Study H-856 August 19, 2009

Memorandum 2009-32

Common Interest Development Law: Nonresidential Associations (Discussion of Issues)

In this study, the Commission is considering which provisions of the Davis-Stirling Common Interest Development Act (Civ. Code §§ 1350-1378) (hereafter "Davis-Stirling Act") should apply to a nonresidential common interest development ("CID"). Beginning at page 22, this memorandum categorizes all provisions of the act that presently apply to a nonresidential CID by function, and then presents a multi-pronged analysis of which categories should continue to be applicable to a nonresidential CID. (A table of contents is provided that begins on page 18.)

The memorandum concludes by identifying and analyzing provisions of the act that, based either on content or specific text, effectively already have no application to nonresidential CIDs.

The following material, discussed below, is attached as an Exhibit:

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

Because the memorandum categorizes more than 90 separate provisions of the Davis-Stirling Act, only relevant excerpts from the provisions are reprinted within the body of the memorandum. However, the full text of the entire Davis-Stirling Act, along with selected relevant provisions of the Corporations Code, has been reprinted in the First Supplement to Memorandum 2009-32. It is hoped that this supplement will serve as a useful reference source in conjunction with all memoranda presented in this study.

ANALYSIS

Summary

As directed by the Commission, all provisions of the Davis-Stirling Act that presently apply to nonresidential CIDs have been categorized in this memorandum according to the function to which the provision primarily relates (e.g., access to records, meetings, elections, etc.). Minutes (June 2009), p. 3.

Most sections in the Davis-Stirling Act contain multiple provisions, which appear in separate subdivisions, separate sentences, or even severable clauses within a single sentence. In the analysis that follows, when a section contains multiple provisions that all relate to the same function, the section itself has normally been listed as a single provision within a category. However, when multiple provisions within a section relate to different functions, each provision has been separately identified and listed in its appropriate category.

When the full text of a provision is not readily identifiable solely by reference to a section number, subdivision, or sentence, the text of the provision has been reprinted in italics, following a shorthand reference to the provision.

Both the categories discussed in this memorandum as well as the provisions within each category are presented in an order intended to best facilitate discussion of the provisions, rather than necessarily in the order that the provisions appear in the Davis-Stirling Act.

After categorizing the provisions, the memorandum analyzes whether each category should be applicable to a nonresidential CID, based on the following

factors that have been identified as significant by the Commission: (1) whether the provisions in the category appear to be primarily "foundational" or "operational" in nature, (2) whether a reason exists to apply the statutory treatment of the provisions to a nonresidential CID, when the Legislature has not provided the same statutory treatment to other commercial relationships, (3) whether the provisions in the category substantially overlap other statutory provisions, and (4) any other relevant factors, including those previously identified in Memorandum 2009-24. Minutes (June 2009), p. 3.

The staff has also noted instances when an individual provision within a category may warrant a different applicability decision than the category as a whole.

Review of Factors

A brief review of the factors identified above may be helpful.

Nature of Provision —Foundational vs. Operational

The Legislature has previously considered the applicability of provisions of the Davis-Stirling Act to nonresidential CIDs. In 1988, three years after the enactment of the Davis-Stirling Act, the Legislature enacted Section 1373, which exempted nonresidential CIDs from six provisions of the act as it existed at that time.

An examination of the provisions in the Davis-Stirling Act immediately prior to the enactment of Section 1373 suggests that the Legislature may have decided which provisions to classify as exemptions at that time based on whether a provision was primarily "operational" in nature (i.e., addressing a regular or routine function of a CID governing body), or primarily "foundational" in nature (i.e., addressing the establishment of a CID, or its fundamental structural elements). See discussion in First Supplement to Memorandum 2009-24.

Although the staff has found no express statement of legislative intent to that effect, each provision included as an exemption in Section 1373 appears to have been an operational provision, and the list of exemptions appears to have included virtually all of the operational provisions in the act at that time. Nearly every provision of the act left applicable to nonresidential CIDs after the enactment of Section 1373 appears to have been foundational in nature, with the exception of four provisions concerning the collection of delinquent assessments

that perhaps may be more accurately characterized as operational. See Sections 1366(e), 1366(f), 1367.1(d), 1367.1(f).

Exemption determinations by the Legislature based on this foundational/operational distinction would have been consistent with other expressions of legislative intent found in the legislative history of Section 1373. See discussion in Memorandum 2009-18, pp. 3-4. This history indicates a legislative view that nonresidential CIDs, both because of perceived business sophistication as well as widely varying needs, should generally be permitted to determine on their own how to run what is in substantial part a collective business venture. Such a view would support a finding that mandatory operating provisions in the Davis-Stirling Act would therefore constitute an unneeded and undesirable burden for most nonresidential CIDs.

At the same time, however, the Legislature may have felt that this autonomy should not extend so far as to exempt nonresidential CIDs from statutory authority that provided for the establishment of a CID, or addressed its basic structural components. Such foundational provisions would likely be needed by a nonresidential CID, or it might have difficulty functioning as a CID at all. This contention was in fact made in a letter to Assemblymember Hauser, the author of the bill that enacted Section 1373, prior to the bill's enactment. Memorandum 2008-63, Exhibit p. 1.

Since the enactment of Section 1373, the Legislature has added many new provisions to the Davis-Stirling Act. However, legislative history suggests that after enacting Section 1373, the Legislature began focusing almost exclusively on the needs of residential CIDs, and for the most part stopped actively considering whether subsequently enacted provisions should apply to nonresidential CIDs. See discussion in Memorandum 2008-63, pp. 4-5.

Many of these subsequently enacted provisions do not appear to be reasonably characterizable as foundational provisions. If the Legislature had evaluated the applicability of these provisions to nonresidential CIDs in a manner consistent with their enactment of Section 1373, it may have exempted nonresidential CIDs from many of those provisions some time ago.

One way the Commission could do so now, if it deems it appropriate, would be to make use of a foundational/operational distinction similar to that likely relied on by the Legislature when it enacted Section 1373.

To assist the Commission to the extent it wishes to do so, the staff has further organized the categories of provisions in this memorandum according to

whether the categories appear to contain primarily foundational provisions, or primarily operational provisions. A short summary of the rationale for each classification is presented in each discussion.

In making these classifications, the staff has relied on definitions of the terms "foundational" and "operational" intended to allow the Commission to track the decisions made by the Legislature when enacting Section 1373 as closely as possible, if the Commission wishes to do so.

A provision has been classified as foundational based on a definition that the staff believes accurately describes nearly all the provisions that the Legislature allowed to remain applicable to nonresidential CIDs, when enacting Section 1373: ***a provision that addresses the establishment of a CID, or its fundamental structural elements***.

In fact, most of the provisions classified as foundational in this memorandum *are* the provisions that were in the Davis-Stirling Act when the Legislature enacted Section 1373, and were left applicable to nonresidential CIDs. Provisions classified as foundational in this memorandum that were added to the Davis-Stirling Act after Section 1373 are identified in the memorandum with an asterisk. The Commission may want to pay special attention to the staff's characterization of these latter provisions, to determine whether they are reasonably defined by the italicized definition above.

As an initial step in a proposed analytical framework presented later in this memorandum, the staff suggests that, in the absence of a substantial countervailing consideration, the Commission follow the lead of the Legislature and allow all provisions determined to be primarily foundational to remain applicable to nonresidential CIDs.

Next, in order to provide the Commission an opportunity to track the *exemption* decisions made by the Legislature when enacting Section 1373 as closely as possible, provisions have been classified as operational in this memorandum based on a definition that appears to accurately describe all provisions that the Legislature made *inapplicable* to nonresidential CIDs, when enacting Section 1373: ***a provision that addresses a regular or routine function of a CID governing body***. As another part of the proposed analytical framework, the staff suggests that the Commission give strong consideration to exempting nonresidential CIDs from each of these provisions.

Finally, because of the number of provisions that have been added to the Davis-Stirling Act since the enactment of Section 1373, it is no longer possible to

neatly classify all provisions presently in the act as either foundational or operational, at least according to definitions that closely track the previous actions of the Legislature. Based on those definitions, a few provisions now in the act, generally relating to *permitted uses* in a CID, are not easily classified as either foundational *or* operational.

In this memorandum, the staff has placed these provisions in a third classification, which it has labeled "Hybrid Provisions." Applicability decisions about these provisions may be among the more difficult the Commission will make, as the Commission may not be able to rely significantly on prior legislative action as a guide.

Special Statutory Treatment of Nonresidential CIDs as Compared to Other Commercial Relationships

A second important factor bearing on the Commission's applicability decisions in this study involves a consideration of when a nonresidential CID should receive different statutory treatment than other similar commercial relationships, relating to the same general subject matter.

The regulation of other business relationships on the subjects addressed by the Davis-Stirling Act, if it exists at all, is generally found in the Corporations Code. Because most nonresidential CIDs are organized as nonprofit mutual benefit corporations, as a first step in analyzing this factor, the staff in this memorandum has compared provisions of the Davis-Stirling Act to provisions addressing the same subject in the Nonprofit Mutual Benefit Corporation Law (Corp. Code §§ 7110-8910). If treatment provided in the Davis-Stirling Act is significantly different than that provided in the Nonprofit Mutual Benefit Corporation Law, the Commission may want to consider whether it is appropriate for nonresidential CIDs to receive the different treatment provided by the Davis-Stirling Act.

One way to answer this question might be to focus on the primary consideration involved in a typical nonresidential CID relationship:

(1) a parcel of real property that is integral to the owner's business,
(2) common ownership of another portion of the development,
(3) shared communal benefit (e.g., parking lot, security, maintenance, etc.),
(4) an agreement that, under specified circumstances, owners in the CID may collectively restrict an individual owner's use and

> enjoyment of the consideration described above, over that individual owner's objection.

A nonresidential CID might warrant the special statutory treatment afforded by a Davis-Stirling Act provision when the provision appears to either (1) safeguard or (2) limit these somewhat unique aspects of a nonresidential CID relationship. In deciding whether a category of provisions presented in this memorandum should apply to nonresidential CIDs, the Commission may therefore want to focus on whether the special statutory treatment afforded by the provisions appears reasonably necessary to achieve either of these objectives.

The Commission will also likely want to preserve the special statutory treatment of a nonresidential CID afforded by a Davis-Stirling Act provision when that provision supplies necessary meaning or context for other provisions of the Davis-Stirling Act that the Commission decides should remain applicable to nonresidential CIDs (e.g., definitional provisions).

The staff suggests that this "special statutory need" factor may prove to be a more important consideration for the Commission when analyzing the applicability of *non*-foundational provisions (i.e., operational or hybrid provisions) to nonresidential CIDs, as opposed to foundational provisions.

After all, for purposes of this analysis, a foundational provision has been defined as a provision that addresses the establishment or structure of a CID. Given that definition, it is more likely that a provision found to be foundational will be seen as reasonably necessary to preserve or limit a key component of a nonresidential CID, even when not as essential in some other similar business relationship.

And even when analyzing a foundational provision that does *not* appear to be essential to preserve a special aspect of a nonresidential CID, the Commission may still want to rely less heavily on this "special statutory need" factor. Again, most of the provisions classified as foundational in this memorandum were (1) initially made applicable to nonresidential CIDs by the Legislature, when it enacted the Davis-Stirling Act, and (2) allowed to *remain* applicable to nonresidential CIDs, when the applicability of the provisions of the Davis-Stirling Act to nonresidential CIDs was specifically presented to the Legislature, three years later (when enacting Section 1373). While it might be that the applicability to nonresidential CIDs of a particular foundational provision was twice not considered by the Legislature, this legislative history also supports a finding that the applicability of that provision to a nonresidential CID (even

when the statutory treatment had not been provided to other similarly situated business relationships) may have been the Legislature's affirmative *choice*.

In the category discussions that follow, the staff will address whether there appears to be a need for the special statutory treatment of nonresidential CIDs afforded by the listed provisions.

Statutory Overlap

Another factor that may be important in deciding whether a provision of the Davis-Stirling Act should be applicable to a nonresidential CID is whether the provision is substantially overlapped by other statutory authority applicable to nonresidential CIDs. See Memorandum 2009-24, pp. 7-8.

There are two distinct scenarios in which statutory overlap might provide a basis for exempting a nonresidential CID from a provision of the Davis-Stirling Act.

The first scenario involves a *conflict* between multiple statutory provisions that apply to nonresidential CIDs, one a provision within the Davis-Stirling Act and one (or more) outside the act. In this scenario, exemption might be warranted for the same reasons generally applicable to any statutory conflict. As has been previously noted, conflicting statutory provisions create ambiguity and confusion, make it difficult for an entity governed by the provisions to be sure it is conforming its conduct to the law, and add unnecessary administrative burden. Exempting nonresidential CIDs from a Davis-Stirling Act provision that conflicted with another statutory provision would be one way to resolve such a conflict.

A second scenario that could be characterized as "statutory overlap" involves statutory provisions within and outside the Davis-Stirling Act that both apply to nonresidential CIDs, but merely address the same subject matter (e.g., a Davis-Stirling Act provision relating to elections, and a Corporations Code provision on the same subject). In this scenario, exemption would be based on answering a policy question specific to nonresidential CIDs: In light of statutory authority outside the Davis-Stirling Act on the subject matter at issue, is some essential purpose served by the additional coverage of the Davis-Stirling Act provision?

In the category discussions that follow, the staff will note whenever "statutory overlap" appears to exist.

However, reliance on statutory overlap as the basis for finding an exemption may raise a somewhat problematic underlying issue. If the Commission were to exempt nonresidential CIDs from a Davis-Stirling Act provision based solely on the existence of overlapping statutory authority, should the exemption apply to an individual nonresidential CID that for some reason *was not governed by the overlapping statutory authority*?

For example, as previously noted, the overlapping statutory provisions discussed in this memorandum are generally provisions of the Nonprofit Mutual Benefit Corporations. If the Commission were to exempt nonresidential CIDs from a Davis-Stirling Act provision based on the existence of an overlapping provision of the Nonprofit Mutual Benefit Corporations Law, should the exemption apply to a nonresidential CID that was *not* a nonprofit mutual benefit corporation?

The answer to this question might appear to be "no," since the rationale for the exemption would have no application to that particular CID. In addition, making the exemption applicable to a nonresidential CID that was not a nonprofit mutual benefit corporation would leave that CID ungoverned by *either* provision on the subject matter at issue.

However, carving out exceptions to proposed exemptions will make the Commission's recommendation in this study more complex, and perhaps more controversial. The Commission might also have to address a "slippery slope" argument — if exemptions based on statutory overlap are subject to exception based on a particular characteristic of an individual nonresidential CID (i.e., unincorporated status), should exemptions based on other factors also be subject to exception, based on other relevant individual CID characteristics (e.g., whether professionally managed, industrial vs. commercial, size, etc.)?

Is this underlying issue raised by the staff a real world concern? As relates to statutory overlap with provisions in the Nonprofit Mutual Benefit Corporation Law, potentially yes. The staff has found no statistical data indicating exactly how many existing nonresidential CIDs are *not* nonprofit mutual benefit corporations. However, the staff has been informally advised that between five and ten percent of nonresidential CIDs are not incorporated at all. In addition, larger CIDs are sometimes organized as nonprofit public benefit corporations, which are also not governed by the Nonprofit Mutual Benefit Corporation Law (although many of the applicable provisions are quite similar). See C. Sproul & K. Rosenberry, Advising California Common Interest Communities, § 1.6, at 7.

This underlying issue is raised at this time so that the Commission has it in mind when considering exemptions based on statutory overlap. However, the Commission need not decide how to *resolve* the issue at this time, as the Commission may ultimately decide not to recommend any exemptions based solely on statutory overlap. If it does, the staff will present further analysis of the issue at that time.

Alternative Legislative Rationales

In Memorandum 2009-18, the staff identified three additional rationales that may also have contributed to exemption determinations previously made by the Legislature when enacting Section 1373:

- Consideration should be given to exempting a nonresidential CID from provisions that *primarily regulate financial management*, based on the relative business sophistication of owners in a nonresidential CID
- Consideration should be given to exempting a nonresidential CID from provisions that *mandate disclosure of CID-related information that is independently obtainable*, based on the undue administrative burden placed on the CID
- Consideration should be given to exempting a nonresidential CID from provisions that *statutorily allow action that is prohibited by a CID's governing documents*, based on detrimental reliance by a nonresidential owner when acquiring an interest in the CID

Memorandum 2009-24, pp. 13-21.

In the category discussions that follow, these considerations will also be noted whenever applicable.

Input from Commenters

The Commission has received several comments on this study.

Stakeholder Group

Two lengthy comments have been submitted from a working group of stakeholders (hereafter, "Stakeholder Group") that was organized to offer the Commission input on this study. The group consists of a number of attorneys that primarily represent developers of nonresidential CIDs, as well as two property managers that manage nonresidential CIDs. First Supplement to Memorandum 2009-18, Exhibit pp. 5, 8.

The Stakeholder Group had previously submitted to the Commission a letter identifying the provisions of the Davis-Stirling Act that the group believes should be made inapplicable to nonresidential CIDs. First Supplement to Memorandum 2009-18, Exhibit pp. 5, 9-11. Within each category discussion presented in this memorandum, the staff has indicated the Stakeholder Group's position as to each provision listed in the category.

The Stakeholder Group has recently submitted a second comment, in a letter sent by Jeffrey Wagner. Exhibit p. 16. This comment, intended to coordinate with the analysis presented in this memorandum, identifies the provisions of the Davis-Stirling Act that the group views as foundational in nature. It should be noted that the definition of "foundational" relied upon by the group in suggesting its classifications is slightly different than the definition relied upon by the staff: "a provision that was essential to the formation of a [CID], essential to protection of basic property rights; or necessary for the operation of the [CID] such as assessments and lien rights." Exhibit p. 16.

The Stakeholder Group also suggests that all provisions characterized as foundational should remain applicable to nonresidential CIDs. *Id.*

In each category discussion that follows, the staff has noted the Stakeholder Group's view on whether the provisions listed in the category are foundational.

Individual Commenters

Craig Stevens, one of the property managers in the Stakeholder Group, has emailed many of his clients, soliciting input for the Commission. Exhibit p. 13. In the email, Mr. Stevens expresses that a large number of his clients have reported that all they want from the Davis-Stirling Act are "1) basic protections, 2) a functional mini-government, and 3) basic financial information and minimal administration and costs." *Id.*

Several replies to Mr. Stevens's email have been received, and the Commission is grateful for the input. Exhibit pp. 1-12, 15, 19. Most of the replies echo Mr. Stevens's call for simplification of the Davis-Stirling Act as it applies to nonresidential CIDs, by eliminating costly and unneeded, unwanted, or inapplicable regulation. Typical comments included the following:

> Please create a simple, basic act for commercial property associations which require less costly rules to govern and enforce.

Scott Levitt, Exhibit p. 12.

> I want my common association costs kept low and for all owners in the park to pay pro-rata with minimal hassles, administration and cost of operating the association.

Kay Adams, Exhibit p. 1.

> I believe that we as owners of a non-residential commercial property do not need more government regulation and are business people well familiar with the term "caveat emptor". We have imposed upon ourselves rules and regulations, CC&R's and other methods of governing our business to cover this and other projects that we do not need to have another layer of bureaucracy imposed on us by the State of California. We are trying to keep our costs low for all of the owners in this association who pay a pro-rata share of the expenses. To add any further regulation on our association will simply add to our costs and make it more difficult to administer and run our operation of serving the healthcare professionals in this community.

Bob Crissell, Exhibit p. 3.

