

Memorandum 2009-53

Statutory Clarification and Simplification of CID Law (Proposed Legislation)

This memorandum continues the Commission’s work to recodify the Davis-Stirling Common Interest Development Act (“Davis-Stirling Act”) in order to improve the Act’s organization, make it easier to understand and use, and implement noncontroversial substantive improvements.

A staff draft of proposed legislation is attached. It is a revised version of the staff draft that was attached to Memorandum 2009-33. The revisions implement Commission decisions made at the August and October meetings. See Minutes (Aug. 2009), p. 4; Minutes (Oct. 2009), pp. 6-10.

This memorandum also presents three letters commenting on the staff draft. Those letters are attached in the Exhibit as follows:

	<i>Exhibit p.</i>
• Kazuko K. Artus, San Francisco (9/4/09)	1
• Duncan R. McPherson, Stockton (10/13/09)	7
• Dick Preuss, Community Associations Institute, California Legislative Action Committee (10/15/09)	18

The issues raised in those letters are discussed below.

In addition, the Office of the Legislative Counsel has reviewed the prior draft and offered constructive criticism, primarily aimed at making the draft consistent with legislative drafting style standards. The staff greatly appreciates that assistance.

The attached draft is also adjusted to reflect changes made to the Davis-Stirling Act in the Legislature’s 2009 regular session.

The staff recommends that the revisions proposed in this memorandum be the last round of revisions prior to the approval and release of a tentative recommendation.

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

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

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PRIOR DECISIONS REVISITED

The staff has received informal suggestions regarding three decisions that the Commission made at its October meeting. Those suggestions are discussed below.

Internet Posting

At its October meeting, the Commission heard testimony explaining that many homeowners do not have effective access to the Internet. Therefore, the proposed law should not allow an association to post a “general notice” on the Internet alone.

The Commission decided to revise proposed Section 4045 to remove Internet posting as one of the authorized methods of providing general notice. Minutes (Oct. 2009), p. 7.

In making that decision, the Commission did not intend to preclude an association from using Internet posting of notices as a supplement to the methods required under Section 4045. The staff has since received informal comments from the Community Associations Institute, asking that this last point be made clearer. **The staff believes that clarification of this point might be helpful. In the attached draft, the Comment is revised as follows:**

Comment. Section 4045 is new. It specifies acceptable methods for delivery of a notice to the membership generally, as distinguished from a notice that is to be delivered to a specific member. See Section 4040 (individual notice). Nothing in this section prevents an association from using supplemental notice methods, such as posting on an Internet website, so long as one or more methods authorized by this section are also used.

...

Ballot Materials in Vote on Governing Document Amendment

At the October meeting, the Commission decided to revise proposed Section 5115 to add subdivision (e), relating to the ballot used when voting to approve a change to the governing documents:

(e) In an election to approve an amendment of the governing documents, the ballot shall include the text of the proposed amendment.

Minutes (Oct. 2009), p. 9.

The staff received informal comment noting the impracticality of that requirement when documents are being entirely readopted. For example, suppose that a set of proposed revisions is 70 pages long. To include 70 pages of material *in the ballot document itself* (which the members must mark, insert into double envelopes and then mail) would be unworkable. Instead it was suggested that the new provision be revised along the following lines:

(e) In an election to approve an amendment of the governing documents, ~~the ballot shall include~~ the text of the proposed amendment shall be delivered to the members with the ballot.

Under that language, the 70-page proposed revision would be provided to the members as a separate enclosure, rather than as part of the ballot itself.

The staff recommends that the proposed change be made. The attached draft uses the proposed language.

Meeting Procedures for Rulemaking Referendum

Proposed Section 4365 provides for a special member meeting and vote on whether to reverse an operating rule change. That section includes a number of existing cross-references to Corporations Code provisions on voting and meetings.

At the October meeting, the Commission directed the staff to “analyze whether the Corporations Code provisions referenced in proposed Section 4365 are in conflict with member election requirements” and report its findings at a future meeting. Minutes (Oct. 2009), p. 8. The results of that analysis are presented below.

Proposed Section 4365 would provide as follows:

4365. (a) Members of an association owning five percent or more of the separate interests may call a special meeting of the members to reverse a rule change.

(b) A special meeting of the members may be called by delivering a written request to the president or secretary of the board, after which the board shall deliver individual notice (Section 4040) of the meeting to the association's members and *hold the meeting in conformity with Section 7511 of the Corporations Code*. The written request may not be delivered more than 30 days after the members of the association are notified of the rule change. Members are deemed to have been notified of a rule change on delivery of notice of the rule change, or on enforcement of the resulting rule, whichever is sooner.

