Study H-856 December 11, 2008

Second Supplement to Memorandum 2008-63

Common Interest Development Law: Nonresidential Associations (Scope and Methodology of Study)

The Commission has received the following comments on CLRC Memorandum 2008-63 and its First Supplement:

Content from the comments is discussed below.

INTEREST IN STUDY

Duncan McPherson, an attorney has been involved in the practice of CID law for some time, welcomes this study. Exhibit p. 1. He believes that CID law affecting nonresidential associations can be reviewed and discussed without the "emotional overlay" that he believes typically accompanies a discussion of residential CID law. He also offers examples illustrating why nonresidential CIDs may warrant different statutory treatment than residential CIDs, based on differences in composition, governance, and other considerations. Exhibit pp. 2-3.

STATUTORY LANGUAGE DEFINING A NONRESIDENTIAL CID

Mr. McPherson suggests a technical correction to language presently used in Section 1373, which describes the CIDs to which the section applies. Exhibit p. 2. He suggests that the term "declaration of covenants, conditions and restrictions" be revised to read "declaration," a term otherwise defined in the Davis-Stirling Act, and that Business and Professions Code 11010.3, which contains parallel language, be amended accordingly.

The staff recommends that **the Commission defer consideration of this issue until later in this study.**

MIXED USE CIDS

Mr. McPherson advises that most mixed use CIDs separate their residential and nonresidential portions by parcel lines, allowing for the possibility that each portion could operate as a separate association. Exhibit p. 3. He also offers that some of these developments are tied together by some form of master association, and suggests that special consideration may be warranted as to how a revision would apply to developments governed by such master associations, which may have only subsidiary associations as members.

Tina Rasnow, who runs a self-help legal clinic for the Ventura County Superior Court, has expressed a preference for how mixed use CIDs should be categorized for purposes of a revision in this study. Exhibit p. 4. Ms. Rasnow has previously offered her belief that owners in nonresidential CIDs may need many of the same consumer protections in the Davis-Stirling Act that residential owners do. See First Supplement to CLRC Memorandum 2008-63, Exhibit p. 4. With regard to mixed use developments, Ms. Rasnow again expresses a preference for maximum statutory application, urging that a development with any residential use at all should be categorized as a residential CID (and presumably be governed by all provisions of the Davis-Stirling Act).

The Commission should consider these comments when it takes up consideration of the treatment of mixed use CIDs. The staff has recommended deferring this consideration until later in this study. See First Supplement to CLRC Memorandum 2008-63, pp. 5-6.

COMMERCIAL CONDOMINIUM PROJECTS

Mr. McPherson notes that condominium projects did not exist at common law, and have always been considered a "creature of statute." Exhibit p. 1. He suggests that if a revision in this study entirely exempted commercial condominium projects from the Davis-Stirling Act, separate statutory authority for these projects would be needed.

It is not likely that a revision in this study would entirely exempt any commercial development, condominium project or otherwise, from all provisions of the Davis-Stirling Act. However, **the need to retain general statutory authority for the formation of condominium projects should be kept in mind by the Commission, when evaluating whether specific provisions of the Davis-Stirling Act should apply to nonresidential CIDs.**

SEPARATE STATUTORY LAW APPLICABLE ONLY TO NONRESIDENTIAL CIDS

Mr. McPherson also suggests that, rather than simply exempting nonresidential CIDs from some provisions of the Davis-Stirling Act, a revision in this study should instead create a separate body of statutory provisions (e.g., a separate chapter in the Davis-Stirling Act), applicable only to nonresidential CIDs. Exhibit p. 1. Mr. McPherson suggests that, with regard to certain provisions of the Davis-Stirling Act, nonresidential CIDs not only need exemption, but also need their own separate and distinct rules on the subject addressed by the provision.

A revision along these lines would be considerably more complicated than a simple "applicable/inapplicable" analysis of each provision of the Davis-Stirling Act. For each provision that the Commission decided should not apply to nonresidential CIDs, the Commission would then have to consider whether the language of the provision could be revised to make the provision appropriately applicable to nonresidential CIDs.

The Commission should consider this option, when deciding on a statutory framework for a revision in this study.

Respectfully submitted,

Steve Cohen
Staff Counsel

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VIA E-MAIL (bhebert@clrc.ca.gov)
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December 9, 2008

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

Re: Commission Memorandum 2008-63 Common Interest Development Law; Non-Residential Associations

Dear Mr. Hebert:

I received the Commission's Memorandum 2008-63 dealing with non-residential common interest developments (**CIDs**) and was pleased to see that this subject is going to receive the focused study that it has long needed. This is a subject that is a good project for the Commission, both because it is a subject that needs study and because it is an area of CID law that can be reviewed and discussed without the emotional overlay that accompanies any discussion of residential CID law.

I would like to comment on a few matters touched on by the Memorandum.

Commercial CIDs are either planned developments, condominium projects, or some combination of these two types of CIDs. Planned developments as you know existed for many years without any statutory authority, prior to the adoption of the Davis-Stirling Common Interest Development Act (**Act**), and can still exist outside the Act. Condominium projects on the other hand have always been considered a creature of statute and are generally considered not to exist at common law. It was not possible to create commercial condominiums before the first generation condominium law was adopted in 1963, and that statutory authority was continued by the second generation condominium law and by the Act. Because of this need for statutory authority, it would not be possible to exempt commercial condominiums from the Act without creating a separate statutory authority for them. It does not seem to make sense to split out commercial condominiums from commercial planned developments and therefore it would seem to better to leave the law related to both in the Act. However, the differences between residential CIDs and commercial CIDs are great enough to consider that a separate Chapter should be created for commercial CIDs within the Act. I do not believe that it is enough to just provide that certain provisions of the Act do not apply to commercial CIDs. In some cases, such as the form of and amendment of condominium plans, it is desirable to have separate and distinct legal rules apply.