A few of the replies addressed a specific provision in the Davis-Stirling Act that Mr. Stevens had highlighted, relating to election procedures (Section 1363.03). Specific comments on this provision were as follows:

> [T]he requirement on larger associations to hire an inspector of elections …. is an expensive unnecessary item.

John Laubach, Exhibit p. 10.

> We don't feel the need to hire independent inspectors for elections or use of double secret blind ballots.

Lisa McLain, Exhibit p. 12.

> Having to hire some one to count votes for an election that has less than 20 voters is a waste of money.

C. H. Holladay, Exhibit p. 6.

Finally, responding to a request from the staff for any other or more specific views about any provisions of the Davis-Stirling Act, somewhat more detailed comments have been submitted. These comments will be noted when discussing the category of provisions to which the comment relates.

OVERALL ANALYTICAL FRAMEWORK

After each category discussion presented in this memorandum, the staff has made a recommendation relating to whether or not the Commission should find the provisions in the discussed category applicable to nonresidential CIDs. These individual recommendations are consistent with the following analytical framework, which might prove to be a useful overall guide for the Commission in making its applicability decisions in this matter.

Provisions Effectively Inapplicable to Nonresidential CIDs

First, the staff suggests that the Commission should exempt nonresidential CIDs from any existing Davis-Stirling Act provision that effectively *already* has no application to nonresidential CIDs, based on the content or text of the provision. An example of such a provision would be Section 1365.7, which limits the civil liability of a volunteer association officer or director, in a CID that is "exclusively residential."

At the conclusion of this memorandum, the staff analyzes a handful of Davis-Stirling Act provisions that appear to fall into this category. Assuming that the Commission agrees with the staff's analysis of these provisions, each could be added to the list of exemptions in Section 1373, with little to no further discussion.

Retention of "Foundational" Provisions

Next, as indicated, the staff suggests that absent any unusual countervailing consideration, the Commission **retain the applicability to nonresidential CIDs of any provision that the Commission finds to be primarily "foundational."**

Allowing provisions that the Commission finds foundational to remain applicable to nonresidential CIDs would carry something of a legislative stamp of approval, as the Legislature would have already made that same decision for most of the provisions. In addition, retaining the applicability of these provisions to nonresidential CIDs would constitute an analytically sound and largely indisputable core principle for the Commission's recommendation in this study. Reliance on a basic premise that any Davis-Stirling Act provision generally addressing either the establishment of a CID or its basic structure should, in the absence of a problem, remain applicable to all CIDs should be both noncontroversial and straightforward to present.

Consideration of All Other Factors

The staff then suggests that all remaining provisions should be analyzed by considering all other factors that have been discussed above, with each given whatever weight the Commission deems appropriate.

However, if any one factor is to receive special emphasis, the staff suggests that it be the exemption of nonresidential CIDs from provisions that the Commission determines to be clearly operational in nature. A recommendation based substantially on this consideration would again be consistent with previous action taken by the Legislature, and would again be supported by a relatively compelling rationale.

The staff also suggests two other factors that might be relevant to the Commission's applicability decisions about these provisions.

Benefit vs. Burden

Because this framework has already addressed provisions that effectively have no application at all to nonresidential CIDs, all remaining provisions will necessarily have at least some applicability to nonresidential CIDs, and most could be argued to provide at least some theoretical benefit to a nonresidential CID.

However, the staff suggests that such benefit alone should not be determinative of whether a provision should remain applicable to a nonresidential CID. It is important to keep in mind that, as a general rule, the exemption of nonresidential CIDs from a particular provision would not preclude an individual nonresidential CID from *voluntarily* implementing whatever treatment the provision had afforded, thereby allowing the CID to continue to realize any perceived benefit. In fact, the absence of a statutory mandate might make it easier for the CID to "personalize" the treatment in the provision, to realize even more benefit. For example, if the Commission were to exempt nonresidential CIDs from the election procedures required by the Davis-Stirling Act, a particular nonresidential CID could still voluntarily implement *exactly* the same election procedures that had been mandated by the act, if it so desired.

Nevertheless, some provisions offer a benefit to nonresidential CIDs, *with little to no regulatory burden*. If there is no real downside to a particular provision, does it still make sense to exempt nonresidential CIDs from its application?

An example of such a provision might be Section 1363(g). Section 1363(g) requires a CID association to notify its owners of an adopted schedule of penalties for violation of a provision of a CID governing document.

This provision has been classified as operational in this memorandum, and is certainly not *necessary* to preserve any key aspect of a nonresidential CID. But in light of the apparent minimal burden that the provision appears to place on CID management, is there still good reason to exempt nonresidential CIDs from this provision?

The Commission may want to consider whether the minimal burden imposed by an otherwise appropriate candidate for exemption is sufficiently outweighed by the benefit that the provision offers, so as to make exemption unwarranted.

Need for Statutory Treatment

The Commission may also want to consider whether preserving the treatment of a particular provision *in a statute* is reasonably necessary to protect a key aspect of the nonresidential CID relationship.

Section 1365.9 provides a possible illustration of this type of necessity. Because owners in a CID are generally each part owners of the common area in a CID, each owner would be subject to joint and several liability in a tort claim based on ownership of that common area. Such litigation would likely be extremely cumbersome due to the number of potential defendants, and could produce harsh results based on the differing financial status of the many owners. Presumably for these reasons (perhaps among others), Section 1365.9 provides owners in a CID with immunity from such civil liability, if the CID maintains a specified level of insurance.

However, this grant of immunity can come only from the state. If a nonresidential CID were exempted from Section 1365.9, owners in the CID could not confer that same immunity from civil liability on themselves. The *statutory authority* of the provision would therefore be necessary, if the Commission wanted to preserve the availability of this immunity for owners in nonresidential CIDs.

Another reason why it might be necessary to preserve the *statutory* treatment of a particular provision would be to protect a significant reliance interest on the part of a substantial minority of owners in the CID.

For an example of this type of possible necessity, consider an exemption of nonresidential CIDs from Section 1360.5. Section 1360.5 guarantees a CID owner

the right to keep at least one pet on the grounds of the CID, subject to reasonable rules and regulations. While this provision may have been drafted with residential CID owners in mind, it seems likely that at least some small business proprietors in CIDs have relied on this provision, and now consider it to be something of a vested right.

If existing nonresidential CIDs were to be exempted from this provision, an individual nonresidential CID *might* continue to allow pets on the grounds, if a majority of the CID was in favor of doing so. But what if only a substantial *minority* of the existing owners desired that benefit? Without a statutory guarantee, the benefit of the provision would likely be permanently lost.

In fact, depending on how a CID's declaration is written, even a *majority* of owners in a nonresidential CID might be prevented from voluntarily implementing the treatment in a provision that was no longer mandated by statute. This could happen if the subject matter of the provision was addressed by the declaration, and the declaration required that any amendment of the declaration must be approved by a specified supermajority.

For example, a nonresidential CID declaration might contain a provision that barred pets except as allowed by Section 1360.5, and also contain a supermajority amendment provision. If nonresidential CIDs were exempted from Section 1360.5, in this CID that declaration provision would then preclude pets on the grounds entirely, and the only way the CID could amend that provision would be to secure the requisite *supermajority* vote of approval.

The Commission may therefore also want to consider whether an otherwise appropriate candidate for exemption affords what might be considered a particularly *polarizing* benefit in a nonresidential CID. Such a benefit would be very much desired by a substantial minority of the ownership in a nonresidential CID (perhaps with particularized wants or needs), but likely opposed by a majority of the ownership. If the Commission felt that it was important to protect the minority's interest in this benefit, the *statutory authority* of the provision would again likely be needed.

However, in this situation, exemption would not have to be ruled out completely. If the Commission felt that but for this reliance interest, a provision appeared to be an appropriate exemption, the Commission could recommend exemption *only for those nonresidential CIDs formed after the effective date of the legislation implementing the Commission's recommendation*. Such a prospective exemption would provide the application of the Davis-Stirling Act desired by the

Commission to *future* nonresidential CIDs, while still protecting the reliance interest of *present* nonresidential CID owners.

If the Commission wished to consider a prospective exemption of this nature, the staff does not believe it would be difficult to draft.

TABLE OF CONTENTS

FOUNDATIONAL PROVISIONS

(Note: As previously indicated, provisions classified as foundational that were added to the Davis-Stirling Act after the Legislature enacted Section 1373 are marked with an asterisk.)

PROVISIONS RELATING TO THE DAVIS-STIRLING ACT ITSELF

§ 1350. Name of act
* § 1350.5. Interpretation of headings within act

Summary of Category

These are the first two provisions of the Davis-Stirling Act, identifying the act and specifying how the headings in the act are to be construed.

Foundational vs. Operational

Although these provisions do not directly relate to the establishment of a CID, they are foundational provisions of the Davis-Stirling Act, which itself provides for the statutory creation of a CID. The provisions in this category therefore appear to be properly characterized as foundational in nature.

The Stakeholder Group also characterizes both of these provisions as foundational. Exhibit p. 18.

Consideration of this factor suggests that the provisions in this category should remain applicable to nonresidential CIDs.

Need for Special Statutory Treatment

Unless the Commission decides to exempt nonresidential CIDs from the Davis-Stirling Act entirely, it is important that the provisions in this category remain applicable to nonresidential CIDs, as part of the statutory framework for other provisions of the act that remain applicable.

Public Comment

The Stakeholder Group does not suggest that nonresidential CIDs be exempted from either provision in this category. First Supplement to Memorandum 2009-18, Exhibit p. 5.

None of the other commenters have expressed a position on either provision in this category.

Recommendation

The staff recommends that **this category of provisions remain applicable to nonresidential CIDs.**

ESTABLISHMENT OF A CID

§ 1352. Statutory requirements for creation of a CID and application of the Davis-Stirling Act
* § 1374. Statement that Davis-Stirling Act applies only to a CID with common area
§ 1370 (excerpt below). Construction of deed or condominium plan of CID

> *Any deed … or condominium plan for a common interest development shall be liberally construed to facilitate the operation of the common interest development, and its provisions shall be presumed to be independent and severable.*

§ 1351. Definitions of terms applicable to a CID

Summary of Category

This category consists of a series of provisions relating to the establishment of a CID.

Section 1352 specifies when a CID is created by statute, and is then to be governed by the Davis-Stirling Act.

Section 1374 provides that the Davis-Stirling Act does not apply to a CID that has no common area, as defined in Section 1351.

The provision excerpted from Section 1370 declares that two recorded documents relating to the establishment of a CID are to be liberally construed, so as to facilitate the operation of the CID.

Section 1351 defines the various types of CIDs, and their component parts. (In this memorandum, a few provisions that appear in Section 1351 are also presented in other categories.)

Foundational vs. Operational

These provisions appear to be classic foundational provisions relating to the creation of a CID. Each relates to or governs the establishment of a CID, and none regulate the day-to-day operations of a CID.

The provisions in this category therefore appear to be properly characterized as foundational in nature.

The Stakeholder Group also characterizes each of these provisions as foundational. Exhibit p. 18.

Consideration of this factor suggests that the provisions in this category should remain applicable to nonresidential CIDs.

Need for Special Statutory Treatment

It would be extremely difficult to preserve the meaning of Davis-Stirling Act provisions that the Commission decides should remain applicable to nonresidential CIDs without the statutory support of these provisions of the act. Therefore, unless the Commission decides that nonresidential CIDs should not be governed by the Davis-Stirling Act at all, there appears to be a need to retain the special statutory treatment of nonresidential CIDs in these provisions.

Public Comment

The Stakeholder Group does not suggest that nonresidential CIDs be exempted from any provision in this category. First Supplement to Memorandum 2009-18, Exhibit p. 5.

None of the other commenters have expressed a position on any provision in this category.

Recommendation

The staff recommends that **this category of provisions remain applicable to nonresidential CIDs.**

GOVERNING BODY OF A CID

§ 1363(a). Requirement that a CID be managed by an association
§ 1363(c). Grant to a CID association of specified statutory powers of a nonprofit mutual benefit corporation
* § 1365.6. Conflict of interest provisions applicable to the board of directors of a CID association

Summary of Category

The provisions in this category address the basic form, powers, and limitations of the governing body of a CID.

Sections 1363(a) requires a CID to be managed by an "association," a term defined elsewhere in the Davis-Stirling Act as "a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development." Section 1351(a).

Section 1363(c) grants to this association most of the powers granted to a nonprofit mutual benefit corporation by Corporations Code Section 7140. Corporations Code Section 7140 provides:

> 7140. Subject to any limitations contained in the articles or bylaws and to compliance with other provisions of this division and any other applicable laws, a corporation, in carrying out its activities, shall have all of the powers of a natural person, including, without limitation, the power to:
>
> (a) Adopt, use, and at will alter a corporate seal, but failure to affix a seal does not affect the validity of any instrument.
>
> (b) Adopt, amend, and repeal bylaws.
>
> (c) Qualify to conduct its activities in any other state, territory, dependency or foreign country.
>
> (d) Issue, purchase, redeem, receive, take or otherwise acquire, own, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own memberships, bonds, debentures, notes and debt securities.
>
> (e) Pay pensions, and establish and carry out pension, deferred compensation, saving, thrift and other retirement, incentive and benefit plans, trusts and provisions for any or all of its directors, officers, employees, and persons providing services to it or any of its subsidiary or related or associated corporations, and to indemnify and purchase and maintain insurance on behalf of any fiduciary of such plans, trusts, or provisions.
>
> (f) Issue certificates evidencing membership in accordance with the provisions of Section 7313 and issue identity cards.
>
> (g) Levy dues, assessments, and admission and transfer fees.
>
> (h) Make donations for the public welfare or for community funds, hospital, charitable, educational, scientific, civic, religious or similar purposes.
>
> (i) Assume obligations, enter into contracts, including contracts of guarantee or suretyship, incur liabilities, borrow or lend money or otherwise use its credit, and secure any of its obligations, contracts or liabilities by mortgage, pledge or other encumbrance of all or any part of its property and income.
>
> (j) Participate with others in any partnership, joint venture or other association, transaction or arrangement of any kind whether or not such participation involves sharing or delegation of control with or to others.

(k) Act as trustee under any trust incidental to the principal objects of the corporation, and receive, hold, administer, exchange, and expend funds and property subject to such trust.

(*l*) Carry on a business at a profit and apply any profit that results from the business activity to any activity in which it may lawfully engage.

The last provision in this category, Section 1365.6, makes the corporate conflict of interest provisions contained in Corporations Code Section 310 applicable to the board of directors of a CID association (again, whether or not the association is incorporated). Corporations Code Section 310 provides:

310. (a) No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any corporation, firm or association in which one or more of its directors has a material financial interest, is either void or voidable because such director or directors or such other corporation, firm or association are parties or because such director or directors are present at the meeting of the board or a committee thereof which authorizes, approves or ratifies the contract or transaction, if

(1) The material facts as to the transaction and as to such director's interest are fully disclosed or known to the shareholders and such contract or transaction is approved by the shareholders (Section 153) in good faith, with the shares owned by the interested director or directors not being entitled to vote thereon, or

(2) The material facts as to the transaction and as to such director's interest are fully disclosed or known to the board or committee, and the board or committee authorizes, approves or ratifies the contract or transaction in good faith by a vote sufficient without counting the vote of the interested director or directors and the contract or transaction is just and reasonable as to the corporation at the time it is authorized, approved or ratified, or

(3) As to contracts or transactions not approved as provided in paragraph (1) or (2) of this subdivision, the person asserting the validity of the contract or transaction sustains the burden of proving that the contract or transaction was just and reasonable as to the corporation at the time it was authorized, approved or ratified. A mere common directorship does not constitute a material financial interest within the meaning of this subdivision. A director is not interested within the meaning of this subdivision in a resolution fixing the compensation of another director as a director, officer or employee of the corporation, notwithstanding the fact that the first director is also receiving compensation from the corporation.

(b) No contract or other transaction between a corporation and any corporation or association of which one or more of its directors are directors is either void or voidable because such director or directors are present at the meeting of the board or a committee

thereof which authorizes, approves or ratifies the contract or transaction, if

(1) The material facts as to the transaction and as to such director's other directorship are fully disclosed or known to the board or committee, and the board or committee authorizes, approves or ratifies the contract or transaction in good faith by a vote sufficient without counting the vote of the common director or directors or the contract or transaction is approved by the shareholders (Section 153) in good faith, or

(2) As to contracts or transactions not approved as provided in paragraph (1) of this subdivision, the contract or transaction is just and reasonable as to the corporation at the time it is authorized, approved or ratified.

This subdivision does not apply to contracts or transactions covered by subdivision (a).

(c) Interested or common directors may be counted in determining the presence of a quorum at a meeting of the board or a committee thereof which authorizes, approves or ratifies a contract or transaction.

Foundational vs. Operational

As each provision in this category affects how a CID is governed, each has at least an indirect effect on the operation of a CID, and each could therefore be technically characterized as an "operational" provision. However, the primary focus of each provision appears to be establishment of a set of fundamental principles that relate to the governing body of a CID *itself*, rather than regulation of that body's day-to-day *operations*. In this manner, these provisions are intended to be distinguished from provisions relating to more routine administrative aspects of CID governance (e.g., the conducting of meetings, or the holding of elections).

While the provisions in this category may be seen as having both foundational and operational aspects, the provisions at minimum appear to be *more* foundational in nature than operational.

The Stakeholder Group characterizes Sections 1363(a) and 1363(c) as foundational. Exhibit p. 18.

Consideration of this factor suggests that the provisions in this category should remain applicable to nonresidential CIDs.

Statutory Overlap

Based on the premise that most nonresidential CIDs are also nonprofit mutual benefit corporations, there is some relatively insignificant statutory overlap between two provisions in this category and provisions of the Nonprofit Mutual Benefit Corporation Law.

Section 1363(a)

Section 1363(a), which requires a CID to be managed by an association, arguably conflicts with Corporations Code Section 7210. That latter section provides that the board of directors of a nonprofit mutual benefit corporation may delegate the management of the activities of the corporation "*to any person or persons*, management company, or committee however composed," provided that person or entity is under the ultimate direction of the board. Corp. Code § 7210 (emphasis added).

A CID may employ a "managing agent" to manage the assets of the CID, but it does not appear that a CID is empowered by the Davis-Stirling Act to delegate management of all activities of the CID to a single person. See Sections 1363.1, 1363.2, 1363.

There appears to be no published appellate authority addressing whether Section 1363(a) or Corporations Code Section 7210 governs a nonresidential CID organized as a nonprofit mutual benefit corporation on this issue. However, Section 1363(a) was enacted in 1985, well after the 1978 enactment of the arguably conflicting provision in Corporations Code Section 7210. 1978 Cal. Stat. ch. 567. Section 1363(a) would therefore appear to be the controlling provision, based on common principles of statutory construction: "[I]f conflicting statutes cannot be reconciled, later enactments supersede earlier ones, and more specific provisions take precedence over more general ones." *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 310, 6 P.3d 713, 99 Cal. Rptr. 2d 792 (2000) (internal citations omitted).

The staff is unaware of any problems that have been created as a result of this arguable statutory conflict.

Section 1365.6

There is also some statutory overlap between Section 1365.6 and Corporations Code Sections 7233 and 7234.

Section 1365.6 incorporates by reference the conflict of interest provisions in Corporations Code Section 310. There is likely not any statutory overlap between these two sections, as Corporations Code Section 310 otherwise does not appear to apply to nonprofit mutual benefit corporations. See Corp. Code § 102(a).

However, the same conflict of interest provisions in Corporations Code Section 310 also appear in Corporations Code Sections 7233 and 7234, sections which do govern nonprofit mutual benefit corporations. Therefore, nonresidential CIDs that are nonprofit mutual benefit corporations appear to be governed by *duplicative* statutory authority relating to conflicts of interest – Section 1365.6 (which incorporates Corporations Code Section 310) and Corporations Code Sections 7233 and 7234.