(c) For the purposes of Section 8330 of the Corporations Code, collection of signatures to call a special meeting under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list solely for that purpose may not be denied on the grounds that the purpose is not reasonably related to the member's interests as a member.

(d) The rule change may be reversed by the affirmative vote of a majority of a quorum of the members (Section 4070), or if the declaration or bylaws require a greater proportion, by the affirmative vote or written ballot of the proportion required. In lieu of calling the meeting described in this section, *the board may distribute a written ballot to every member in conformity with the requirements of Section 7513 of the Corporations Code*.

(e) Unless otherwise provided in the declaration or bylaws, for the purposes of this section, a member may cast one vote per separate interest owned.

(f) *A meeting called under this section is governed by Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and 7613 of, the Corporations Code.*

(g) A rule change reversed under this section may not be readopted for one year after the date of the meeting reversing the rule change. Nothing in this section precludes the board from adopting a different rule on the same subject as the rule change that has been reversed.

(h) As soon as possible after the close of voting, but not more than 15 days after the close of voting, the board shall provide general notice (Section 4045) of the results of the member vote.

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

(Emphasis added.) The italicized language in subdivisions (b), (d), and (f) is analyzed below.

Subdivision (b) — Member Meeting Held Pursuant to Section 7511

Corporations Code Section 7511 regulates the procedure for giving members notice of a member meeting and provides rules for calling a special meeting of

the members. Those are important issues in the context of Section 4365, which authorizes members to call a special meeting.

Because the Davis-Stirling Act does not provide guidance on those issues, the cross-reference to Corporations Code Section 7511 appears to be appropriate and helpful. **The staff recommends that it be retained.**

Subdivision (d) – Ballot Distributed in Conformity with Section 7513

Corporations Section 7513 provides some basic guidance on member voting. In relevant part, it authorizes voting by mailed ballot, provides a quorum rule for such votes, provides a rule for delivery of ballots, and provides that a written ballot is irrevocable. See Section 7513(a)-(d).

All of those issues are addressed by the Davis-Stirling Act. See proposed Sections 5115, 5120(a).

There is no need to have two sources of law on those points, and the overlap could be confusing.

The staff recommends that the reference to Section 7513 be deleted. That change is made in the attached draft. This should not be a substantive change in the law because the Davis-Stirling Act's election provisions expressly supersede the Corporations Code to the extent of any conflict. See proposed Section 5100(e).

Subdivision (f) – Meeting Governed by Chapter 5 (Commencing with Section 7510)

Proposed Section 4365(f) incorporates an entire chapter of the Nonprofit Mutual Benefit Corporation Law by reference. That chapter includes Section 7511 and 7513, which are discussed above. Other provisions of the chapter include:

- Section 7510, relating to the place and time of meetings, quorum for a member vote, rules for calling a special meeting, and teleconferencing.
- Section 7512, addressing quorum issues.
- Section 7514, addressing the form and use of proxies.
- Section 7515, authorizing the court to order a legally required meeting to be held.
- Section 7516, authorizing action by unanimous written consent, without a meeting.
- Section 7517, relating to the acceptance or rejection of member ballots.
- Sections 7520-7527, which relate to election of a director and so are not relevant here.

On balance, the incorporation of those provisions is probably more helpful than problematic. They address a number of issues that are not adequately covered by the Davis-Stirling Act (e.g., default quorum, detailed rules for the use of proxies, authority of court to order legally required meeting). To the extent that there are conflicts between that chapter and the Davis-Stirling Act, the express supremacy of the Davis-Stirling Act's election rules should be sufficient to resolve them.

The staff recommends that the language discussed here be left unchanged.

CHANGES MADE TO REFLECT 2009 LEGISLATION

The attached draft has been revised to reflect changes to the Davis-Stirling Act made in the Legislature's 2009 regular session. Those changes are briefly outlined below.

AB 313 (Fletcher) (2009 Cal. Stat. ch. 431)

AB 313 (Fletcher) added Section 1366.4, which limits an association's ability to use the taxable value of a separate interest as a basis for setting assessments. That provision would be continued without change in proposed Section 5625.

AB 899 (Torres) (2009 Cal. Stat. ch. 484)

AB 899 (Torres) made four changes to the Davis-Stirling Act:

- (1) Section 1350.7 was amended to expand the application of its notice delivery procedures.
- (2) Section 1350.7 was amended to provide guidance on how a member may consent to receipt of electronic notices.
- (3) Section 1363.005 was added, to require that an association provide a specified "disclosure document index" to any member on request.
- (4) Section 1365.2.5 was revised to require that the "Assessment and Reserve Funding Disclosure Summary" expressly state the assumed interest and inflation rates used in preparing the summary.