The background information of *Civil Code Section 1373*, contained in the Memorandum, provides an understanding of the background on the attempts to separately regulate commercial CIDs. I think I can provide some background that may be helpful. When *Section 1373* was enacted in 1988, the Section provided that certain provisions of the Act were not applicable "to common interest developments that are expressly zoned as industrial developments and limited in use to industrial purposes or expressly zoned as commercial developments and limited in use to commercial purposes". This language was taken from *Business and Professions Code Section 11010.3*, which had been adopted in 1980, for the purpose of exempting commercial and industrial subdivision from the public report process.

I was involved in the amendment of *Section 11010.3* in 2000, which changed the language of that Section to read, "The provision of this chapter shall not apply...in which lots or other interests (a) limited to industrial or commercial uses by zoning or (b) by a declaration of covenants, conditions and restrictions, which declaration has been recorded...". The purpose of the amendment was the concern about the use of the language "expressly zoned" since many current zoning methods involve zones in which both residential and commercial uses may be situated by the use of use permits, and to make it clear that if the zoning limited the use or if the declaration limited the use the commercial subdivision was exempt from the jurisdiction of the Department of Real Estate. In 2003, *Section 1373* was amended to parallel *Section 11010.3*, but instead of the words, "...by a declaration of covenants, conditions, and restrictions..." the wording read "by its declaration". That wording picked up the defined term "declaration" in the Act which did not exist in the *Business and Profession Code* and the provisions of the Act, which provided where the declaration was to be recorded. In 2004, *Section 1373* was amended to make the language parallel the *Business and Professions Code* section. This, I believe, was a mistake for it took out the wording that had been deliberately altered from the language of *Section 11010.3* in the 2003 amendment of *Section 1373*, to take into account the defined terms in the Act and the provisions of the Act on the recording of declarations, and substituted the language of *Section 11010.3*, which uses the term, "A declaration of covenants, conditions and restrictions..." which varies from the defined term "declaration" in the Act. What probably should have been done was to amend *Section 11013.3* to just use the term "declaration" with a cross-reference to the defined term in the Act.

I noticed in Sections 1 through 18 of AB 1921, which amended various provisions of the *Business and Professions Code* that many of the sections of the *Business and Professions Code* contained terms such as "declaration of covenants conditions and restrictions", "homeowners' associations" or "owners' association" which were out of conformity with the defined terms of the Act. Section 11010.3 was not amended by AB 1921, but also contains the "declaration of covenants, conditions and restrictions" language which is out of conformity with the term used by the Act. It may be worth while in any revision of the Act to considered bringing the terms in the Business and Professions Code sections which use the terms defined in the Act as "declaration", "association" etc. into conformity with the Act and cross reference them to the Act.

There are many differences between residential and commercial CIDs, which should be examined and could be the subject of further legislation. One major difference is that the ownership rights, voting, and assessments, are often based on the square footage of the units owned rather than on a single vote and assessment per unit. This in turn creates special issues for voting and for

assessments. It also creates a situation where one or more owners may have most of the voting power and be paying most of the assessments. Commercial CIDs generally do not maintain reserves and rely on assessments which can change considerably from year-to-year when major repairs or renovation is required. Another major difference is that it is much more likely that owners will desire to change the boundaries of their ownership interest during the life of a project, which requires an easier method to alter condominium plans, to allow boundary changes between units. The current systems of using bar or grid systems with each grid or bar purporting to be a condominium unit are cumbersome and subject to conveyance and title errors. Other issues, such as commercial signage and customer and employee parking, do not exist in a residential setting. There is also likely to be much more of a mixture of owner-users and tenants and situations where there are only a handful of owners with many more tenants.

I noticed in the First Supplement to Memorandum 2008-63, the discussion of mixed-use developments. For many reasons, including the provisions of *Business and Professions Code Section 11010.3*, most mixed-use developments attempt to separate the residential and commercial portions by parcel lines (both on the ground and located in airspace), so that any residential association can operate as a separate residential association. The residential and any commercial which are commonly not commercial CIDs, but which could include separate commercial CIDs, are tied together by some sort of master association or a reciprocal easement and maintenance agreement. True mixed developments are likely to be residential with a small number of commercial separate interests, such as commercial space on the first story of a mid-rise residential condominium building. This type of mixed development is processed as a residential development. However, even in these situations it may be beneficial to allow for easier modification of commercial condominium units.

The discussion of mixed-use developments does bring up an interesting hybrid of association, an association whose members are either commercial entities or other residential associations or both (such as a master association of a mixed-used high rise building whose members are a residential association, commercial entities holding the portions of the building used for retail and hotel uses and perhaps even a commercial CID. In a residential situation, some master associations have only other residential associations as members. Some thought should be given as to what provisions of the Act should apply to associations, which do not have individual separate interest owners as members, but only other associations or commercial entities. It would seem that the membership voting and the assessment and collection provisions of the Act may not function well in these master association situations.

Very truly yours,

DUNCAN R. McPHERSON

DRM/clm

EMAIL FROM TINA RASNOW, VENTURA COUNTY SUPERIOR COURT (DECEMBER 9, 2008)

Thanks for the update. I prefer the conservative view on the mixed use CID in terms of including it as a residential CID if there is any aspect of it that is residential. Thanks for considering my comment.

"Our lives begin to end the day we become silent about things that matter." ---Dr. Martin Luther King, Jr.

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