Again, the staff is unaware of any problem that has been caused by this statutory duplication.

Need for Special Statutory Treatment

Section 1363(a)

There would appear to be a need to retain the statutory treatment of Section 1363(a) in this category, which requires a CID to be managed by an association.

Several provisions in the Davis-Stirling Act make reference to a CID "association." While in many of these provisions the reference is to the managing body of a CID, in others the term appears to refer to the *community of owners* in the CID. See e.g., Section 1363.09 (giving any "member of an association" standing to bring a specified civil action). This ambiguity does not create any present problem, since under existing law the community of owners in a CID *is* the managing body of the CID.

However, if a nonresidential CID were exempted from the requirement that it be managed by an association, any other provision in the Davis-Stirling Act referring to a CID "association" that remained applicable to a nonresidential CID would require a substitution of terms. In some cases the Legislature's original intent in using the term "association" might be difficult to determine. Each revision would require analysis, and carry a risk of unintended consequences.

Sections 1363(c), 1365.6

If the Commission agrees to retain the requirement that a nonresidential CID be managed by an association, the remaining two provisions in this category,

addressing the powers and limitations of that association, would appear to be desirable complementary provisions. Even though the subject matter of these provisions is generally addressed in the Corporations Code, the Corporations Code provisions would have no application to unincorporated nonresidential CID associations.

Public Comment

The Stakeholder Group does not suggest that nonresidential CIDs be exempted from any provision in this category**.** First Supplement to Memorandum 2009-18, Exhibit p. 5.

None of the other commenters have expressed a position on any of the provisions in this category.

Recommendation

Although there appears to be some statutory overlap between two provisions in this category and provisions of the Nonprofit Mutual Benefit Corporation Law, there is no indication that the overlap is causing any significant problem.

All other factors in this analysis point toward retaining the applicability of these provisions to nonresidential CIDs.

The staff recommends that **this category of provisions remain applicable to nonresidential CIDs.**

GOVERNING DOCUMENTS OF A CID

§ 1351(j) "Governing document" defined
§ 1354(a) (first sentence). Restrictions and covenants in a CID declaration to bind and benefit all owners
§ 1370 (excerpt below). Liberal construction of CID declaration to facilitate operation of CID

> *Any … declaration … for a common interest development shall be liberally construed to facilitate the operation of the common interest development, and its provisions shall be presumed to be independent and severable. Nothing in Article 3 (commencing with Section 715) of Chapter 2 of Title 2 of Part 1 of this division* [relating to the duration of leases of land] *shall operate to invalidate any provisions of the governing documents of a common interest development.*

§ 1353(a)(1)(first two sentences), (b). General content of declaration
* § 1353(a)(1)(remainder of subdivision), (a)(2). Disclosures required in declaration relating to location of CID

§ 1355. General provisions relating to amendment of declaration
* § 1355.5. Allowed amendment of governing document after construction and marketing, to delete provision intended to assist developer with construction and marketing
§ 1357. Extension of term of CID declaration when not provided for in declaration
* § 1363.5(a). Information to be included in CID's articles of incorporation (if CID incorporated)
§ 1354 (except for first sentence of Section 1354(a)). Enforcement of governing documents

Summary of Category

These provisions govern multiple aspects of a CID's governing documents, including interpretation, legal effect, content, amendment, extension, and enforcement.

Section 1351(j) defines a "governing document" as any document that governs the operation of a CID or its association. The term specifically includes the CID declaration, its articles and bylaws if incorporated, and its operating rules.

The first sentence of Section 1354(a) declares that the restrictions and covenants in a CID declaration, unless unreasonable, constitute enforceable equitable servitudes that inure to the benefit of and bind all owners in a CID.

The provision excerpted from Section 1370 states that a CID declaration should be liberally construed to facilitate the operation of the CID.

The first two sentences of Section 1353(a) require that a CID declaration include basic identifying information about the CID, as well as a statement of the restrictions that are intended to be enforceable equitable servitudes. Section 1353(b) allows the declaration to include any other matters that the original declarant or the owners deem appropriate.

The remainder of Section 1353(a) requires the declaration to disclose, if applicable, that (1) the CID is located in the vicinity of an airport, and (2) the CID is within the jurisdiction of the San Francisco Bay Conservation and Development Commission (hereafter, "SFBCDC").

Section 1355 generally addresses how a CID declaration may be amended.

Section 1355.5 allows a specific amendment to a governing document, following the completion of the construction and marketing of the CID, to delete a provision intended to assist the developer of the CID in that construction or marketing.

Section 1357 allows for the extension of the term of a CID declaration, if the declaration itself does not provide for extending the term.

Section 1363.5(a) requires the inclusion of some basic information about the CID in the CID's articles of incorporation, if the CID is incorporated.

The remainder of Section 1354, other than the first sentence of Section 1354(a), address how a CID's governing documents may be enforced.

Foundational vs. Operational

As each provision in this category relates to a CID's governing documents, each provision again has at least an indirect effect on how a CID operates. Similar to the provisions in the previously discussed category, each of these provisions could therefore also be technically classified as "operational" provisions.

However, again similar to the previously discussed provisions, the primary focus of each of these provisions does not appear to be the regulation of any aspect of the day-to-day operations of a CID's governing body. Instead, the focus of these provisions again appears to be the establishment of a baseline set of fundamental principles that this time address the governing *documents* of a CID (rather than its governing *body*).

The staff therefore again suggests that each provision in this category is at least more properly characterized as foundational than operational.

Here, the Stakeholder Group partially disagrees. Exhibit p. 18. The group characterizes most provisions in this category as foundational, but does not assign that characterization to three of the provisions: (1) the latter portion of Section 1353(a)(1) (special disclosures in a CID declaration), (2) Section 1363.5(a) (information to be included in a CID's articles of incorporation), and (3) Section 1355.5 (allowing deletion of developer-related provisions from a CID declaration, after completion of the construction and marketing of the CID).

The Stakeholder Group's comment classifying provisions as foundational or not does not include explanations as to individual provisions, and the staff is unsure why the group has not classified these three provisions as foundational.

It is important to note that all three of these provisions were added to the Davis-Stirling Act *after* the enactment of Section 1373. Nevertheless, each provision nevertheless appears to address an aspect of a CID governing document that integrally relates to the establishment of a CID. Conversely, none

of the provisions appear to relate to a "day-to-day" operation of a CID governing body.

The staff solicits further input on this issue, from the Stakeholder group and any other interested party.

Pending this input, the staff believes that consideration of this factor suggests that all provisions in this category should remain applicable to nonresidential CIDs.

Need for Special Statutory Treatment

Section 1351(j)

Continuing the definition of "governing document" set forth in Section 1351(j) is necessary to retain the meaning of any other provision that the Commission decides should remain applicable to nonresidential CIDs, and references that term.

Section 1354(a)

The special statutory treatment provided by the first sentence of Section 1354(a), which states that the covenants and restrictions in a CID declaration inure to the benefit of and bind all owners of separate interests in the CID, also appears necessary, in order to preserve the fundamental nature of a nonresidential CID.

If nonresidential CIDs were exempted from this provision, nonresidential owners seeking to enforce their CID declaration would need to rely on either common law principles governing equitable servitudes, or general statutory authority addressing covenants that run with the land. See Civ. Code §§ 1460-1471. Under either body of authority, compliance with additional technical requirements (e.g., use of formal express language, specification of covenant within deed) might be needed to achieve the effect of the first sentence of Section 1354(a). See *Nahrstedt v. Lakeside Village Condominium Assn.*, 8 Cal. 4th 361, 375, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994), C. Sproul & K. Rosenberry, Advising California Common Interest Communities, § 7.44, at 488-89.

Since most nonresidential CIDs established after the enactment of the Davis-Stirling Act have likely relied on the first sentence of Section 1354(a) when drafting their declarations, rather than on common law or other statutory authority, exemption of nonresidential CIDs from the first sentence of Section

1354(a) could make enforceability of many existing nonresidential CID declarations problematic.

Section 1355

The special statutory treatment afforded by Section 1355, relating to amendment of a CID declaration, appears reasonably necessary as well. Since a CID declaration is required to contain all covenants and restrictions intended to bind the owners of the CID, it is an extremely important document, not unlike a constitution. An amendment to a declaration is therefore a significant event that could substantially affect owners' property rights, and exemption of nonresidential CIDs from Section 1355 would deprive nonresidential CIDs of important statutory guidance relating to this function.

Statutory Overlap

For nonprofit mutual benefit corporations, Section 1363.5(a), which requires the inclusion of additional information in an incorporated CID's articles of incorporation, overlaps with Corporations Code Section 7130, which specifies the required content of the articles of incorporation of a nonprofit mutual benefit corporation.

However, there is no statutory conflict between the two provisions, and the additional information required by Section 1363.5(a) is minimal. The overlapping provisions therefore should not create any significant burden on a CID, nor do they appear to be causing any other problem.

Alternative Legislative Rationales

The Commission might consider exempting nonresidential CIDs from three provisions in this category, based on alternative rationales that may have contributed to the Legislature's prior determinations when enacting Section 1373.

Exemption from Provisions Mandating Disclosure of CID-Related Information

The Commission could exempt nonresidential CIDs from the portion of Section 1353(a) requiring certain disclosures about a CID's location in its declaration, based on a rationale that nonresidential CIDs should be exempted from provisions that mandate the arguably unnecessary disclosure of CID-related information. See discussion in Memorandum 2009-24, pp. 16-17.

The Stakeholder Group suggests that nonresidential CIDs be exempted from this provision, seemingly based on this rationale. First Supplement to CLRC Memorandum 2009-18, Exhibit p. 9.

The provision at issue, added to Section 1353 in two parts in 2002 and 2004, requires a CID declaration to disclose if (1) there is an airport in the vicinity, or (2) the CID is within the jurisdiction of the SFBCDC. 2002 Cal. Stat. ch. 496, 2004 Cal. Stat. ch. 618.

The existence of either of these circumstances could subject a business to legal restrictions relating to the activities it conducts on its premises, and could have a meaningful impact on a nonresidential CID owner's business operations. See discussion in Memorandum 2009-24, p. 17. Disclosure of either circumstance would therefore seem to be of some importance to prospective nonresidential CID owners when examining a CID declaration prior to purchase.

But when the Legislature enacted Section 1373, it exempted nonresidential CIDs from another provision, Section 1368, that also requires disclosure of seemingly important CID-related information. Section 1368 mandates disclosures to prospective owners relating to, among other matters, a CID's financial stability, the existence of construction defects, and unresolved violations of governing documents. See discussion in Memorandum 2009-18, pp. 14-16.

At first glance, the Legislature's exemption of nonresidential CIDs from Section 1368 might suggest similar treatment of this provision in Section 1353(a). However, there are substantial differences between the disclosures required by the two provisions.

The disclosures mandated by Section 1368 are far more numerous than those required by Section 1353(a), and they are required each time any owner in a CID seeks to re-sell that owner's separate interest. Section 1368 therefore appears to be much more like an operational provision, as it concerns a function of the CID governing body that must be repeatedly performed.

Moreover, much of the information required to be disclosed by Section 1368 will change over time. Section 1368 therefore requires a CID association to research, compile, and provide a current version of the information required, each time a prospective purchaser seeks to buy any separate interest in a CID. (Although the owner selling the separate interest is required to make the actual disclosure, the association is obligated to supply the owner with the information that needs to be disclosed. Section 1368(b).) Particularly in a nonresidential CID, which likely has significantly higher turnover than the typical residential CID,

this obligation imposed by Section 1368 could create a substantial administrative burden.

In contrast, the disclosures required by Section 1353(a) would appear to create a far less significant burden.

First, only two disclosures are mandated by the Section 1353(a) provision. Moreover, the disclosures are to be made only *if* a specified circumstance exists, and if it does, the disclosure required is quite straightforward. Further, either disclosure will likely need to be made only once, at the time a CID's declaration is first drafted. Except when a new airport is built in the vicinity of a CID, or the SFBCDC expands its jurisdiction to include the CID, *after* a CID declaration is drafted, the provision in Section 1353(a) seems to require only an initial disclosure of at most two facts.

(There may be an internal conflict within Section 1353(a) relating to the airport disclosure, which could add somewhat to a CID's administrative burden. According to the section, if there is an airport in the vicinity of the CID, the declaration must include the statement "This property is *presently* located in the vicinity of an airport." Section 1353(a)(1) (emphasis added). However, the section also indicates that the airport disclosure must be made if the CID is in an "airport influence area," which the section defines as "the area in which current *or future* airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses…." Section 1353(a)(1), (2) (emphasis added).)

Because the Legislature had previously expressly exempted nonresidential CIDs from the disclosure requirements of Section 1368, and chose *not* to do so when later adding the disclosure requirements to Section 1353(a), an argument might be made that the Legislature *intended* that the disclosure requirements in Section 1353 apply to nonresidential CIDs. However, uncodified statutory language seems to indicate that the Legislature was focusing only on residential CIDs when it added the disclosure requirement. The first section of the bill that added the airport disclosure requirement to Section 1353(a) reads as follows:

> SECTION 1. The Legislature finds and declares that the current mechanisms for providing notice *to homebuyers* of potential airport impact are inadequate, as evidenced by the number of complaints and lawsuits regarding airport noise by *residents* of surrounding communities.

2002 Cal. Stat. ch. 496 (emphasis added). There also appears to have been no consideration of applicability to nonresidential CIDs when the SFBCDC

disclosure requirement was added to Section 1353(a), two years later. See 2004 Cal. Stat. ch. 618.

Exemption From Provisions That Allow Action Prohibited by Governing Documents

Two other provisions in this category might be candidates for exemption based on an alternative rationale that may have been previously relied on in part by the Legislature. This alternative rationale would be the exemption of nonresidential CIDs from provisions that permit an action otherwise prohibited by a CID's governing documents, based on a nonresidential owner's detrimental reliance. See discussion in Memorandum 2009-24, pp. 17-21.

The first provision that might be classified as an exemption based on this rationale would be Section 1355.5. Section 1355.5 allows the deletion of a specified developer-related provision from a CID governing document, notwithstanding a prohibition against the deletion in the governing document (or in another governing document).

The Stakeholder Group also suggests that nonresidential CIDs should be exempted from this provision. First Supplement to CLRC Memorandum 2009-18, Exhibit p. 9.

Section 1355.5 allows a CID board, after construction and marketing of a CID has been completed, to delete from a governing document a provision that (1) was intended to aid the CID developer in construction or marketing of the CID, and (2) provided for access by the developer to the CID common area, for those purposes. A majority of the voting power of the CID must also approve the deletion.

However, if that approval is given, the deletion may occur even it was otherwise prohibited by the declaration, or another governing document.

In allowing a simple majority of the voting power of a CID to potentially circumvent a provision in a CID's governing documents, Section 1355.5 bears some similarity to another section in the Davis-Stirling Act that the Legislature included in the Section 1373 list of exemptions, Section 1356.

However, upon closer examination, a significant distinction between the two provisions is again apparent.

Section 1356 allows a simple majority of a CID's voting power to seek court approval to amend virtually any provision in a CID declaration, at any time, notwithstanding a provision in the declaration that would preclude the amendment sought without the support of a supermajority. In that situation, the

impact on an owner's detrimental reliance appears much clearer. Because Section 1356 has such broad application, it could allow a simple majority of voting power in a CID to modify or delete a crucial use permission or restriction upon which a nonresidential owner may have substantially based a long term business plan.

In the scenario presented by Section 1355.5, it is not clear why a nonresidential CID owner would *ever* detrimentally rely on a provision in a governing document that (1) was intended only to assist the developer of the CID in construction and marketing of the CID, and (2) related only to granting the developer access to the common area for those purposes.

Rather, it appears that the only party that might rely on such a provision would be the CID developer. But even then, it is difficult to see why the developer would object to the deletion of a provision that the developer could seemingly no longer rely upon.

The second provision in this category that could theoretically be classified as an exemption based on this alternative legislative rationale would be Section 1357. The Stakeholder Group does *not* suggest that nonresidential CIDs should be exempted from this provision. First Supplement to CLRC Memorandum 2009-18, Exhibit p. 5.

Section 1357 allows a majority of the voting power of a CID to extend the term of the CID declaration, when the declaration itself does not make provisions for an extension. As indicated in a statement of legislative intent that appears in Section 1357(a), such a scenario could create a significant problem if a CID is still operating when its declaration expires. Without a declaration to bind the CID owners, it may be impossible for an association to collect revenue for maintenance and repair, and the owners in the CID would no longer be obligated to adhere to the covenants and restrictions set forth in the declaration.

However, it would seem that such a scenario would only arise as the result of inadvertent drafting of the declaration. The detrimental reliance rationale that might otherwise be a basis for exemption of this provision therefore appears inapplicable.

Public Comment

As indicated, the Stakeholder Group suggests that nonresidential CIDs should be exempted from two provisions in this category.

The group suggests that nonresidential CIDs should be exempted from the part of Section 1353(a) that requires a CID declaration to contain certain disclosures relating to a CID's location, because "[t]he policy decisions which support providing this disclosure to residential owners do not apply. The developer should have the liberty to draft its own disclosures." First Supplement to CLRC Memorandum 2009-18, Exhibit p. 9.

But it is not clear to the staff why at least one policy supporting these disclosures — the need for prospective owners to be made aware of information that might substantially affect their investment — would not apply to nonresidential CIDs. Perhaps the argument is that prospective nonresidential owners have sufficient business sophistication to do their own research, and determine for themselves whether there is an airport nearby, or whether the CID is under SFBCDC jurisdiction. However, in light of the minimal nature of the disclosures, and the fact that both circumstances that might require disclosure will almost certainly be known by the developer, it remains unclear why this provision represents a burden or problem for either a CID developer, or anyone else.

The group also suggests exemption from Section 1355.5, permitted deletion of developer related provisions from a CID declaration once construction and marketing are completed. As to this provision, the group explains that "[t]here is generally a greater balance of bargaining power between buyer and seller in nonresidential CIDs making the protections of 1355.5 unnecessary." First Supplement to CLRC Memorandum 2009-18, Exhibit p. 9.

But assuming this greater balance of bargaining power exists, this provision still appears to have only an upside, and no downside. Unless the provision is causing some kind of problem, the benefit it provides seems to point against discontinuing its applicability to nonresidential CIDs.

The staff welcomes further input or clarification on both of these provisions, from the Stakeholder Group or from any other interested party.

None of the other commenters have expressed a position on any of the provisions in this category.

Recommendation

Until the Commission receives further input on these provisions from the Stakeholder Group or any other interested party, the factors in this analysis

appear to point toward retaining the applicability of each provision in this category to nonresidential CIDs.

At this time, the staff recommends that **all provisions in this category remain applicable to nonresidential CIDs.**

APPLICATION OF BASIC PROPERTY LAW PRINCIPLES IN A CID

Rights Relating to Ownership of Separate Interest

§ 1351(*l*) (sixth paragraph, unnumbered). Manner in which title to separate interest may be held
§ 1360. Right to make improvements
* § 1353.7(b). Right to construct separate interest with roofing material required by law
§ 1361. Right to ingress, egress, and support
* § 1361.5. Right to access separate interest
§ 1364(f). Right to access common area to maintain external telephone wiring
* § 1368.1. Right to market separate interest
§ 1358 (except for first sentence of subd. (b)). Transfer or sale of separate interest
§§ 1358(b) (first sentence), 1359. Restrictions on partition of condominium project

Rights Relating to Ownership of Common Area

§ 1351(b) (second sentence). Manner in which title to common area may be held
§ 1362. Nature of ownership right in common area
* § 1365.9. Civil liability based on ownership interest in common area

Miscellaneous Property Ownership Principles

§ 1364(a)-(e). Maintenance responsibilities
§ 1369. Filing of mechanics lien for work performed in a condominium project
§ 1371. Determination of legal boundary lines in a condominium

Summary of Category

Because of the number of provisions in this category, it is divided into three sub-categories. However, each provision in the category addresses how basic principles of real property law apply to the relatively unique CID property form.