Issues related to implementation of those changes in the attached draft are discussed below.

Expansion of Notice Delivery Procedures

Section 1350.7 was revised to apply its notice delivery rules to any of the "disclosure documents" listed in Section 1363.005.

From the legislative history of AB 899, it appears that this change was only intended to permit *electronic* delivery of the disclosure documents. See, e.g., Senate Transportation and Housing Committee Analysis of AB 889 (June 17, 2009), p. 3. However, the revision would have a broader effect than that. It would authorize *any* of the delivery methods permitted in Section 1350.7, which includes publication in a periodical or broadcast on an association television program.

The apparent intent of the bill could be best preserved by limiting delivery of these documents to the methods specified in proposed Section 4040 (for “individual delivery” of notices). That includes mail or electronic delivery.

No changes to the attached draft are required to implement that approach, as the attached draft already specifies individual delivery for all but one of the disclosure documents.

The exception requires discussion. In AB 899, the list of disclosure documents includes the “assessment collection policy” delivered under Section 1367.1(a). However, that statement of policy is included in a notice of delinquent assessments that is sent to an individual member by certified mail. AB 899 does not amend Section 1367.1, so there is now a conflict between that section, which requires delivery by certified mail, and Section 1350.7, which authorizes delivery by first class mail, electronic delivery, or publication. That conflict strongly suggests that the change described here was inadvertent, and that there was no intention to permit these delinquency notices to be delivered by any means other than certified mail. **The attached draft would preserve former law on this point. The staff recommends that approach.**

Consent to Electronic Delivery of Notices

AB 899 amended Section 1350.7(b)(3) to provide guidance on the method by which a member may give consent to receive notices by electronic delivery, thus:

(b) A document shall be delivered by one or more of the following methods:

...

(3) E-mail, facsimile, or other electronic means, if the recipient has agreed to that method of ~~delivery as provided in subdivision (e)~~ delivery. The agreement obtained by the association shall be consistent with the conditions for obtaining consumer consent described in Section 20 of the Corporations Code. If a document is delivered by electronic means, delivery is complete at the time of transmission.

Corporations Code Section 20 provides as follows:

20. "Electronic transmission by the corporation" means a communication (a) delivered by (1) facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, for that recipient on record with the corporation, (2) posting on an electronic message board or network which the corporation has designated for those communications, together with a separate notice to the recipient of the posting, which transmission shall be validly delivered upon the later of the posting or delivery of the separate notice thereof, or (3) other means of electronic communication, (b) to a recipient who has provided an unrevoked consent to the use of those means of transmission for communications under or pursuant to this code, and (c) that creates a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form. However, an electronic transmission by a corporation to an individual shareholder or member under this code is not authorized unless, in addition to satisfying the requirements of this section, the transmission satisfies the requirements applicable to consumer consent to electronic records as set forth in the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7001 (c)(1)).

The attached draft has been revised to preserve the substance of the amendment, by revising proposed Section 4040(a)(2) as follows:

E-mail, facsimile, or other electronic means, if the recipient has agreed to that method of delivery. The agreement obtained by the association shall be consistent with the conditions for obtaining consumer consent described in Section 20 of the Corporations Code.

Disclosure Documents Index

AB 899 added Section 1363.005, which provides:

The association shall, at the request of any member, distribute to the member, in the manner described in Section 1350.7, the following Disclosure Documents Index:

...

The section then lists 14 "disclosure documents."

The Disclosure Documents Index could be helpful to an association member under existing law, because the disclosure requirements are currently scattered throughout the Davis-Stirling Act. The index provides a handy summary of those scattered requirements.

Under the proposed law, all but one of the various disclosures are aggregated into three annual documents, the annual budget report (proposed Section 5300), the annual financial statement review (proposed Section 5305), and the annual policy statement (proposed Section 5310). That will make it much easier to keep track of the information that an association must provide its members. **In the staff's view, this approach makes the Disclosure Document Index unnecessary. For that reason, it is not included in the attached draft.**

There is one "disclosure document" that would not be included in one of the three documents described above. That is the notice of delinquency that is sent to a member, under Section 1367.1(a), who owes overdue assessments. The staff sees no reason to provide all members with advance notice that they *might* be receiving such a notice, when most members will never receive the notice. This is especially true since the collection policy information in the notice of delinquency is largely duplicative of the information that would already be provided in the annual policy statement. If the Commission agrees, no change will be made to the attached draft on this issue.

