road or to operate a water system). In the remainder of this letter, I will expand upon my comments and suggestions.

Excluding Small Developments from Certain Statutory Requirements

As you know Civil Code section 1373 provides that certain of the statutes in the Act do not apply to industrial or commercial developments that are limited to those uses by zoning or by a declaration of covenants, conditions and restrictions (CC&Rs). Civil Code section 1365 also requires that a review of financial statements be prepared in accordance with generally accepted accounting principles ("GAAP") for those associations which have annual gross income exceeding \$75,000.00. Section 1365.9 draws a distinction between associations having more than 100 separate interests and smaller associations for purposes of limiting tort claims against owners in setting a threshold amount of liability insurance. Aside from these provisions¹, the Davis-Stirling Act makes very little distinction between small developments and those that are much larger.

The requirements of the Davis-Stirling Act have expanded substantially since the legislation was adopted in 1985. Many of the statutory provisions may be essential for master planned communities of 500 or more homes or developments where there are substantial improvements within the common area. However, there are a number of small common interest developments in California. For example, one of my clients purchased a townhouse in a two lot planned development and I am currently working on a four unit and a twelve unit project.

There are a number of statutes in the Act which do not impose a disparate burden on small developments then they do for large ones. Examples include: limitations on creating exclusive common area; restrictions on pets, signs, flags, and antennas; requirements that specified documents be delivered to the prospective purchaser of a separate interest; prohibition of discriminatory covenants in CC&Rs and unreasonable restrictions on the ability to market a separate interest; and the fire retardant roofing and water conservation provisions in Civil Code sections 1353.7 and 1353.8.

¹ Of course there are some statutes that apply to condominium projects but not to planned developments.

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However, I have observed that the current statutes cause several problems for small developments or those which have a very limited function (e.g., where the separate interests consist of single family lots and there are no significant improvements in the common area). I will focus on two of these difficulties that are significant. One problem is financial. If the association is a mature one (in the sense that there are long-time residents), the assessments may be low and a number of owners could be resistant to modifying them. In that situation, anything which contributes to cost can put a strain on the association's budget. One example of a statute that created this problem is Civil Code section 1363.03, which, among other things, requires retaining an independent third party as an inspector of an election (and presumably compensating someone for that) as well as a proxy and voting system which is equivalent to participating in a general election. To that I would add Sections 1365, 1365.2.5 and 1365.5, which require that a study be made of association reserves for replacement of common area improvements².

A second problem is that it is often difficult to find people who are willing to serve as a director of the homeowners association. The substantial increase in duties of the board of directors and the tasks that the association must perform are further disincentive to volunteer one's time on behalf of your neighborhood. While a master planned community might be able to afford professional management, that is not the case with small associations.

Therefore, I believe it would be very much in the interests of the owners in small associations or those with a limited function were relieved from some of the requirements set forth in the Act or they were subject to a less onerous and costly manner of voting, keeping records of reserves, etc.

Having said that, it might be appropriate to apply the existing statutes governing assessments and collections and alternative dispute resolution to small developments.

The Definitions

The second comment that I have arises from the definitions of the term "planned development" (which is set forth in Civil Code section 1351(k)) and the term "common area" (set forth in Civil Code section 1351(b)). In rural areas of the State, associations that have been formed solely to maintain roads are very common; there are many examples of this in Monterey County. Likewise there are small water associations which are not mutual

² I have heard of one instance which illustrates the unfortunate impact of this requirement on an association that consisted of only six units. When the association asked a vendor for a quote to make a reserve study, the figure exceeded 20% of the association's annual budget.

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water companies. Section 1351(b) states that the common area for a planned development can consist of mutual or reciprocal easement rights - which presumably could mean shared rights to use a private road or a well, water tank and pipelines. If the owners, whether individually or through an association, share the right to use a road or a water system, then their lots may fall within the term "planned development" - both because of common ownership, under clause (1) of Civil Code section 1351(k), or if the owners' agreement contains a lien mechanism as set forth in Section 1351(k)(2).