Rights Relating to Ownership of Separate Interest

The provisions in this first sub-category address applications of real property law relating to ownership of a separate interest in a CID.

The sixth paragraph of Section 1351(*l*) provides that an estate in a separate interest in a CID may be held as a fee, a life estate, an estate for years, or any combination of the foregoing.

Sections 1360 generally provides an owner of a separate interest contained within a single building the right to make improvements to that interest, with specified limitations.

Section 1353.7(b) permits an owner in a CID located in a high intensity fire zone to use roofing material that is required to be used by Health and Safety Code Section 13132.7.

Section 1361 provides an owner of a separate interest in a CID with nonexclusive rights of ingress, egress, and support, through the common area of the CID if necessary.

Section 1361.5 generally guarantees an owner physical access to the owner's separate interest.

Section 1364(f) permits an owner reasonable access to the common area of a CID, in order to maintain telephone wiring.

Section 1368.1 protects an owner's right to sell the owner's separate interest in a CID from unreasonable interference.

Section 1358 identifies the ownership interest that is included when an owner transfers or sells a separate interest in a CID. The section also validates specified restrictions on the severability of component interests in real property that may be contained in a CID declaration.

The first sentence of Section 1358(b), and Section 1359, address the circumstances in which the interests in a condominium project may be partitioned.

Rights Relating to Ownership of Common Area

The provisions in this second sub-category address applications of real property law relating to part ownership of the common area in a CID.

Section 1351(b) provides that an estate in the common area of a CID may be held as a fee, a life estate, an estate for years, or any combination of the foregoing.

Section 1362 specifies the manner in which owners hold title to the common area in specified types of CIDs.

Section 1365.9 provides owners holding title to common area as tenants in common with immunity from civil liability arising from ownership of that common area, if specified insurance requirements are met.

Miscellaneous Property Ownership Principles

The provisions in this third sub-category address applications of real property law in a CID that do not easily fit in either of the first two subcategories.

Section 1364(a) through (e) addresses responsibility for maintenance of the various ownership interests within a CID.

Section 1369 addresses which interests in a condominium project are subject to a mechanics lien for work performed in the project.

Section 1371 addresses how boundary lines within a condominium project are to be determined when interpreting a deed or condominium plan.

Foundational vs. Operational

The primary focus of each of these provisions appears to be an explanation of how basic principles relating to real property apply to ownership of property within the CID property form. Each provision appears to address a fundamental element of a CID, and none relates to the regular or routine operation of a CID's governing body.

The provisions in this category therefore appear to be properly characterized as foundational in nature.

The Stakeholder Group characterizes a majority of the provisions in this category as foundational, but does not agree with that classification as to five of the provisions. Exhibit p. 18. Again, no explanation of the group's rationale is available, but as to four of the five — Sections 1360 (right to make improvements to separate property), 1364(a)-(e) (division of maintenance responsibility), 1364(f) (right to access common area to maintain telephone wiring), and 1368.1 (right to sell separate interest without interference) — the group does not suggest that nonresidential CIDs be exempted from the provisions. First Supplement to CLRC Memorandum 2009-18, Exhibit p. 5.

The only provision in this category that the Stakeholder Group does not characterize as foundational *and* suggests should be declared an exemption is Section 1353.7, a provision that permits an owner in a high fire intensity zone to use what appears to be legally required roofing material in constructing the

owner's separate interest. First Supplement to CLRC Memorandum 2009-18, Exhibit p. 9.

The staff discusses the group's ultimate recommendation to exempt nonresidential CIDs from this provision below. Addressing at this time only whether the provision should be considered foundational, the staff suggests that a provision governing the construction of an integral structural component of an owner's separate interest is properly characterized in that manner.

The staff solicits further input on this issue, from the Stakeholder group and any other interested party.

Pending this input, the staff believes that consideration of this factor suggests that all provisions in this category should remain applicable to nonresidential CIDs.

Need for Special Statutory Treatment

Because each provision in this category addresses unique aspects of property ownership within a CID, there would appear to be a need to retain the special statutory treatment of nonresidential CIDs provided by these sections. Absent application of these provisions, nonresidential CID owners would have no statutory guidance as to how to resolve the issues addressed by the provisions.

Statutory Overlap

As will be discussed in the next section of this memorandum, Section 1353.7 is effectively duplicated by Health and Safety Code Section 13132.7. However, the duplication appears to be causing no harm, whereas an exemption from Section 1353.7 based on the existence of this statutory overlap might send an incorrect message relating to legislative intent.

Public Comment

As indicated, the Stakeholder Group suggests exemption of nonresidential CIDs from just one of the provisions in this category, Section 1353.7**.** First Supplement to Memorandum 2009-18, Exhibit p. 9.

Section 1353.7, which substantially incorporates the provisions of Health and Safety Code Section 13132.7, reads as follows:

> (a) No common interest development may require a homeowner to install or repair a roof in a manner that is in violation of Section 13132.7 of the Health and Safety Code.

> (b) Governing documents of a common interest development located within a very high fire severity zone, as designated by the Director of Forestry and Fire Protection pursuant to Article 9 (commencing with Section 4201) of Chapter 1 of Part 2 of Division 4 of the Public Resources Code or by a local agency pursuant to Chapter 6.8 (commencing with Section 51175) of Part 1 of Division 1 of Title 5 of the Government Code, shall allow for at least one type of fire retardant roof covering material that meets the requirements of Section 13132.7 of the Health and Safety Code.

Health and Safety Code Section 13132.7 requires that, in the "very high fire intensity zone" referenced in Section 1353.7(b) above, certain specified roofs must be made with certain specified fire resistant material.

In addition, subdivision (*l)* of Health and Safety Code Section 13132.7 effectively duplicates the language of Section 1353.7:

> No common interest development, as defined in Section 1351 of the Civil Code, may require a homeowner to install or repair a roof in a manner that is in violation of this section. The governing documents, as defined in Section 1351 of the Civil Code, of a common interest development within a very high fire severity zone shall allow for at least one type of fire retardant roof covering material that meets the requirements of this section.

In asserting that Section 1353.7 should not apply to nonresidential CIDs, the Stakeholder Group notes that "[t]he language of the statute even uses the term 'homeowner'." While this statement is clearly true, it is only subdivision *(a)* of the section that uses that term. Based at least on a literal reading of their text, both subdivision *(b)* of Section 1353.7 as well as the second sentence of Health and Safety Code Section 13132.7(*l*) would appear to applicable to all types of CIDs.

Were these latter two provisions *intended* to apply to nonresidential CIDs? Certainly, the Legislature's use of term "homeowner" in each of these sections suggests that, when enacting the two sections, it was not thinking about nonresidential CIDs. However, that lack of contemplation does not mean that, if the Legislature *had* considered the applicability of the sections to nonresidential CIDs, it would have affirmatively determined that the sections should *not* apply.

Both of these statutory sections were enacted as part of a single bill, in 2004. 2004 Cal. Stat. ch. 318. The staff has reviewed the available committee analyses of the bill, which all appear consistent with the text of the two sections. It appears that the bill was focused on homeowners, and there appears to be no indication

as to whether the Legislature thought the sections should or should not apply to nonresidential CIDs.

However, whether through inadvertence or otherwise, Section 1353.7(b) *does* appear to presently apply to nonresidential CIDs, and the staff is hard pressed to find a policy justification for exempting nonresidential CIDs from what appears to be a significant safety requirement. Further, all Section 1353.7(b) apparently does is require a CID to allow its owners to act in a manner that appears to be *legally required* by Health and Safety Code Section 13132.7. Even if nonresidential CIDs were to be exempted from Section 1353.7(b), it appears that Health and Safety Code Section 13132.7 would compel the same result.

An argument might be made that, based on the statutory duplication between Section 1353.7 and Health and Safety Code Section 13132.7, no significant harm would be caused by exempting nonresidential CIDs from Section 1353.7. However, that may not be true. In light of the arguably ambiguous application of both sections to nonresidential CIDs based on use of the word "homeowner," an affirmative exemption of nonresidential CIDs from one of the sections (Section 1353.7) might suggest legislative intent that *neither* section should apply to nonresidential CIDs (and that the Legislature's failure to exempt nonresidential CIDs from Health and Safety Code Section 13132.7 was inadvertent).

Again, the staff solicits further input on this provision from the Stakeholder Group and any other interested party.

None of the other commenters have expressed a position on any provision in this category.

Recommendation

Pending further input from any commenter on Section 1353.7, the staff recommends that **all provisions in this category remain applicable to nonresidential CIDs.**

FINANCIAL OBLIGATIONS IN A CID

§ 1366(a) (first sentence). Obligation of a CID association to levy assessments on the owners of a CID
* § 1366(c). Protection of assessments against judgment creditors of association
§ 1367.1(a) (first sentence). Assessment as debt of owner

Summary of Category

These provisions address the basic financial obligations and responsibilities of the owners in a CID, both individually and collectively (through their association).

The first sentence of Section 1366(a) provides that a CID association must levy assessments on its owners, in order to perform the association's obligations.

Section 1366(c) provides that these collected assessments, to the extent necessary to provide essential services, shall generally be exempt from execution by a judgment creditor of the association.

The first sentence of Section 1367.1(a) provides that a levied assessment against a separate interest, along with associated collection obligations, constitutes a debt of the owner of the separate interest.

Foundational vs. Operational

The provisions in this category set forth fundamental principles relating to how owners in a CID are to satisfy their mutual obligation to provide funds reasonably necessary to maintain their CID's existence. The provisions are intended to be distinguished from other provisions, to be discussed later in this memorandum, that concern the operational details or mechanics involved in *collecting* these funds, ultimately through liens and foreclosure.

Although the line may not be crystal clear, the staff therefore suggests that the three provisions in this category are more properly characterized as foundational than operational.

The Stakeholder Group characterizes the first sentence of Section 1363(a) and the first sentence of Section 1367.1(a) as foundational. Exhibit p. 18. The group does not explain why it does not characterize Section 1366(c) as foundational, but it does not suggest that nonresidential CIDs be exempted from that provision. First Supplement to CLRC Memorandum 2009-18, Exhibit p. 5.

The staff believes that consideration of this factor suggests that all provisions in this category should remain applicable to nonresidential CIDs.

Alternative Exemption Rationale

The Commission could consider exempting nonresidential CIDs from all provisions in this category based on an alternative rationale that may have been previously relied upon by the Legislature. Each of these provisions might

arguably be classified as inapplicable to a nonresidential CID, as a provision regulating the financial management of a CID. See discussion in Memorandum 2009-24, pp. 13-16.

Although assessments are certainly one way that a nonresidential CID can fund its operations, they would not appear to be the *only* way that a CID could secure needed capital. For example, a nonresidential CID might find it more efficient to require its owners to maintain a specified sum in a trust account, from which the association was authorized to withdraw funds. There are likely several other mechanisms by which a nonresidential CID might obtain funds it requires in order to function.

However, exempting nonresidential CIDs from provisions relating to and requiring the levying of assessments would effectively deprive nonresidential CIDs of the collection and enforcement provisions that are also a part of the Davis-Stirling Act. The text of each of these provisions is based on an assumption that CID operations *will* be funded by the levying of assessments, as specified consequences such as liens and foreclosure all flow from a failure to pay these assessments.

If the Commission ultimately decides to exempt nonresidential CIDs from all collection and enforcement provisions of the Davis-Stirling Act, the Commission might revisit the applicability of the provisions in this category. Otherwise, notwithstanding the fact that the provisions in the category arguably regulate the financial management of a CID, each provision would appear to be needed as foundational support for the collection and enforcement provisions of the act.

Need for Special Statutory Treatment

As indicated in the previous section of this memorandum, each of these provisions is needed as statutory support for the collection and enforcement provisions of the Davis-Stirling Act.

Public Comment

The Stakeholder Group does not suggest that nonresidential CIDs should be exempted from any provision in this category. First Supplement to Memorandum 2009-18, Exhibit p. 5.

None of the other commenters have expressed a position on any of the provisions in this category.

Recommendation

The staff recommends that **this category of provisions remain applicable to nonresidential CIDs.**

INTERPLAY BETWEEN CIDS AND PUBLIC AGENCIES

§ 1372. Zoning ordinances
* § 1363.001. DCA and DRE to develop education course for directors of association

Summary of Category

Section 1372 is a general directive that local zoning ordinances are normally to be construed so as to avoid disparate treatment of CIDs based solely on the type of CID involved (e.g., condominium project, planned development, community apartment project, stock cooperative).

Section 1363.001 is a specific directive to the Department of Consumer Affairs (hereafter, "DCA") and to the Department of Real Estate (hereafter, "DRE") to develop an online course for the purpose of educating CID directors.

Foundational vs. Operational

These two provisions only marginally relate to the establishment of a CID, and do not involve any day-to-day regulation of the operations of a CID governing body at all.

This factor would therefore not appear to have a great deal of relevance to the Commission's applicability decisions about these provisions. To the extent the Commission does wish to make use of this factor, however, the provisions in this category appear to be more appropriately characterized as foundational rather than operational, suggesting that they should remain applicable to nonresidential CIDs.

The Stakeholder Group characterizes only Section 1372 as foundational. Exhibit p. 18.

Need for Special Statutory Treatment

There also does not appear to be any significant need for the special statutory treatment of nonresidential CIDs in these provisions. Nevertheless, application does not appear to be problematic in any way, whereas classifying either as an exemption could have a minor negative impact.

The online education course provided for in Section 1363.001 appears to impose no burden on a nonresidential CID at all. Exemption would only deprive directors in nonresidential CIDs of whatever benefit that might be available from the course.

Exempting nonresidential CIDs from Section 1372, relating to zoning ordinances, could theoretically lead to an unintended interpretation of the legislative action. Exempting only nonresidential CIDs from the provision while leaving it applicable to residential CIDs might be viewed as an affirmative statement that the directive in the provision should *not* apply to nonresidential CIDs (i.e., that zoning ordinances affecting nonresidential CIDs *should* be interpreted according to the type of CID involved).

Other Considerations

Exempting nonresidential CIDs from Section 1363.001 might provide minimal cost savings to the two named state agencies, as the online education course would then not need to address issues that related only to nonresidential CIDs. However, per a committee analysis of the bill that enacted Section 1363.001, even in its present form the section was expected to generate only "minor absorbable costs" on the part of the agencies. Analysis of SB 137 (Ducheny), Assembly Committee On Appropriations (August 17, 2005).

Public Comment

The Stakeholder Group does not suggest that nonresidential CIDs be exempted from either of the provisions in this category. First Supplement to Memorandum 2009-18, Exhibit p. 5.

None of the other commenters have expressed a position on either of the provisions in this category.

Recommendation

These two provisions impose no burden on nonresidential CIDs, and may provide some slight benefit. There is also a slight risk that classifying one of the provisions as an exemption could create an unintended inference as to legislative intent.

The staff recommends that **the two provisions remain applicable to nonresidential CIDs.**

MISCELLANEOUS NOTICE REQUIREMENTS

§ 1363(g). Notice of schedule of penalties for violating provision of governing document
§ 1363.5(b). Statement of principal business activity
§ 1363.6. Provision of identifying information to Secretary of State
§ 1368.5. Notice to owners before commencement of specified civil actions

Summary of Category

The provisions in this category address various types of notices that must be provided by a CID governing body, other than notices relating to meetings. Notice provisions relating to meetings are included in the category labeled "Meetings," *infra*.

Section 1363(g) specifies the manner in which a CID association must notify its owners of an adopted schedule of penalties for violation of a provision of a CID governing document.

Section 1363.5(b) requires an incorporated CID to provide basic identifying information in its annual statement of principal business activity that must be filed with the Secretary of State.

Section 1363.6 requires a CID, whether incorporated or not, to biennially submit to the Secretary of State a form containing more detailed identifying information about the CID.

Section 1368.5 requires a CID board of directors to give specified notice to its owners before commencing a civil action against either the CID developer or the signatory of the CID declaration for specified damage to the CID.

Foundational vs. Operational

Each provision in this category relates to relatively routine notices that must be prepared and sent by the managing body of a CID, on multiple occasions, over the lifetime of the CID. As each provision regulates a "day-to-day" function of the CID, it is appropriately characterized as operational in nature, rather than foundational.

The Stakeholder Group does not characterize any provision in this category as foundational. Exhibit p. 18.

Consideration of this factor suggests that nonresidential CIDs should be exempted from all provisions in this category.

Statutory Overlap

Section 1363.5(b), requiring an incorporated CID to include some basic CID-related information in its annual statement of principal business activity that must be filed with the Secretary of State, arguably overlaps with Corporations Code Section 1502, which identifies the standard information that must be included in that statement.

However, the overlap would not appear to be problematic. There is no conflict between the two provisions, and the additional information required is only an identification of the CID, its address, and the name and address of any managing agent, a seemingly minimal addition to a form that is already required to be filed by Corporations Code Section 1502.

Need for Special Statutory Treatment

Each of these provisions address relatively routine subject matter, and there appears to be no aspect of the nonresidential CID relationship that requires the special statutory regulation afforded by the provisions in this category. In addition, none of the provisions appear to provide any needed statutory support for any other provision that is or should remain applicable to nonresidential CIDs.

In sum, it does not appear that nonresidential CIDs *need* to be governed by any of the provisions in this category. Consideration of this factor therefore also suggests that the provisions in this category need not remain applicable to nonresidential CIDs.

Benefit vs. Burden

Nevertheless, each provision in this category appear to provide some benefit, either to owners in a nonresidential CID or others, seemingly without placing any significant burden on the governing body of a nonresidential CID. Exemption of nonresidential CIDs from what appears to be the relatively harmless regulation of these provisions may not be worth the loss of whatever benefit the provisions afford.

Public Comment

Perhaps for that reason, the Stakeholder Group does not suggest exemption of nonresidential CIDs from any provision in this category. First Supplement to Memorandum 2009-18, Exhibit p. 5.

No other commenter has expressed a position on any provision in this category.

Recommendation

Even though no provision in this category appears essential to the proper functioning of a nonresidential CID, none of the provisions appear particularly burdensome, and all appear somewhat beneficial.

The staff at this time recommends that **the provisions in this category remain applicable to nonresidential CIDs.**

OWNER ACCESS TO RECORDS

§ 1363(f). Owners entitled to access to financial records and operating rules
§ 1365.2. Detailed provisions allowing owner access to records
§ 1363(i) (excerpt below). Owners entitled to access to joint association records

> *Whenever two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association shall be … entitled to the same access to the joint association's records as they are to the participating association's records.*

Summary of Category

These provisions allow for owner access to records maintained by a CID governing body.

Section 1363(f) grants owners access to association records, "in accordance with" a specified article in the Nonprofit Mutual Benefit Corporation Law that grants members of nonprofit mutual benefit corporations access to corporate records. Section 1363(f) also provides owners with that same access to the operating rules of the association.

The use of the phrase "in accordance with" in Section 1363(f) makes it slightly unclear whether the provision applies to associations that would not otherwise

be governed by the Nonprofit Mutual Benefit Corporation Law. It is possible, but not likely, that the provision was simply intended to confirm that associations that *are* nonprofit mutual benefit corporations remain subject to the record access provisions in the Corporations Code, and to have no independent legal significance for any unincorporated association.

In light of the existence of unincorporated residential CIDs, however, the staff believes it much more likely that Section 1363(f) was intended by the Legislature to grant to owners in both incorporated *and* unincorporated associations the record access described in the Corporations Code provisions. That access generally includes member names, addresses and voting rights (Corp. Code § 8330), as well as "accounting books and records," and minutes of meetings. Corp. Code § 8333.

Section 1365.2, a provision enacted in 2003, provides for owner access to a much more comprehensive list of association records, inclusive of but significantly broader than the records available under either Corporations Code Sections 8330 or 8333. Included within the scope of Section 1365.2 are contracts (which could include employee contracts), tax returns, check registers, cancelled checks, invoices, and credit card statements. The section also permits an association to withhold or redact information requested, for specified reasons. Section 1365.2(d)(1).

The excerpt from Section 1363(i) authorizes the same owner access provided by Section 1363(f) to records of a joint association (an association in which the functions of two or more associations is consolidated). The language of Section 1365.2 would appear to also apply to the records of a joint association.

Foundational vs. Operational

Each provision in this category grants owners in a CID regular access to records maintained by the CID governing body, for as long as the development is in existence. As such, each provision involves what could be fairly considered a "day-to-day" function of the CID governing body, and is appropriately characterized as operational.

The Stakeholder Group does not characterize any provision in this category as foundational. Exhibit p. 18.

Consideration of this factor suggests that nonresidential CIDs should be exempted from all provisions in this category.

Statutory Overlap

As indicated, the provisions in this category substantially overlap with the two Corporations Code provisions that grant access to corporate records.

The overlap creates no statutory conflict, as Section 1365.2(*l)* indicates that the provisions of Section 1365.2 (which effectively supersedes the coverage of the other two provisions in this category) "are intended to supersede the provisions of Sections 8330 and 8333 of the Corporations Code to the extent the sections are inconsistent."

The statutory overlap issue that remains, however, is whether there exists a *need* for nonresidential CIDs to be governed by the provisions in this category, given the coverage of the same subject in the Corporations Code provisions. This question is discussed below.

Need for Special Statutory Treatment

The records to which Section 1365.2 grants access, while important, do not appear to have any more significance for nonresidential CIDs than for other types of commercial relationships. Instead, it is likely that the Legislature chose to provide such broad record access in the Davis-Stirling Act only because the records to which access was being granted were perceived to relate to the maintenance and management of people's homes. Nonresidential CID owners appear to have simply been unintended beneficiaries of this legislative action.

Particularly in light of the two Corporations Code provisions that generally provide for record access, consideration of this factor also suggests that nonresidential CIDs should be exempted from the provisions in this category.

Benefit vs. Burden

Although the transparency promoted by these provisions undoubtedly benefits nonresidential CID owners as well as residential owners, Section 1365.2 imposes a relatively significant burden on a CID governing body.

Although under Section 1365.2 an association is permitted to bill an owner for the cost of copying and mailing requested records, it may bill no more than $200.00 for the time spent on any needed redaction, no matter how large the scope of the record request. Section 1365.2(c)(5). This amount could be significantly inadequate for a exhaustive request, given the scope of records that may be requested.

In addition, Section 1362.5(f) provides that an association may be civilly liable for any wrongful withholding or redaction. The section also provides that an association may be civilly liable for any negligent *disclosure* of information that results in identity theft or other breach of privacy. Section 1365.2(d)(3). Potential tort liability of this magnitude is not provided for in the Corporations Code, which would appear to condition any such liability on the breach of the corporate "good faith" standard. See Corp. Code §§ 7231, 7231.5.

This special burden imposed on CID associations by Section 1365.2 substantially offsets the benefit afforded by the provision, suggesting that consideration of this factor also points toward exemption.

Public Comment

The Stakeholder Group advocates exemption for nonresidential CIDs from the two significant provisions in this category, Sections 1363(f) and 1365.2. First Supplement to Memorandum 2009-18, Exhibit pp. 9, 10. The group does not address Section 1363(i). (A reference to Section 1363(i) appears in the Stakeholder Group comment, but based on the listed rationale, it appears clear the group meant to refer to Section 1363(j), addressing a different subject.)

As support for an exemption from Section 1363(f), the group states that "The owners should be given the liberty to choose how much accounting information they want to make available for inspection."

The group urges an exemption from Section 1365.2 for essentially for the same reason: "The owners should be given the liberty to choose how much accounting information they need to obtain and what they want to make available for inspection."

John Laubach, an owner in a nonresidential CID, seems to disagree. Exhibit p. 10. Although Mr. Laubach indicates he would like to see "minimum government involvement" in the regulation of nonresidential CIDs, he urges that "[c]omplete financial reports and books should be made available to all owners upon request." Exhibit p. 11.

Recommendation

The factors in this analysis all suggest exemption of nonresidential CIDs from the provisions in this category.

While the staff is sympathetic to the expressed concerns of Mr. Laubach, who no doubt speaks for other nonresidential CID owners, an exemption of

nonresidential CIDs from the provisions in this category would still leave the owners in the vast majority of nonresidential CIDs with statutorily guaranteed record access under the provisions of the Corporations Code. The Legislature has determined that this degree of access is appropriate for all other nonprofit mutual benefit corporations, and there appears to be no reason to treat nonresidential CIDs differently.

Further, any nonresidential CID in which a majority of voters desired more or different records access than that provided in the Corporations Code should generally be able to achieve that result by providing for such access in their governing documents.

The staff recommends that **nonresidential CIDs be exempted from the provisions in this category.**

MEETINGS

§ 1363(d). Parliamentary procedure required
§ 1363(e). Meeting notices must specify matters to be presented at meeting
§ 1363(h). Meeting relating to owner discipline
§ 1363(i) (excerpt below). Right of owners to attend and participate in meetings of joint associations

> *Whenever two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association shall be (1) entitled to attend all meetings of the joint association other than executive sessions, (2) given reasonable opportunity for participation in those meetings….*

§ 1363.05. Comprehensive meeting rules

Summary of Provisions

These provisions concern the manner in which CID meetings (of both the association generally, and of the board of directors of the association) are to be conducted.

Section 1363(d) requires association meetings to be conducted in accordance with some system of parliamentary procedure.

Section 1363(e) requires notice of an upcoming CID meeting to state the matters that the board of directors intends to present for action at the meeting. This provision has been subsumed by a subsequently enacted provision, Section 1363.05, discussed *infra*.

Section 1363(h) addresses the meeting of a CID board of directors to consider discipline of an owner, including notices that must be given relating to that discipline. This provision has also been subsumed by Section 1363.05.

The excerpt from Section 1363(i) entitles all owners in a CID governed by a joint association to attend and participate in meetings of the joint association.

Section 1363.05, the "Common Interest Development Open Meeting Act," includes a detailed set of procedural requirements governing both association and board of director meetings.

Foundational vs. Operational

Each provision in this category addresses some aspect of how the governing body of a CID is to conduct a CID meeting. The provisions all appear to be classic operational provisions, as that term has been defined for purposes of this analysis.

The Stakeholder Group does not characterize any provision in this category as foundational. Exhibit p. 18.

Consideration of this factor suggests that nonresidential CIDs should be exempted from all provisions in this category.

Statutory Overlap

Assuming the applicability to nonresidential CIDs of the Nonprofit Mutual Benefit Corporation Law, there is substantial statutory overlap between all provisions in this category and Corporations Code Sections 7211, 7510, and 7511, which provide relatively comprehensive requirements relating to meetings of nonprofit mutual benefit corporations.

In several instances, there is a statutory conflict between the provisions in this category and the Corporations Code provisions. Most of these conflicts have to do with relatively minor administrative details, such as how much notice must be given before a meeting, or the type of notice. One significant difference, however, relates to *board of director* meetings.

Section 1363.05 generally provides that board meetings shall be open to any member of the association. Section 1363.05(b). Corporations Code Section 7211 makes no such provision. In fact, under Corporations Code Section 7211 it appears that directors may meet anywhere they choose, including outside the state, with no notice to non-directors, or may take a required action by written

unanimous consent, without any meeting at all. Corp. Code § 7211(a)(2), (a)(3), (a)(5), (b).

Need for Special Statutory Treatment

The provisions in this category provide for more transparency in meetings, and perhaps more owner "rights," than do the provisions in the Corporations Code. The provisions in this category may therefore be preferred overall by many owners in nonresidential CIDs over governance solely by the Corporations Code provisions.

However, there appears to be no substantial reason why owners in nonresidential CIDs *need* any statutory treatment relating to meetings that differs from the treatment afforded other commercial relationships. Instead, these owners again appear to have been uncontemplated beneficiaries of statutory treatment designed to accommodate the needs of the typical owner in a *residential* CID.

As Section 1363.05 was enacted in 1995, it may be that these meeting "rights" have by now become an accepted practice in most nonresidential CIDs. However, as with the record access provisions, if nonresidential CIDs were to be exempted from the provisions in this category, the vast majority would still be governed by the meeting provisions in the Nonprofit Mutual Benefit Corporation Law. And again, any nonresidential CID in which a majority of voters wanted even more transparency in meetings would likely be able to achieve that result, on their own.

Public Comment

The Stakeholder Group advocates exemption for nonresidential CIDs from all provisions in this category other than Section 1363(d) (parliamentary procedure), and Section 1363(i) (joint association meetings), which the group does not address. First Supplement to Memorandum 2009-18, Exhibit pp. 9, 10. (Again, the comment does reference Section 1363(i), but based on the provided rationale, it appears clear the intended reference was Section 1363(j).

The group suggests exemption from Section 1363(e) because "The owners should be given the liberty to choose how formally they want to conduct their meetings." First Supplement to CLRC Memorandum 2009-18, Exhibit p. 9.

As to Section 1363(h), the group states that "The proper discipline to impose in a nonresidential CID is a business decision and the owners should be given the liberty to establish their own procedures on discipline." *Id.*

And in support of an exemption from Section 1363.05, the group offers that "the owners should be given the liberty to choose how they want to conduct their business affairs and whether they want to do so privately or openly."

Three other commenters have also expressed views on provisions in this category.

John Laubach is apparently critical of Section 1363.05(i)(1), which generally restricts a board from taking action on or even discussing any matter that was not listed on a properly distributed agenda. Mr. Laubach indicates "We don't want pre-published agendas with no room to talk about stuff that was not on an agenda." Exhibit p. 11. On the other hand, Mr. Laubach also advises that "We want open meetings," and "Just make sure all members are notified of meetings and meeting minutes published." *Id.*

Bob Crissell reports that meetings are generally sparsely attended in nonresidential CIDs, agendas change at the last minute, and it "makes no sense" to have to provide 10 day notices of agenda changes for small nonresidential CIDs. Exhibit p. 3.

Bruce Ibbetson concurs. He states that the "Open Meeting Act is somewhat limiting for nonresidential CIDs in that the Board cannot discuss anything that is brought up in a meeting if it was not on an agenda distributed 10 days in advance to all owners." Exhibit p. 8.

Recommendation

The staff recommends that **nonresidential CIDs be exempted from the provisions in this category.**

ELECTIONS

§ 1363.03. Detailed procedural rules for the conducting of elections
§ 1363.04. Prohibition against use of association funds for campaign purposes
§ 1363.09. Permits civil action to enforce election provisions

Summary of Provisions

These provisions govern elections in a CID, including election of directors and officers as well as any other CID action requiring a vote.

Section 1363.03 sets forth a number of detailed procedural rules relating to how voting in a CID must be conducted, including the appointment of an election inspector.

Section 1363.04 prohibits the use of association funds in connection with a board election.

Section 1363.09 allows an owner to bring an action for declaratory or equitable relief based on an alleged violation of election procedures required by the provisions in this category.

Foundational vs. Operational

These provisions address how a CID governing body is to conduct elections in a CID. Although the right to vote, in general, might be characterized as foundational, these provisions are much more focused on a regulation of the *mechanics* of conducting an election by the CID governing body. As such, the provisions appear to be more appropriately characterized as operational.

The Stakeholder Group does not characterize any provision in this category as foundational. Exhibit p. 5.

Consideration of this factor suggests that nonresidential CIDs should be exempted from all provisions in this category.

Statutory Overlap

Assuming a nonresidential CID organized as a nonprofit mutual benefit corporation, there is also substantial statutory overlap between the provisions in this category and provisions of the Nonprofit Mutual Benefit Corporation Law, which also set out a detailed statutory scheme for elections in a nonprofit mutual benefit corporation. See Corp. Code §§ 7512-7616.

There is no significant statutory conflict between the provisions of the two codes, as Section 1363.03(n) provides that, in the event of any conflict between Section 1363.03 and the Corporations Code provisions, the provisions of Section 1363.03 are to prevail.

Perhaps the more important consideration relating to "statutory overlap," however, is the breadth of coverage of this subject in the Corporations Code provisions. The coverage in the Corporations Code may actually be *more*

comprehensive than that contained in the provisions in this category (even though somewhat different), strongly suggesting that elections in nonresidential CIDs would still have adequate statutory governance if nonresidential CIDs were to be exempted from the provisions in this category.

Even for unincorporated nonresidential CIDs, the Corporations Code contains some basic statutory regulation relating to elections, in the provisions generally governing unincorporated associations. See Corp. Code § 18330.

Need for Special Statutory Treatment

The staff sees no significant reason why voting in a nonresidential CID requires different statutory treatment than that made applicable to other commercial relationships, and apparently neither does anyone else. The provisions in this category, in particular Section 1363.03, have been a lightning rod for criticism by virtually all stakeholders associated with nonresidential CIDs.

Public Comment

The Stakeholder Group advocates exemption for nonresidential CIDs from all provisions in this category. First Supplement to Memorandum 2009-18, Exhibit pp. 9, 10.

In urging exemption from Section 1363.03, the group states that "the owners should be given the liberty to choose how they want to vote and what matters require approval by the members, rather than approval by the board."

Relating to Section 1363.04, "The issues present in the election process applicable to residential associations are far different than the business and economic decisions which are involved in nonresidential associations."

And as to Section 1363.09, "This section only applies to Sections 1363.03, 1363.04, 1363.05, and 1363.07, none of which should apply to nonresidential associations."

As has been previously indicated, several commenters responding generally to the email of Craig Stevens, one of the members of the Stakeholder Group, have voiced displeasure relating to the election procedures mandated by the Davis-Stirling Act, in particular the requirement that an election inspector be used for every election.

Commenters that expressed multiple complaints about provisions of the Davis-Stirling Act also focused on the election provisions.

Bob Crissell indicates that the process called for in Section 1363.03 is cumbersome and not cost effective for most nonresidential CIDs, which he says are much smaller than residential CIDs. Exhibit p. 3.

John Laubach reports that the elections processes in the Davis-Stirling Act are "onerous." Exhibit p. 10.

Bruce Ibbetson says there is no need in nonresidential CIDs for "double secret blind balloting/envelopes, hiring of independent inspectors of elections, etc." Exhibit p. 8.

Recommendation

The staff recommends that **nonresidential CIDs be exempted from the provisions in this category.**

MISCELLANEOUS GOVERNANCE PROVISION

§ 1363.07. Granting of exclusive use of common area

Summary of Category

This category contains a single governance provision not readily classifiable in any other category.

Section 1363.07 addresses the granting of exclusive use of a part of the common area of a CID to an owner by the CID governing body.

Exclusive use of certain portions of the common area of a CID, such as a balcony, patio, or parking space, is often granted to an owner in the CID declaration. The Davis-Stirling Act also contains provisions identifying specific portions of a CID as "exclusive use common area," unless a contrary provision exists in the CID declaration. Section 1351(i).

An owner may be granted exclusive use of other parts of the common area well after establishment of a CID, based on a decision by the governing body of a CID. This decision is governed by Section 1363.07. With limited exceptions, the provision requires any such grant to be supported by an affirmative vote of at least 67% of the owners of separate interests in the CID, unless the CID governing documents specify a different percentage.

Foundational vs. Operational

This provision involves the grant to an owner of exclusive *use* (not ownership) of a part of the common area of the CID. To the extent use of property in a CID can be considered a fundamental structural element of a CID relationship, this provision could be characterized as foundational.

However, the provision appears to be more concerned with a discretionary decision by the governing body of a CID, subject to repetition over the life of the CID, relating to how some aspect of the CID community is used. As such, even though the provision has a foundational characteristic, the staff believes the provision to be more reasonably characterized as an operational provision.

The Stakeholder Group does not characterize this provision as foundational. Exhibit p. 18.

Consideration of this factor suggests that nonresidential CIDs should be exempted from the provision.

Need for Special Statutory Treatment

On the other hand, there does appear to be some justification for providing the statutory treatment of this provision in the nonresidential CID context.

Granting one participant in a business relationship the exclusive right to use a portion of property owned by all, and precluding all others from using property that they own, appears to be a somewhat unique concept. Without any statutory authority regulating how that grant may occur and under what circumstances, the procedure could be subject to significant abuse.

Nevertheless, as is true about most provisions in the Davis-Stirling Act, a nonresidential CID *could* make detailed provision for how this grant can occur in its declaration. Whether present nonresidential CIDs have actually done so may be another story.

Section 1363.07 was only enacted in 2005, and became effective on January 1, 2006. 2005 Cal. Stat. ch. 458. Prior to 2006, any business owner seeking to acquire an interest in a nonresidential CID would necessarily have had to rely on the CID declaration for whatever assurance was desired regarding this practice.

Public Comment

The Stakeholder Group suggests that nonresidential CIDs should be exempted from this provision. First Supplement to Memorandum 2009-18, Exhibit p. 10. The group argues that "The CC&Rs should be able to establish

whatever protections do or do not seem appropriate relating to grants of exclusive use. There is no good reason to compel the board to obtain the approval of the owners as a prerequisite to the grant of exclusive use rights."

No other commenter has offered a position on the provision in this category.

Recommendation

The staff views the applicability decision on this provision as a close call.

Of particular concern are nonresidential CIDs that were or will be established in the relatively small window of time between the effective date of the provision and the effective date of legislation that would exempt nonresidential CIDs from the provision. It is possible that the declarations in these CIDs either did not or will not substantially address the grant of exclusive use, or may only provide that the grant of exclusive use shall be "subject to" the provisions of Section 1363.07.

The staff recommends that **the Commission exempt nonresidential CIDs generally from this provision, but excepting those nonresidential CIDs whose declaration was recorded on or after January 1, 2006, and prior to the effective date of legislation implementing this exemption.**

ASSESSMENT PROCEDURES

§ 1365.1. Requirement that annual notice be given to owners summarizing law relating to assessments
§ 1366(a) (last two sentences). Limit on ability of association to increase assessments from previous year
§ 1366(d). Notice of increase in assessments
§ 1366(e). Procedures relating to delinquent assessments
§ 1366(f). Exemption from constitutional interest-rate limitations
§ 1366.2. Recordation of statement containing assessment information

Summary of Category

This category contains provisions relating to the mechanics of levying assessments on owners in a CID.

Section 1365.1 requires an association to annually distribute a form notice to owners summarizing provisions of law governing assessments, payments, and foreclosure.

The last two sentences of Section 1366(a) indicate that a board may not increase regular assessments from the previous year unless the board has either (1) "complied with" a provision of the Davis-Stirling Act — from which nonresidential CIDs are exempt — requiring an association to provide a budget and other financial information to its owners, or (2) has obtained the approval of a specified number of owners at an election.

Section 1366(d) requires an association to provide specified notice to owners of an increase in assessments.

Section 1366(e) indicates when levied assessments become delinquent, as well as the late fees and interest that may be recovered by the association in the event of such delinquency.