I can certainly see why it might be appropriate to apply statutes that give certain protections (e.g., the requirement to deliver the notice pertaining to assessments and foreclosures set forth in Civil Code section 1365.1, and the mechanism for creating and enforcing liens is addressed in Sections 1367 and 1367.1, 1362.4 and 1362.5) to road or water associations. However, it does not seem necessary to require that any association of property owners who share the right to use a road or a well be a common interest development and thus subject to all of the provisions set forth in the Davis-Stirling Act.

Rental Restrictions

The subject of rental restrictions is a frequent issue for common interest developments. Some argue that limiting the number of units which can be leased is beneficial because owner occupants are more likely to take care of their property than are tenants and lenders may be discouraged from extending financing if there is too large a tenant mix in the development. On the other hand, prohibition on rentals might significantly hurt an owner who needs to lease a unit in order to pay the mortgage. Prohibiting an owner from leasing property might increase the risk of causing the property to be lost at foreclosure, which seems particularly imprudent at this time. Governmental entities may also have an interest in CC&Rs that limit the pool of available rental housing. Unfortunately, there is no statutory authority on which boards of directors can rely in making decisions about limiting rentals of a separate interest.

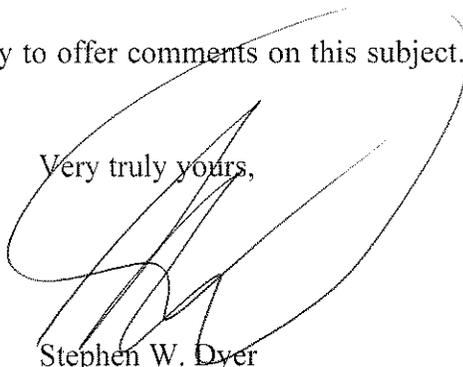
I am not suggesting that the Law Revision Commission make a recommendation either to prevent or encourage rental restrictions. Because rental restrictions are such a sensitive topic, the Commission may not want to propose any changes until there is a policy direction from the Legislature. However, clearly this is an area where association boards struggle, and it would help to give directors some guidance on how they can proceed.

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Therefore, if the Commission decides to get into this area, there are two approaches which could be beneficial here. The first is a direction on whether a restriction against rental of a separate interest can be applied against a person who purchased his/her separate interest before the restriction went into effect.³ Another is whether directors could make exceptions to a limitation on rentals in a hardship situation, particularly in the case of factors such as an extended illness, a job transfer or a military assignment that cause the owner to move from the area where the separate interest is located.

I appreciate the opportunity to offer comments on this subject. If you have any questions, please let me know.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephen W. Dyer", is enclosed within a large, hand-drawn oval. The signature is fluid and cursive.

Stephen W. Dyer

SWD/dkp

cc: David M. Van Atta, Esq. (via electronic mail)
William G. Priest, Jr., Esq. (via electronic mail)
Paul D. Gullion, Esq. (via electronic mail)

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³ There is precedent for making a distinction on this basis. The Legislature did that when it adopted Civil Code section 1360.5 to limit the ability of an owners association to prohibit pets.

**EMAIL FROM JOHN RANISESKI & JIM VIELE, SUN CITY ROSEVILLE
(NOVEMBER 16, 2007)**

November 16, 2007

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

Re: First Supplement Memorandum 2007-47, Section 4640, page 55.

Dear Mr. Hebert:

We are generally pleased with your response to Comments contained in your October 12, 2007 First Supplement to Comments on Tentative Recommendations. We particularly applaud the addition of item (5) to Section 4640 (a).

However, the addition of item (6) to Section 4640(a) does not address our concerns, even though it provides a "catch-all" regarding uses of the written ballot (Corporate Code Section 7513).

Section 1357.14, member reversal of a rule change, refers to the written ballot procedure because it was adopted before the secret ballot procedures were adopted. Section 6120(d) should be updated to recognize use of the secret ballot (4640) as an option to voting at a meeting. And, the new 4640(a)(6) should be deleted. We strongly believe that for all issues that are subject to member approval by mailed ballot, the Association should have the single method contained in Section 4640 to follow, thereby avoiding confusion and guaranteeing confidentiality.

Thank you for your reconsideration of this matter.

Sincerely,

John Raniseski
President, Board of Directors

Jim Viele
Chairman, Governmental Affairs Committee