Section 1366(f) exempts associations from interest-rate limitations contained in Article XV of the California Constitution.

Section 1366.2 allows the board of an association to record with the county recorder a statement providing, among other CID-related information, an identification of all separate interests in the CID subject to assessment.

Foundational vs. Operational

Each provision in this category addresses procedures that may or must be followed by a CID governing body in connection with levying assessments on its owners, or otherwise relates to those procedures. As these provisions concern the manner in which assessments may be levied, rather than an owner's basic financial obligation to the CID, the provisions appear to be more appropriately characterized as operational rather than foundational.

The Stakeholder Group does not characterize any provision in this category as foundational. Exhibit p. 18.

Consideration of this factor suggests that nonresidential CIDs should be exempted from all provisions in this category.

Need for Special Statutory Treatment

As previously discussed, a significant part of the Davis-Stirling Act is based on the general proposition that assessments levied on owners will be the means by which a CID association secures necessary funding for the operation of the CID.

However, assuming that this general proposition is to remain applicable to nonresidential CIDs, none of the provisions in this category appears *necessary* to

implement that levying of assessments. There appears to be no reason why a nonresidential CID could not decide on its own what notice an owner needs relating to assessments, when assessments may be increased, when an assessment is considered delinquent, or what late fees or interest may be recovered by the association.

Special Consideration

Section 1366(f), relating to exemption from constitutional interest-rate limitations, is one of the few provisions in the Davis-Stirling Act that requires statutory authority to be applicable to a nonresidential CID. Unless the Commission believes that interest assessed by nonresidential CIDs for delinquent assessments *should* be limited when interest assessed in residential CIDs is *not*, nonresidential CIDs should not be exempted from Section 1366(f).

Public Comment

The Stakeholder Group suggests that nonresidential CIDs should be exempted from only two provisions in this category, Sections 1365.1 (distribution of form notice) and the last two sentences of Section 1366(a) (prohibited increase in annual assessments without budget or approval of owners). First Supplement to Memorandum 2009-18, Exhibit p. 10.

In urging exemption from Section 1365.1, the group expresses that "The owners should be given the liberty to choose how much information concerning lien rights should be provided to owners."

With regard to the last two sentences of Section 1366(a), the group states that "It is understandable that the Legislature wants to protect homeowners on a fixed income from substantial increases in Regular Assessments. However, these protections are not suited for nonresidential CIDs where the flexibility to raise funds as and when needed through different funding mechanisms seems more appropriate."

The staff does not take issue with these two comments, but wonders why the group does not suggest exemption of nonresidential CIDs from the three remaining provisions in this category.

The staff solicits input on the remaining provisions in this category, from the Stakeholder Group and any other interested party.

No other commenter has expressed a position on any provision in this category.

Recommendation

Pending any further input, the staff recommends that **nonresidential CIDs be exempted from all provisions in this category other than Section 1366(f).**

COLLECTION AND ENFORCEMENT

§ 1367.1(a) (other than first sentence). Pre-lien notice
§ 1367.1(b). Pre-lien collection procedure
§ 1367.1(d) (except for last two sentences). Right of association to lien separate interest, and pursue foreclosure
§ 1367.1(c)(2). How decision to record lien is to be made
§ 1367.1(f). Priority of association lien
§ 1367.1(d) (last two sentences). Right of association to lien for damage to common area
§ 1367.1(e) Prohibition against lien for disciplinary violations
§ 1367.1(g) Enforcement of lien
§ 1367.1(h). Alternative means of enforcement
§ 1367.1(i). Erroneous recording of lien
§ 1367.1(j)-(n). Miscellaneous associated provisions
§ 1367.4. Additional procedural requirements relating to enforcement of lien or foreclosure
§ 1367.5. Reversal of fees based on erroneously filed lien
§ 1367. Liens and foreclosure (obsolete)

Summary of Category

The provisions in this category address the methods that a CID association may use to collect delinquent assessments and other monetary obligations of an owner to the CID.

Section 1367.1(a), other than its first sentence, specifies notice that must be given to an owner before a CID association may record a lien against the owner's separate interest, based on a delinquent assessment.

Section 1367.1(b) discusses how a payment made by an owner toward a delinquent assessment shall be credited.

Section 1367.1(d), except for its last two sentences, allows an association to record a lien against an owner's separate interest based on a delinquent assessment, and eventually enforce the lien through a nonjudicial foreclosure proceeding, provided certain procedural requirements are followed. The section also addresses the procedural requirements that must be followed when the lien is satisfied.

Section 1367.1(c)(2) addresses how decisions to record a lien based on a delinquent assessment are to be made by an association board.

Section 1367.1(f) provides that a recorded lien shall be prior to all other liens on the owner's separate interest that are later recorded, unless the CID declaration provides otherwise.

The last two sentences of Section 1367.1(d) allow an association to record a lien against an owner's separate property based on damage to common area of the CID caused by the owner, or by the owner's guests or tenants, except for a narrow subclass of associations identified in the last sentence of the provision.

Section 1367.1(e) prohibits the recording of a lien enforceable through nonjudicial foreclosure for any other discipline imposed on an owner.

Section 1367.1(g) addresses the assigning or pledging of an owner's financial obligation to the association, and sets forth procedural requirements for enforcing a recorded lien through foreclosure.

Section 1367.1(h) allows for alternative means of collecting for a delinquent assessment.

Section 1367.1(i) addresses what is to happen if a lien is recorded in error.

Sections 1367.1(j) through (n) contain miscellaneous administrative or procedural provisions relating to lien enforcement and collection.

Section 1367.4 limits an association's ability to enforce a lien for a delinquent assessment through foreclosure. The section prohibits such enforcement unless the delinquency either equals or exceeds $1,800.00, or has been a delinquency for more than 12 months, and imposes other procedural requirements.

Section 1367.5 provides for various reimbursements to an owner if it is determined, in certain circumstances, that a lien was erroneously recorded against the owner's separate interest.

Section 1367, an original provision of the Davis-Stirling Act relating to the ability of an association to record a lien for a delinquent assessment, has been effectively superseded by Section 1367.1. Section 1367 applies only to liens recorded prior to January 1, 2003. Section 1367(g).

Foundational vs. Operational

The provisions in this category all address the means by which a CID association may collect a debt owed by one of its owners to the CID, based either on a delinquent assessment, or damage to the common area of the CID. As such,

the provisions clearly seem to be more appropriately characterized as operational, rather than foundational.

However, at least the provisions in the category that grant the *authority* to record a lien against an owner's property, and ultimately to foreclose on that lien, can also be viewed as a relatively fundamental element upon which a CID relationship is based. Unless owners are provided with near certainty that a levied assessment against an owner in a CID will eventually be recovered (through foreclosure, if necessary), a CID might be viewed as so financially unstable as to lose its essential character.

It also bears noting that the provision in this category that is essential to the grant of that authority, Sections 1367.1(d), was a provision contained within the Davis-Stirling Act when the Legislature enacted Section 1373, and was allowed to remain applicable to nonresidential CIDs.

The Stakeholder Group characterizes Section 1367.1, apparently in its entirety, as foundational. It does not characterize any of the other provisions in the category as foundational. Exhibit p. 18.

Although the staff has classified the provisions in this category as more operational than foundational, at least Section 1367.1(d) has aspects of both classifications. However, with that exception, consideration of this factor suggests exemption of nonresidential CIDs from the remainder of the provisions in this category.

Need for Special Statutory Treatment

As indicated above, there appears to be substantial reason why nonresidential CIDs need to retain the ability to record a lien against a delinquent owner's separate interest, and ultimately foreclose if necessary on that lien. If a CID association was required to resort to standard collection remedies in order to secure funding for necessary CID operations, the CID would be far less financially stable. Moreover, CIDs in general would be *perceived* as far less financially stable, causing many prospective owners to rethink committing to acquiring an interest in a CID.

Further, while most of the clearly operational provisions in this category do not seem *necessary* in order to allow a nonresidential CID to be able to lien and foreclose, it may be difficult to cull individual provisions for exemption. Nearly all of the provisions in this category are part of a single statutory section, Section 1367.1, and many are somewhat intertwined. Attempting to exempt

nonresidential CIDs from single subdivisions within Section 1367.1 could cause ambiguity in interpreting provisions that remain applicable, and might lead to unintended consequences.

However, two provisions in this category, Sections 1367.4 and 1367.5, do appear severable from Section 1367.1.

Section 1367.4, a provision enacted subsequent to Section 1367.1 and clearly designed to limit the application of Section 1367.1, contains safeguards for owners that are much more relevant in residential CIDs than in nonresidential CIDs. While there may be substantial reasons to protect a homeowner (who may be on a fixed income) with a delinquent assessment of less than $1,800.00 from foreclosure, those reasons would not appear to apply in a business context.

Exemption of Section 1367.4 while generally retaining the applicability of Section 1367.1 would require one other exemption. Because Section 1367.4 is clearly intended as a limitation on Section 1367.1, Section 1367.1(n) provides that "[Section 1367.1] is subordinate to, and shall be interpreted in conformity with, Section 1367.4." If nonresidential CIDs were exempted from Section 1367.4, it would also be necessary to exempt nonresidential CIDs from Section 1367.1(n).

The staff sees no resulting problem in applying all other parts of Section 1367.1 to nonresidential CIDs based on an exemption from Section 1367.1(n).

Section 1367.5 is also clearly severable from Section 1367.1. This section does not affect an association's ability to lien or foreclose at all, instead addressing only the consequences of an erroneously recorded lien, and only in specified circumstances.

Public Comment

The Stakeholder Group suggests that nonresidential CIDs should be exempted from three provisions in this category. First Supplement to Memorandum 2009-18, Exhibit p. 10.

Despite apparently characterizing the entirety of Section 1367.1 as foundational, the group argues for exemption from a portion of Section 1367.1(a), which specifies the content of a pre-lien notice that must be sent to a delinquent owner. The group notes that two items that are required to be included in the notice "refer to 1363.810 and 1369.510 which should not apply to nonresidential CIDs and therefore these paragraphs should be deleted."

For a similar reason, the group urges exemption from Section 1367.5, because "(Recording of Assessment Lien in Error) is based upon the meet and confer

procedure in 1363.810 and the alternative dispute resolution procedures of 1369.510 which should not apply to nonresidential associations."

The group's argument for exemption from these two provisions is based on the group's suggestion that nonresidential CIDs also be exempted from the two sections that are referred to in the two provisions above, Sections 1363.810 and 1369.510, both concerning alternative dispute resolution. These two exemptions are discussed in the section of this memorandum that follows, entitled "Resolution of Conflicts Between Owner and Association."

An individual commenter, Kadie De Sena, expresses concerns about the applicability of the provisions in this category to either nonresidential *or* residential CIDs. Exhibit p. 4. In sum, Ms. De Sena feels that the power to lien and foreclose is too much power for *any* CID association to have, and that those decisions should be left to a court of law.

The staff appreciates Ms. De Sena's concern. However, while reasonable arguments can be made both for and against the granting of such power, the Legislature has already made a carefully considered policy decision on the issue. Revisiting the issue at this time would appear to be well beyond the scope of this study.

Other commenters are troubled by provisions in this category for other reasons.

Bob Crissell indicates that "[c]ash flow is an issue with small nonresidential CIDs. Therefore, we think that [Section 1367.1] is again cumbersome and unworkable for non-residential projects." Exhibit p. 3.

John Laubach objects to the "hassles and hoops of collecting/foreclosing," and explains that "you want everyone to pay or have a very streamlined method to deal with the collection or foreclosure." Exhibit p. 10.

Bruce Ibbetson seeks exemption for nonresidential CIDs from both Sections 1367.1 and 1367.4, finding a cause for concern "[o]wner oriented rights that make it very difficult and lengthy process to collect delinquent assessments and/or to lien and foreclose." Exhibit p. 8.

Unfortunately, while the staff understands and is sympathetic to these concerns, it is beyond the scope of this study to *revise* Sections 1367.1 and 1367.4 so as "streamline" their application to nonresidential CIDs. Faced with a choice of either complete exemption or complete applicability, it is not clear that any commenter would choose the former.

Recommendation

As will be discussed in the next section of this memorandum below, the staff concurs with the Stakeholder Group that nonresidential CIDs should be exempted from the alternative dispute resolution provisions in the Davis-Stirling Act. **If the Commission agrees with that recommendation, the staff recommends that nonresidential CIDs also be exempted from the portion of Section 1367.1(a) identified above, and from Section 1367.5, for the reasons given by the Stakeholder Group above.**

The staff also recommends that **nonresidential CIDs be exempted from Section 1367.4, as well as Section 1367.1(n).**

The staff recommends that **all provisions in this category that are a part of Section 1367.1 (with the exception of Section 1367.1(n)) remain applicable to nonresidential CIDs.**

Finally, the staff recommends **that Section 1367 also remain applicable to nonresidential CIDs.** Although the section may be approaching obsolescence (as it applies only to liens recorded prior to January 1, 2003), it may still have applicability in an unusual case. And if it does, as the predecessor to Section 1367.1, it should remain applicable to nonresidential CIDs for the same reasons supporting the applicability of Section 1367.1, above.

RESOLUTION OF CONFLICTS BETWEEN OWNER AND ASSOCIATION

§§ 1363.810 to 1363.850. Informal dispute resolution
§§ 1367.1(c)(1)(A), (c)(1)(B), and (c)(3). Alternative resolution relating to delinquent assessment
§ 1367.6. Small claims court
§§ 1369.510 to 1369.590. Alternative dispute resolution as prerequisite to commencement of civil action

Summary of Category

These provisions offer a CID association and its owners various opportunities to resolve CID related disputes.

Sections 1363.810 through 1363.850, an article added to the Davis-Stirling Act based on a Commission recommendation, provide for an informal means by which an owner and a CID association may attempt to resolve a dispute without engaging in litigation. See *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003).

Sections 1367.1(c)(1)(A), (c)(1)(B), and (c)(3) provides various options for an association and an owner to resolve a dispute relating to a delinquent assessment, prior to the recordation of a lien by the association.

Section 1367.6 allows an owner to pay an amount allegedly owed to the association for certain disputes under protest, and then commence an action in small claims court to adjudicate the dispute.

Sections 1369.510 through 1369.590 provide for more formal alternative dispute resolution in which parties may participate, prior to the commencement of litigation. These sections, restating and improving existing law on the issue, were also added to the Davis-Stirling Act as part of the Commission recommendation referenced above.

Foundational vs. Operational

These provisions all address regular participation by a CID governing body in processes aimed at settling disputes with owners in the CID, typically concerning the owner's financial obligations or other operational aspects of the CID. As such, the provisions appear to be properly characterized as operational, rather than foundational.

The Stakeholder Group does not appear to characterize any provision in this category as foundational. Exhibit p. x. Section "1367.1" is listed as a foundational provision, but in light of the group's suggestion that nonresidential CIDs be exempted from Section 1367.1(c), the staff assumes that reference is to other provisions in Section 1367.1 not listed in this category.

Statutory Overlap

Assuming a nonresidential CID organized as a nonprofit mutual benefit corporation, Government Code Section 8216 also offers an opportunity for an owner to attempt to resolve a dispute with a CID association in an alternative manner. Government Code Section 8216 allows the Attorney General, upon receipt of a complaint that a corporation is not fulfilling its corporate obligations, to forward the complaint to the corporation, and if no "satisfactory" response is received, to bring an action against the corporation.

There is no statutory conflict between Government Code Section 8216 and any of the provisions in this category, but at least for incorporated nonresidential CIDs, the Government Code section offers something of a substitute for the provisions in this category.

Need for Special Statutory Treatment

The provisions in this category clearly offer some benefit both to individual nonresidential CID owners and to their governing bodies. However, the staff sees no particular need for nonresidential CIDs to be *specially* subject to the statutory treatment of these provisions, to the extent other commercial relationships are not.

In essence, these provisions simply provide participants in a business relationship alternative means to resolve disputes arising out of their business relationship. Such alternatives can always be voluntarily agreed to by participants in such a relationship, on an individual basis. But there does not appear to be a substantial basis for compelling nonresidential CIDs to be governed by such provisions.

Public Comment

The Stakeholder Group advocates exemption for nonresidential CIDs from all provisions in this category. First Supplement to Memorandum 2009-18, Exhibit pp. 10, 11.

In urging exemption from Sections 1363.810 through 1363.850, the group suggests that "The CC&Rs should be able to establish whatever Dispute Resolution Procedures seem appropriate. There is no good reason to compel the use of a particular dispute resolution procedure between nonresidential owners and the association."

With regard to its suggestion to exempt nonresidential CIDs from Section 1367.1(c) (apparently in its entirety), the group notes that the provision "refers to 1363.810 and 1369.510 and establishes a meet and confer procedure which should not apply to nonresidential CIDs and therefore this subdivision should be deleted."

As to Section 1367.6, the group argues that "(Payment Under Protest) is based upon the dispute resolution procedures of 1363.810 which should not apply to nonresidential associations."

And with regard to Sections 1369.510 through 1369.590, the group repeats that "The CC&Rs should be able to establish whatever Dispute Resolution Procedures seem appropriate. There is no good reason to compel the use of a particular dispute resolution procedure."

Three other commenters addressed provisions in this category.

Bruce Ibbetson advises that "IDR/ADR and 'meet and confer' programs are very owner tolerant, create all sorts of hoops for the association to collect late assessments and tie into [difficulties with liens and foreclosures]." Exhibit p. 8.

John Laubach indicates that "rights such as 'meet and confer' etc" cause complexity in nonresidential CID operations. Exhibit p. 10.

Bob Crissell also indicates problems with "IDR and ADR." Exhibit p. 3.

Recommendation

The staff recommends that **the Commission exempt nonresidential CIDs from all provisions in this category.**

LITIGATION BY CID ASSOCIATION

§ 1368.3. Standing of association
§ 1368.4. Effect of comparative fault on part of association
§ 1375. Pre-filing requirements for construction defect action
§ 1375.05. Litigation of construction defect civil action
§ 1375.1. Notification to owners of resolution of construction defect dispute

Summary of Category

These provisions relate to litigation that may be engaged in by a CID association, either against an owner or a third party.

Section 1368.3 provides an association with standing to participate in specified litigation, in its own name as a real party in interest.

Section 1368.4 applies principles of comparative fault to litigation brought by a CID association.

Section 1375 provides a series of detailed pre-filing requirements (including specified alternative dispute resolution) that must be met before an association may commence a construction defect action.

Section 1375.05 sets forth detailed procedures relating to the litigation of construction defect actions brought by an association.

Section 1375.1 addresses notice required when a construction defect dispute is settled.

Foundational vs. Operational

These provisions address the manner in which an association may litigate, or details about that litigation. As such, each provision would appear to be properly characterized as an operational provision.

The Stakeholder Group somewhat disagrees, characterizing Sections 1368.3 and 1368.4 as foundational provisions. Exhibit p. 18.

Section 1368.3, which grants an association standing to litigate, does have foundational aspects, as it could be viewed as defining the legal status of the association. However, the provision's chief function appears to be the overcoming of a procedural obstacle interfering with an association's ability to litigate, which would seem to be an operational function.

The staff is unclear why the Stakeholder Group characterizes Section 1368.4 as foundational.

The staff solicits further input on these provisions from the Stakeholder Group and any other interested party.

Pending that input, consideration of this factor appears to point, although perhaps not clearly, toward exempting nonresidential CIDs from the provisions in this category.

Special Consideration

However, the three provisions relating to construction defect litigation, Sections 1375, 1375.05, and 1375.1, along with most other statutes relating to construction defect litigation, are very politically sensitive provisions. The staff suggests that it would not be prudent for the Commission to consider any change to existing law in this area, in the context of this study.

Need for Special Statutory Treatment

There also appears to be a substantial basis for applying the special statutory treatment of the two remaining provisions in this category to nonresidential CIDs.

Section 1368.3, which grants an association standing in its own name to engage in litigation, and Section 1368.4, which applies principles of comparative fault to that litigation, were formerly provisions in Code of Civil Procedure Section 383.

Section 383 (formerly Section 374) was enacted in response to *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 107 Cal.

Rptr. 123 (1973), which had precluded a condominium owners association from pursuing a construction defect action for allegedly damaged common area in the CID because, apparently based on the manner in which title was held to the common area at issue, the court found that the association did not have the requisite possessory or ownership interest to confer standing to sue. *Windham at Carmel Mountain Ranch Assn. v. Superior Court (The Presley Cos.)*, 109 Cal. App. 4th 1162, 135 Cal. Rptr. 2d 834 (2003).

The provisions contained in Sections 1368.3 and 1368.4 simplify the standing requirement in litigation that may need to be prosecuted by a CID association, as well as provide for some expediency in that litigation by precluding separate and related causes of action. If nonresidential CIDs were to be exempted from these provisions, it is not clear why the problems addressed by the Legislature when it enacted Section 383 would not plague nonresidential CIDs as well.

Public Comment

The Stakeholder Group advocates exemption for nonresidential CIDs only from the construction defect litigation provisions in this category. First Supplement to Memorandum 2009-18, Exhibit p. 11. The group offers the same rationale for all: "The CC&Rs should be able to establish whatever Dispute Resolution Procedures seem appropriate. There is no good reason to compel the use of a particular dispute resolution procedure."

No other commenter offers a position on any provision in this category.

Recommendation

The staff recommends that **all provisions in this category continue to remain applicable to nonresidential CIDs.**

MANAGING AGENTS

§ 1363.1. Disclosures required of a prospective managing agent for CID
§ 1363.2. Financial obligations of managing agent of CID

Summary of Provisions

These provisions relate to the responsibilities of a person or entity serving as a managing agent of a CID. A managing agent is authorized to manage the assets of a CID.

Section 1363.1 requires a person or entity seeking to become the managing agent for a CID to make various disclosures relating to qualification to serve as a managing agent.

Section 1363.2 specifies various procedures that a managing agent must follow in handling a CID's assets.

Foundational vs. Operational

Both provisions in this category relate to obligations, both before and after hiring, of a managing agent that may be retained by a CID during the existence of the development. As both provisions relate to a repetitive, relative routine aspect of a CID operations, the provisions appear to be properly characterized as operational.

The Stakeholder Group does not characterize any provision in this category as foundational. Exhibit p. 18.

Consideration of this factor suggests that nonresidential CIDs should be exempted from both provisions in this category.

Need for Special Statutory Treatment

However, both provisions in this category relate to a rather specialized aspect of CID function, the responsibilities of an individual or entity hired to manage CID association assets. While the provisions may not be crucial to the function of a nonresidential CID, they may be reasonably necessary to define what the Legislature has decided should be qualifications and obligations of this employee.

Public Comment

The Stakeholder Group, which includes two "managing agents" of nonresidential CIDs, does not suggest exemption for nonresidential CIDs from either provision in this category. First Supplement to Memorandum 2009-18, Exhibit p. 5.

None of the other commenters have expressed a position on any of the provisions in this category.

Recommendation

The staff has not received comment from any other managing agents of nonresidential CIDs that seek exemption from either of these provisions.

Pending any further input on these provisions, the staff at this time recommends that **the provisions in this category remain applicable to nonresidential CIDs.**

HYBRID PROVISIONS

§ 1353.5. Display of United States flag
§ 1353.6. Display of noncommercial sign
§ 1353.8. Use of low water-using plants
§ 1360.5. Pets
§ 1376. Antennas and satellite dishes

Summary of Category

These provisions generally address permissive uses by an owner on the grounds of a CID. Each of these provisions was added to the Davis-Stirling Act after the enactment of Section 1373.

The primary difficulty in classifying these provisions stems from the fact that that each is phrased so as to restrict a CID governing body from regulating a described use of the CID premises, *except as permitted*. As such, each addresses somewhat discretionary decisions made on a relatively regular basis by the CID governing body, generally relating to "life in a CID," and each could therefore be fairly characterized as an operational provision.

On the other hand, each provision could also be viewed as the granting to an owner of a property right appurtenant to that owner's ownership of a separate interest in the CID, and as such could be fairly characterized as a foundational provision.

Section 1353.5 generally precludes a CID governing document from limiting or prohibiting the display a flag of the United States on or in the owner's separate interest, or within a portion of the common area of the CID allocated to that owner's exclusive use, "[e]xcept as required for the protection of the public health or safety." Section 1353.5(a).

Section 1353.6 generally precludes a CID governing document, with some specified limitations, from prohibiting the posting or display of a noncommercial sign on or in the owner's separate interest.

Section 1353.8 precludes a CID's architectural guidelines from prohibiting or including conditions that "have the effect of" prohibiting the use of low water-using plants.

Section 1360.5 precludes a CID governing document from prohibiting an owner from keeping one pet of a specified type on the grounds of a CID, "subject to reasonable rules and regulations of the [CID] association." Section 1360.5(a).

Section 1376 generally precludes a CID declaration or any other document affecting the transfer or sale of a separate interest in a CID from limiting or prohibiting allows an owner to install and use a video or television antenna, including a satellite dish, again subject to "reasonable restrictions." Section 1376(b).

Foundational vs. Operational

As indicated, the staff believes that reasonable persons could reasonably differ as to whether these provisions are more properly characterized as foundational or operational.

The Stakeholder Group does not characterize any provision in this category as foundational. Exhibit p. 5.

Need for Special Statutory Treatment

This factor is also rather difficult to apply to these provisions, as individual owners in a nonresidential CID are likely to have significantly different views as to how "necessary" these provisions are to the proper function of a nonresidential CID. Most could be seen as quite important to particular owners, largely for personal reasons; the provision allowing an antenna or satellite dish might be argued by some as essential for business reasons.

As such, the provisions may be the best examples of statutory treatment in the Davis-Stirling Act that *might* be perceived by the Commission as reasonably necessary, in order to protect significant interests of a substantial minority of CID owners.

Special Consideration

Exempting nonresidential CIDs from two of the provisions in this category, Section 1353.5 (flags) and Section 1353.6 (noncommercial signs), might implicate substantial constitutional concerns, bringing controversy and heightened scrutiny to a Commission recommendation in this matter. (Noncommercial signs likely includes all political matter.)

Statutory Overlap

Section 1376, relating to permitted antenna or satellite dish use, is substantially overlapped by the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), as well as interpretative regulations of that act implemented by the Federal Communications Commission.

The extent and effect of that overlap, including the possibility of statutory preemption, is beyond the scope of this memorandum. If requested by the Commission, the staff will address the relevant issues in detail in a subsequent memorandum.

Public Comment

The Stakeholder Group advocates exemption for nonresidential CIDs from three of the provisions in this category**.** First Supplement to Memorandum 2009-18, Exhibit pp. 9, 11.

The group suggests exemption from Section 1353.6, concerning noncommercial signs, because "Nonresidential CIDs are commercial enterprises and signage can properly be limited to commercial signage."

The group suggests exemption from Section 1360.5, relating to pets, as "Pets may have an important role in a family, to those who live alone, etc., this is not the case with commercial enterprises."

And the group urges exemption from Section 1376, relating to antennas or satellite dishes, because "the Legislature may want to preserve the rights of individuals to receive telecommunication services in their residence; however, nonresidential CIDs involved different dynamics. The CC&Rs should be able to establish whatever antenna and satellite restrictions are reasonable and not contrary to the Telecommunications Act of 1996."

None of the other commenters express a position on any provision in this category.

Recommendation

The potentially significant controversy that could be generated by a proposed exemption of nonresidential CIDs from any of these provisions might derail the enactment of an otherwise noncontroversial bill that could significantly benefit the nonresidential CID community.

In conjunction with this study, the staff recommends that **all provisions in this category remain applicable to nonresidential CIDs.**

PROVISIONS THAT APPEAR EFFECTIVELY INAPPLICABLE TO NONRESIDENTIAL CIDS

§ 1350.7. Delivery of documents
§ 1352.5. Prohibition against restrictive covenant in governing document
§ 1365.3. Reports that must be submitted to CID by community service organizations
§ 1365.2.5. Detailed form that must be used to summarize assessment and reserve information required to be disclosed
§ 1365.7. Limited immunity from tort liability available to an officer or director of a CID

Summary of Category

These provisions, despite not being listed as exemptions in Section 1373, nevertheless appear to be effectively inapplicable to nonresidential CIDs, based either on their content or some portion of their text.

Each of these provisions was added to the Davis-Stirling Act after the enactment of Section 1373.

In the event that the Commission does not find a provision in this category to be effectively inapplicable to nonresidential CIDs, or does not find that inapplicability a sufficient reason to expressly exempt nonresidential CIDs from the provision, the staff suggests that the Commission should then evaluate the provision according to the other considerations discussed in this memorandum. To assist in that effort, the staff has also offered a characterization of each of the provisions in this category as either foundational or operational.

Section 1352.5

Section 1352.5, a provision the staff would classify as foundational, addresses the inclusion in a governing document of a restrictive covenant that violates Government Code Section 12955.

The vast majority of practices prohibited by Government Code Section 12955 explicitly relate to housing, including a practice specifically relating to restrictive covenants:

> 19255. It shall be unlawful:
> ….
> (*l*) To discriminate through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry. Discrimination includes, but

> is not limited to, *restrictive covenants*, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), *that make housing opportunities unavailable*.
>
> Discrimination under this subdivision also includes the existence of a *restrictive covenant*, regardless of whether accompanied by a statement that the restrictive covenant is repealed or void. This paragraph shall become operative on January 1, 2001.

(Emphasis added.)

An express declaration of legislative intent appears to further confirm the inapplicability of Government Code Section 12955 to nonresidential developments. Government Code Section 12920 declares the purpose of the Government Code statutory part that contains Section 12955 to be the elimination of discrimination with regard to employment opportunity and "housing accommodations."

Section 1352.5 turns entirely on the existence of a restrictive covenant that violates Government Code Section 12955. As it appears that Government Code Section 12955 has no application to a restrictive covenant in a nonresidential CID, it appears that Section 1352.5 can have no application to a nonresidential CID.

Section 1365.7

Section 1365.7, another provision that the staff would classify as foundational, provides limited immunity from civil liability to "[a] volunteer officer or volunteer director of an association … which manages a common interest development *that is exclusively residential*."

It appears that this provision therefore has no effective applicability to a nonresidential CID.

Section 1350.7

Section 1350.7, a provision that the staff believes to be operational, sets forth specific rules relating to how documents are to be delivered in a CID. However, the section applies only "to the extent the section is made applicable by another provision of [the Davis-Stirling Act]." Section 1350.7(a).

The Legislature has made Section 1350.7 applicable to only two provisions of the Davis-Stirling Act, Sections 1357.130 and 1357.140 (operating rules in a CID). Both of these sections are expressly inapplicable to nonresidential CIDs, pursuant to Section 1373. Section 1373(a)(2). Section 1350.7 was made applicable to these

two sections at the time all three sections were enacted, as part of the same bill. 2003 Cal. Stat. ch. 512.

Sections 1350.7, 1357.130 and 1357.140 were all added to the Davis-Stirling Act in conjunction with a 2002 Commission recommendation on CID association rulemaking and decisionmaking. *Common Interest Development Law: Procedural Fairness in Association Rulemaking and Decisionmaking*, 33 Cal. L. Revision Comm'n Reports 81 (2003). The focus of that recommendation was on fairness in rulemaking in *residential* CIDs. The Commission later ratified an amendment to the implementing bill that added the substantive provisions of the bill to the list of nonresidential CID exemptions in Section 1373. See discussion in Memorandum 2008-63, pp. 4-5. The failure to include Section 1350.7 in that amendment may have been inadvertent, as the staff has located no discussion in any bill analysis addressing the issue.

Section 1365.3

Section 1365.3, another seemingly operational provision, addresses the obligations of a specified and defined "community service organization," and information that is received from such an entity by a CID association. Per the section, the "community service organization" referred to is defined by Section 1368(c)(3).

Section 1368(c)(3) defines a "community service organization" as "a nonprofit entity, other than an association, that is organized to provide services *to residents* of the common interest development *or to the public in addition to the residents*, to the extent community common areas or facilities are available to the public. (Emphasis added.)

The staff reads this language in Section 1368(c)(3) as defining an entity that serves only *residential* CIDs, which would cause Section 1365.3 to have no application to nonresidential CIDs. In addition, while perhaps not a determinative fact on its own, the Legislature has expressly exempted nonresidential CIDs from the entirety of Section 1368, where the definition of "community service organization" is found. Section 1373(a)(8).

Section 1365.2.5

Section 1365.2.5, another seemingly operational provision, provides that "The *disclosures required by this article* with regard to an association or a property" are to be summarized on a statutory form that is reprinted in the section. Section

1365.2.5(a) (emphasis added). The form is entitled "Assessment and Reserve Funding Disclosure Summary," and the blanks on the form to be filled in are disclosures relating either to the amount of assessments, or to the sufficiency of the CID's reserve account balances.

It does not appear to the staff that any disclosures required by the article in which Section 1365.2.5 appear are required of nonresidential CIDs, therefore making Section 1365.2.5 effectively inapplicable to nonresidential CIDs.

The article in the Davis-Stirling Act in which Section 1365.2.5 appears contains seven sections, as listed below.

Section 1365.1 requires a CID to annually distribute to its owners a form notice, with no blanks to be filled in, summarizing the statutory provisions of the Davis-Stirling Act relating to assessments and foreclosure. None of the information in the notice appears to correspond to any information to be provided on the Section 1365.2.5 form.

Section 1365.2 grants owners in a CID access to a comprehensive list of CID records, and requires the CID association to make these records reasonably available to its owners. However, the section does not appear to require an association to make any affirmative *disclosure* of any specific information that is required to be summarized in the Section 1365.2.5 form.

Section 1365.2.5 itself appears to require only the completion of the form, and no independent disclosures.

Section 1365.3 is effectively inapplicable to nonresidential CIDs as discussed in the previous section of this memorandum. In any event, Section 1365.3 requires no specific disclosures that correspond to the Section 1365.2.5 form.

Section 1365.6, mandating the application of conflict of interest provisions in the Corporations Code, requires no disclosures of any kind.

Finally, the two remaining sections in the article, Sections 1365 (mostly) and 1365.5 (possibly), appear to be the *only* two sections in the article that require disclosure of the information that is to be summarized in the Section 1365.2.5 form. Section 1365 requires a CID association to annually prepare and distribute to its owners a significant amount of financial information, including a pro forma operating budget, and a considerable amount of reserve funding information. Section 1365.5 imposes various financial duties on the board of a CID, including providing notice to owners whenever reserve funds are used.

Both Sections 1365 and 1365.5 are expressly inapplicable to nonresidential CIDs. Section 1373(a)(4),(5). Given the inapplicability of these two sections, there

appears to be no section in the article in which Section 1365.2.5 appears that mandates any "disclosure" contemplated by the Section 1365.2.5 form, that is required of a nonresidential CID.

Public Comment

The Stakeholder Group suggests that nonresidential CIDs be exempted from all of these provisions, with the exception of Section 1365.7. First Supplement to Memorandum 2009-18, Exhibit pp. 9, 10. The group offers no explanation why it does not suggest exemption from Section 1365.7.

The staff solicits input on this issue from the Stakeholder Group and any other interested party.

No other commenter has offered any specific comment on any of the sections in this category.

Recommendation

Each provision in this category appears to already have no effective application to nonresidential CIDs. A legislative enactment expressly exempting nonresidential CIDs from the provisions would help clarify the law applicable to nonresidential CIDs, and would not appear to cause any adverse consequence.

Pending any further input relating to Section 1365.7, the staff recommends that **nonresidential CIDs be exempted from each provision in this category.**

Respectfully submitted,

Steve Cohen
Staff Counsel

EMAIL FROM KAY ADAMS, TECH WEAR, INC.
(JUNE 10, 2009)

Dear Sir;

I am a commercial property owner and want to advise you that Craig Stevens of Mar West conveys my position, restated as follows:

I am a "sophisticated enough" business person/property owners who can watch out for myself and ALL I want is 1)basic protections 2) a functional mini-government 3) basic financial information and minimal administration and costs. I do not need to know all the micro detail of the 88 sections of the Davis-Stirling Act and quite frankly, have stated that I want it kept simple. I bought a commercial building/Unit/parcel, and operate a business from that location. I want my common association costs kept low and for all owners in the park to pay pro-rata with minimal hassles, administration and cost of operating the association.

Kay Adams
Tech Wear, Inc.
6154 Innovation Way
Carlsbad, CA 92009

EMAIL FROM JOHN ANDREASEN
(JUNE 14, 2009)

Dear Mr. Cohen,

I concur with all that Mr. Stevens has conveyed in his June 9 email below. As a board member for the last 18 months in a small commercial association in Irvine, CA (Wald Business Association), it has been apparent to me that there is a certain degree of excess administration required for our association as a result of CA law. We have just 14 owners, and our goal, as Mr. Stevens pointed out, is simplicity and low cost. My impression is the body of law designed for large residential associations is not a good fit for a commercial association like ours. Any improvement in making things simpler and less expensive for us would be welcome. Thank you,

John Andreasen
544 Wald
Irvine, CA 92618

EMAIL FROM JACK BHASIN, BHASIN ENTERPRISES INC. (JUNE 9, 2009)

Dear Mr Cohen

Please take action so that our Commercial condominium project is not subject to the sterling Davis act

Instaed a revision should be made to exclude Business parks such a our. This is the time to take action, we want to control un-necessary expences that serve no purpose & were intended for home owners.

Act Now In the interest of businesses

Thanks

Jack Bhasin
Bhasin Enterprises Inc. DBA. aahs
First imperial Trading company Inc.
(Halloween distributers)
13711 freeway drive
Santa Fe Springs, CA. 90670

EMAIL FROM GUY CHARBONNEAU, LEMOBILE INC. (JUNE 10, 2009)

Dear Steve Cohen,

As the president of Le Mobile Inc. and Charbonneau Properties. I will support and validate that Craig Stevens has truly conveyed my position by providing input to the staff attorney's at the CLRC.

Regards

Guy Charbonneau
LeMobile Remote Recording Studio
3214 Grey Hawk Court
Carlsbad, CA 92010-6651

EMAILS FROM BOB CRISELL, CRISELL COMMERCIAL ADVISORS, INC. (JUNE 10, 2009 AND JUNE 11, 2009)

Mr. Cohen, I understand that you are part of a group charged with rewriting and interpreting provisions of the Davis-Stirling Act. I am a member of an Owners Association that is responsible for managing a multi-owner medical office building in Murrieta, CA and known as Rancho Springs Medical Plaza II. It is my understanding that this complicated Act was originally created to protect unsophisticated homeowners in the normal course of a residential homeowners association. I believe that we as owners of a non-residential commercial property do not need more government regulation and are business people well familiar with the term "caveat emptor". We have imposed upon ourselves rules and regulations, CC&R's and other methods of governing our business to cover this and other projects that we do not need to have another layer of bureaucracy imposed on us by the State of California. We are trying to keep our costs low for all of the owners in this association who pay a pro-rata share of the expenses. To add any further regulation on our association will simply add to our costs and make it more difficult to administer and run our operation of serving the healthcare professionals in this community.

Thank you for your consideration.

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Specifically, we have problems with:

1) the process called for in Section 1363.03 with regard to the voting procedures and necessity of secret balloting, etc. The majority of non-residential CID's are much smaller than residential CID's. Therefore, to require such a formal process will be cumbersome and time consuming not say anything about the cost effectiveness of such a process (more management fees, etc).

2) 1367 &1367.1 Cash flow is an issue with small non-residential CID's. Therefore, we think that this provision is again cumbersome and unworkable for non-residential projects. Surely this has been a common complaint from similar non-residential CID's.

3) Prov #? IDR and ADR. Resolution of disputes. All we want is to have a less restrictive ability to enforce the rules on collecting monies due the association. We need to pay the bills for these smaller associations in a timely manner. If the delinquent party (non-residential means they are more sophisticated) fails to pay, we have the ability to assess and enforce with liens if necessary.

4) 1369? Noticing requirement for meeting agenda, etc. We find that practically speaking that the meeting are sparsely attended in the non-residential CID's (unlike residential where you can get retired types or larger attendance) and agenda's change at the last minute and/or old and new business may come up as a subject is brought up at the meeting and a decision needs to be made (trash collection is a problem from a new tenant; graffiti problem again?) To have to notice each time with 10 day notices of agenda changes just makes no sense for these 10-20 unit non-residential CID's. You get the idea of what we are objecting to here.

Thanks again for your follow up. Bob Crisell
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EMAILS FROM KADIE DE SENA
(JUNE 18, 2009 AND JULY 1, 2009)

Dear Mr. Cohen:

Thank you for the timely reply. We are also grateful to the opportunity to vent and make suggestions. I think at the top of the list is the growing power struggle, in so many areas, of both HOA and business owners association. I hope a revision is made regarding placing lien's, permitting judicial or non-judicial foreclosure. These associations were placed to benefit the tenants and owners; certainly not to cause them trauma and emotional and financial problems.

We also believe laws should be revised to make it harder to transfer money from the reserve fund, and repayment time should never be more than a year.

We also feel that the developers should have the ability to place contracts for only one year, on all business developments. It can be a selling point, as in our case, we had fire alarm installed. We found the cost excessive, and asked the provider if we could cancel, and seek another company. We were told that our developer had the units installed on a 'no money down' basis, all the equipment is leased, thus the high cost. The contract is for five years, then we will have the opportunity to shop for a more reasonable rate.

Another concern for a business owner is the responsibility placed on business owners regarding any damage by visitors or guests.

We would also like to get back to you with more concerns and questions. Is there a time limit on your project?

Thank you again for this excellent opportunity. This is already a learning process, which in itself is a plus. Speaking with other business owners has made us realize how important your work is to everyone.

Best regards,

Kadie De Sena

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Dear Mr. Cohen:

I am back, please accent my apology for the late reply. After rereading my last note, I realized I had been reacting from a personal viewpoint. In my own family, we have had an issue with a Home Owners Association, so this has definitely colored my opinion.

So heeding the advice of the wise man below, I thought about it a lot. I also did a lot of research, mostly online. I know how important it is to be as objecive and fair as possible; especially since the fellow owners in our business park, seem intelligent and reasonable. Our Developer, also has been exceptionally cooperative.
~~~~~~~~~~

I am thinking that Home Owners Associations must have been a 'sure sell' by a developer/realtor using the basic premise that if we unite and work for the good of the whole, we can accomplish/attain anything. Well something to that effect.

Sadly, somewhere along the way greed crept in like a silent mist, and shot that one down. On the plus side, there are many dreamers and optimist like myself who know that ants don't spoil a picnic. So indeed I still believe that in theory, it is a great idea. I am just not not in agreement with the amazing power they have attained. It also worries me that if a Home Owners Association has this much power, to lien property, cause homeowners more gief and financial hardship than we are already experiencing. How can this be good or fair for anyone? If they are 'David', what will 'Goliath' be able to do?

So again I am bowing to your expertise, I am thinking that if this option is open to the HOA, then it no doubt will be for the BOA. Please tell me if I am wrong. So after reading and thinking about it, in between the zillion other thoughts that fly in and out... I realize how lucky we are that somebody has brought you and the others together.

If you asked what problems I would like to see rectified having to do with liens and foreclosures regarding business owners associations, I would say that they should **never have this power. A Court of law, not a Board of Directors, should make this decision.**

Here again, a business owned by a private party or a corporation, will have the financial and legal advantage that the average homeowner does not.

Is this project solely devoted to the CIDs or do you and your group discuss how power has corrupted some of the HOAs? Ok, off I go to think some more and wait for your answer and listen. Thank you for this wonderful opportunity to have you listen....

Kadie

"In seeking wisdom the first step is silence, the second: listening, the third:remembering, the fourth:practicing, the fifth:teaching others."

— Rabbi Shlomo ibn-Gavirol —

EMAIL FROM PETER GOTTSCHLICH, AUTOMATION GT (JUNE 11, 2009)

Hello Steve

We agree with Craig, we want basic protection

We are "sophisticated enough" business people/property owners to watch out for themselves

Regards

Peter Gottschlich
CEO
Automation GT
1250 Pacific Oaks Place, Suite 100
Escondido, CA 92029-2900

EMAILS FROM C. H. HOLLADAY (JUNE 10, 2009 AND JUNE 11, 2009)

I agree with Mar West. We need something simple.

C. H. Holladay, Building owner in Irwindale Business Park masater Association

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I am not familiar with the laws concerning CIDs but I do know that having to hire some one to count votes for an election that has less than 20 voters is a waste of money. I would defer to Marwest who are the experts. That's why we hire them.

C. H. Holladay
~~~~~~~~~~~~~

EMAIL FROM MATT HUARTE, ARIZONA TILE LLC (JUNE 19, 2009)

Dear Steve Cohen:

with 14 commercial properties in California, Arizona Tile supports your efforts to "clean up" the unnecessary bureaucratic requirements of our associations. Please help create a sensible solution.

Thanks,

Matt Huarte
Vice President - Business Development
Arizona Tile LLC
1620 S Lewis Street, Anaheim, California 92805

EMAILS FROM BRUCE IBBETSON, ZMI REAL ESTATE, INC. (JUNE 17, 2009 AND JULY 1, 2009)

Dear Mr. Cohen, Esq.

Please note: I am in complete agreement with Mr. Craig Stevens with the issues stated below.

We manage 4 commercial real estate associations, and completely support the stated positions.

We will forward this request to all the owners, and hope that some will take the time to independently forward their comments to you.

Bruce Ibbetson
ZMI Real Estate, Inc.
1000 Quail Street, Suite 100
Newport Beach, CA 92660

~~~~~~~~~~~~

Dear Mr. Cohen, Esq.

Sorry for the delay in responding about some of the specific issues that we feel are burdensome & unwarranted for nonresidential CIDs.

I am in complete agreement with Mr. Craig Stevens with the issues stated below.

Owner oriented rights that make it very difficult and lengthy process to collect delinquent assessments and/or to lien and foreclose.(1367, 1367.1 and 1367.4)

Commercial are exempt from creating budgets, but in fact we create them any way…..there are other items required in that same section, so the industry got that section exempt….point being….is that nonresidential associations should have a cleaner body of law that succinctly addressed the simple structural and operational needs of nonresidential CID's.

No need for double secret blind balloting/envelopes, hiring of independent inspectors of elections etc. (1363.03)

Open Meeting Act is somewhat limiting for nonresidential CID's in that the Board cannot discuss anything that is brought up in a meeting if it was not on an agenda distributed 10 days in advance to all owners. (1363.05).

IDR/ADR and "meet and confer" programs are very owner tolerant, create all sorts of hoops for the association to collect late assessments and tie into #1 above.(1363.830 and 1369.510).
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EMAIL FROM MICHAEL E. JOHNSON, GLENMOUNT GLOBAL SOLUTIONS (JUNE 10, 2009)

Dear Mr. Cohen:

I understand that you are engaged in reviewing and recommending changes to those current laws that burden commercial property owners associations with many of the consumer protection and other provisions that apply to residential homeowner associations.

I am an owner and a board member in a commercial property owners association, and continue to be amazed by the host of unnecessary and costly state rules that apply to governance of our association. We simply do not need these and do not benefit in any way. In fact, these laws cost money that could be better spent building our businesses and hiring employees. While the multitude of regulations may have worthwhile purpose in a residential environment, they do not provide value for a group of commercial property owners.

I urge you to do anything you can to simplify this regulatory structure and to exempt us from unnecessary red tape.

Thanks,

Michael E. Johnson
GLENMOUNT GLOBAL SOLUTIONS
17701 Cowan Avenue, Suite 130
Irvine, CA 92614

EMAILS FROM JOHN LAUBACH, LAUBACH CONSTRUCTION, INC. (JUNE 9, 2009 AND JUNE 11, 2009)

Dear Mr. Steve Cohen,

I am a board member on two (2) non residential/commercial owners associations. I am writing this letter requesting that you "clean up" the Davis Sterling Act as it relates to properties like ours. The owners of these properties are looking to simplify management and eliminating laws that don't make sense, like the requirement on larger associations to hire an inspector of elections. This is an expensive unnecessary item.

The owners are sophisticated and can watch out for themselves, all they want is basic protections, a functional mini-government, basic financial information and minimal administration costs.

We approve of and back the attorneys and management companies referred to as "the Stakeholders Group"

Please feel free to contact me directly to get an actual owners perspective. The Davis Sterling Act does not work for our association and is not entirely in our best interests.

Sincerely
John Laubach
Laubach Construction, Inc.
9841 Irvine Center Dr. #120
Irvine, CA 92618

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Steve,

I have responded in your text. Sorry I can't be more specific on certain items but this should help.

Thanks.

Would it be possible for you to further describe for the Commission any specific laws or provisions that you would like to see declared inapplicable to commercial CIDs?

The Onerous areas include the elections processes, hassles and hoops of collecting/foreclosing, extensive with owner rights thus causing complexity in the operations….rights such as "meet and confer" etc….Association dues for large properties can add up quick. With a bankruptcy/foreclosure that takes too long the association looses on that money. The new owners should have the obligation to pay or streamline the operation. I am not a legal expert by any means but I and the other property owners are Intelligent. We are not talking peoples homes. These are investments. The laws should treat them as investments similar to owning other investments. Get rid of the crooks provide minimal oversight and let capitalism work.
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Also — or alternatively — could you describe the types of provisions that you believe would provide the "basic protection" and the "basic financial information" that you would like to see remain available in commercial CIDs?

The owners of these properties are very similar in their needs we want minimum government involvement and you want everyone to pay or have a very streamlined method to deal with the collection or foreclosure. We want open meetings. We don't want pre-published agendas with no room to talk about stuff that was not on an agenda. There is no reason to post an agenda. Just make sure all members are notified of meetings and meeting minutes published. Complete financial reports and books should be made available to all owners upon request. Reserves & reserve studies should be left up to the owners.

EMAIL FROM SCOTT L. LEVITT, THE FULLMER COMPANIES (JUNE 10, 2009)

Please use this email as a communication in support of simplifying the rules governing business/industrial associations under the Davis-Stirling Act. I represent owners in several business parks who wish the Act only applied to residential associations. Please create a simple, basic act for commercial property associations which require less costly rules to govern and enforce. Thank you.

Scott L. Levitt, Esq.
General Counsel
The Fullmer Companies
1725 S. Grove Ave.
Ontario, CA 91761

EMAIL FROM LISA MCLAIN, ACME ARCHIVES (JUNE 10, 2009)

Hi Steve,

I am one of the many business owners that bought a commercial building where we own and operate our business from our location. We would like our common association costs kept low with minimal hassles and administration and cost. We don't feel the need to hire independent inspectors for elections or use of double secret blind ballots. We are reasonable individuals with a similar goal which is to run our businesses efficiently with less unnecessary expenses.

Sincerely,

Lisa Mc Lain
Acme Archives
7575 San Fernando Rd.
Burbank, CA 91505

EMAIL FROM CRAIG STEVENS, MAR WEST REAL ESTATE (JUNE 9, 2009)

To: Mar West Prop Mgrs and Assistants

Re: URGENT- BLDG. OWNER HELP NEEDED NOW! Pls. read and act this week

All,

As you know, I have been working with a group of 15 or so attorney's and management companies ("The Stakeholders Group") who form and/or manage non-residential CID's/commercial owners associations (Commercial Property Owners Associations). Our goal over the past few years has been to work with the staff attorney's at the California Law Revision Commission (a multi-member panel appointed by the governor to clean up poorly written and/or non-functional law) to "clean up" the Davis-Stirling Act as it relates to the formation and operational management of non-residential CID's/commercial owners associations for the long term benefit of our commercial building owners.

The Davis-Stirling Act was originally created to protect unsophisticated HOMEOWNERS. Due to the legal structure of the underlying "owners association" being the same for residential and commercial (meaning California Non-Profit Mutual Benefit Corporations), this body of law known as the Davis-Stirling Act unfortunately applies to all such entities in the State of California. Every time the legislature passes a new law for HOA's, and unless they specifically exempt non-residential CID's, it applies to the non-residential/commercial associations too…even when it does not make sense , fit the property or serve the needs/wants of the commercial building owners. Laws such as the requirement for a 15 building business park to hire an independent inspector of elections for $1000 and added hassle and cost of implementing the use of double secret blind ballots etc.

The large number of the owners in our parks have told me that they are "sophisticated enough" business people/property owners to watch out for themselves and ALL they want is 1)basic protections 2) a functional mini-government 3) basic financial information and minimal administration and costs. They do not know all the micro detail of the 88 sections of the Davis-Stirling Act and quite frankly, have stated that they want it kept simple. They bought a commercial building/Unit/parcel, and in 90% of our portfolio, the building owner operates a business from that location. They have represented that they want their common association costs kept low and for all owners in the park to pay pro-rata with minimal hassles, administration and cost of operating the association.

_____CALL TO ACTION_____

WE NEED AS MANY OWNERS AS POSSIBLE, TO VALIDATE THAT WHAT I HAVE CONVEYED AS THEIR POSITION, IS TRUE BY PROVIDING INPUT TO THE STAFF ATTORNEY'S AT THE CLRC NOW. PLEASE REACH OUT TO AS

MANY OWNERS AS YOU CAN ASAP AND ASK THEM TO PROVIDE THEIR COMMENTS DIRECTLY TO:

STEVE COHEN
Attorney
California Law Revision Commission
(916) 739-7068
scohen@clrc.ca.gov

DO NOT PROVIDE ANY WORDING FOR YOUR OWNERS TO USE. SIMPLY PROVIDE THEM WITH THE ABOVE SUMMARY AND ASK THEM TO SEND AN E-MAIL ASAP!

Thanks.

Craig

P.S. For detailed information about this entire project, go to http://www.clrc.ca.gov/H850.html

EMAIL FROM MIKE TURNER, VENTURE CORPORATION (JUNE 10, 2009)

Our company has developed over 30 commercial condominium projects in California and we fully support Mr.. Steven's comments (below). Our associations are professionally run by third party managers and we support these associations in keeping their burden of adhering to state rules and regulations. However, simpler more applicable rules and regulations would be a benefit to us and the companies and business these associations serve.

Mike Turner
VP Development
Venture Corporation
125 E. Sir Francis Drake Blvd., Third Floor
Larkspur, CA 94939

EMAIL FROM DAVID VAN GROL, LESTER AUTHORIZED SALES AND SERVICE CENTER (JUNE 10, 2009)

Hello Steve,

For what it is worth, I agree with Craig Stevens.

As a small business owner I am always looking to keep costs and paperwork to a minimum. And on a personal level anything that keeps me from focusing on my business, including this e-mail, is a distraction I could do without.

Very Best Regards,

David Van Grol
Assembly Supplies, Co.
Leister Authorized Sales and Service Center
1250 Pacific Oaks Place, Suite 104
Escondido CA 92029

LAW OFFICE OF
JEFFREY G. WAGNER
1777 N. CALIFORNIA BLVD., SUITE 200
WALNUT CREEK, CALIFORNIA 94596-4150

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(925) 952-9021

FACSIMILE: (925) 952-9109
JWAGNER@JWAGNERLAW.COM
VPARK@JWAGNERLAW.COM

July 31, 2009

Via Email scohen@clrc.ca.gov

Steve Cohen
Staff Counsel
California Law Revision Commission
3200 Fifth Avenue
Sacramento, CA 95817

Re: Common Interest Development Law
Nonresidential Associations

Dear Steve:

We understand that the Commission has requested an analysis of the Davis Stirling Common Interest Development Act (the "Act") using a foundational/operational approach because of the likelihood that the Legislature used this approach in adopting the Civil Code section 1373 exemption.

The stakeholder group in analyzing the Act on this basis generally considered a "foundational" provision as a provision that was essential to the formation of a common interest development, essential to protection of basic property rights; or necessary for the operation of the common interest development such as assessments and lien rights.

Please note that the Foundational List attached as Exhibit A does not change the stakeholder group's recommendation for expanding the exemption list as set forth in our letter to the Commission dated April 14, 2009. The group recognizes the advisability of having nonresidential associations subject to certain "operational" provisions.

Please note there is a correction to the group's recommended Expanded Exemption List attached as Exhibit B to the April 14, 2009, letter. In the third paragraph from the end of the list, we included sections "1375, 1375.05 and 1371 (action against developer)". 1371 was a typo. It should be 1375.1.

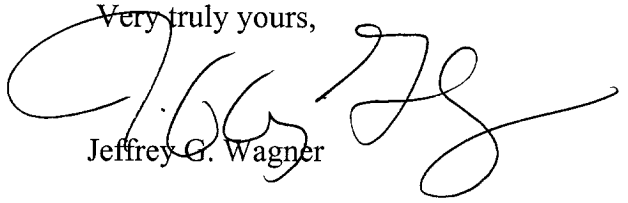
We also would like to respond to the comments in Memorandum 2009-24 regarding the potential difficulty in providing an "opt-in" provision. The Memorandum, acknowledging that there would be no difficulty with an "opt-in" provision for new residential developments, expressed concern about existing developments and the problem with adopting an opt-in provision through the

amendment process. While the amendment process can be difficult on occasion, this should not justify denying members of existing nonresidential associations the opportunity to adopt provisions of the Act that the members deem beneficial to their association.

We will be providing you with a separate letter regarding commercial condominium plans and the issue of liability protection for volunteer directors of commercial associations.

If you have any questions regarding the foregoing or the attached exhibit, please give me a call.

Very truly yours,



Jeffrey G. Wagner

JW:ya

Enclosure

cc: CLRC Committee ("Stakeholder Group") Via Email (w/encs.)

EXHIBIT A

STAKEHOLDER'S GROUP FOUNDATIONAL LIST

1350

1350.5

1351

1352

1353(a)(1) - Note: First two sentences only

1354

1355

1357

1358 - Note: Subsections (a) and (d) do not apply to non-residential projects

1359

1361

1361.5

1362

1363 - Note: (a) & (c)

1365.9

1366(a) - Note: First sentence only

1367.1

1368.3

1368.4

1369

1370

1371

1372

1373

1374

EMAIL FROM LAWRENCE A. WOODWARD, THE CURRIE PARTNERS (JUNE 11, 2009)

Dear Mr. Cohen,

I am the owner of a Class A office buiding in the Carlsbad Forum subdivision. Mar West manages our Association. He has taken an active role in a movement the Clean Up the act as it applies to Office property. I am in complete aagreement with his objectives and goals.

I have been a commercial developer in San Diego since 1982 and have built numerous commercial projects in San Diego.

Your consideration is appreciated.

Very Truly Yours,
Lawrence A. Woodward
Chairman, The Currie Partners
Managing Member LW Properties LLC