Assessment and Reserve Funding Disclosure Summary

AB 889 made minor changes to the Assessment and Reserve Funding Disclosure Summary form provided in Section 1365.2.5. **The attached draft has been revised to include those changes.** See proposed Section 5570.

AB 927 (Calderon) (2009 Cal. Stat. ch. 7)

Under existing law, Section 1375 (relating to construction defect claims) becomes inoperative on January 1, 2010, and is repealed by operation of law on January 1, 2011. See Section 1375(s).

AB 927 extends that sunset provision to 2017. **The attached draft is revised to reflect that change in the law.** See proposed Section 6000(s).

AB 1061 (Lieu) (2009 Cal. Stat. ch. 503)

Prior to enactment of AB 1061, Section 1353.8 provided as follows:

1353.8. The architectural guidelines of a common interest development shall not prohibit or include conditions that have the effect of prohibiting the use of low water-using plants as a group.

AB 1061 amends that provision to read:

1353.8. (a) Notwithstanding any other law, a provision of any of the governing documents of a common interest development shall be void and unenforceable if it does any of the following:

(1) Prohibits, or includes conditions that have the effect of prohibiting, the use of low water-using plants as a group.

(2) Has the effect of prohibiting or restricting compliance with either of the following:

(A) A water-efficient landscape ordinance adopted or in effect pursuant to subdivision (c) of Section 65595 of the Government Code.

(B) Any regulation or restriction on the use of water adopted pursuant to Section 353 or 375 of the Water Code.

(b) This section shall not prohibit an association from applying landscaping rules and regulations established in the governing documents, to the extent the rules and regulations fully conform with the requirements of subdivision (a).

In the attached draft, proposed Section 4755 has been revised to use the new language, with some minor nonsubstantive adjustments to conform to the drafting style used in the proposed law. Those drafting changes are noted in the Comment to proposed Section 4755.

AB 1246 (Jones) (2009 Cal. Stat. ch. 520)

AB 1246 made substantive changes to the law governing certain types of housing cooperatives (addressing issues that are beyond the scope of the Davis-Stirling Act). In connection with those changes in the law, the bill also revised part of the definition of stock cooperative, as follows:

1351. ...

(m) ...

A "stock cooperative" includes a limited equity housing cooperative which is a stock cooperative that meets the criteria of ~~Section 33007.5 of the Health and Safety Code~~ 817.

The attached draft reflects that change. See proposed Section 4190(b).

AB 1572 (Committee on Elections and Redistricting) (2009 Cal. Stat. ch. 547)

AB 1572 would change statutory references to "absentee ballots" to instead refer to "vote by mail ballots."

Such a change was made in Section 1363.03(e), relating to member elections in a CID. **The attached draft reflects that change.** See proposed Section 5115(a).

CHANGES MADE ON THE SUGGESTION OF THE OFFICE OF LEGISLATIVE COUNSEL

As noted in the introduction, the Office of the Legislative Counsel carefully reviewed the last version of the staff draft and made a number of suggestions for improvement. For the most part, the suggestions were minor, stylistic, and technical. They have been implemented in the attached draft and are not discussed here. Where a change in wording was made, the Comment to the revised section has been adjusted to note the change.

A few of the suggestions involve more substantive issues. They are discussed below.

Nonresidential CIDs

Existing Section 1373(a)(6) exempts nonresidential CIDs from Section 1366(b).

Section 1366(b) requires member approval of assessment increases above a specified size, but also provides an emergency exception to that requirement. Those provisions would be continued in proposed Sections 5605(b) (member approval requirement) and 5610 (emergency exception).

Proposed Section 4025 would continue the special exemptions for nonresidential CIDs that are provided in Section 1373. However, in drafting proposed Section 4025(a)(9), the staff only exempted nonresidential CIDs from the member approval requirement of Section 1366(b); *the emergency exception was not included in the exemption*. The Legislative Counsel staff noted that omission as a possible error.

The decision not to exempt a nonresidential CID from the emergency exception provision was based on an incorrect assumption, that the emergency exception only applies to the member approval requirement in Section 1366(b) (requiring approval when assessments are increased above a specified amount). In fact, the emergency exception has broader application than that. It also applies to the member approval requirement in Section 1366(a) (requiring approval when association fails to prepare annual pro forma budget).

Because the emergency exception also applies to Section 1366(a), *which applies to nonresidential CIDs*, the emergency exception is relevant to nonresidential CIDs. For that reason, omission of the emergency exception from proposed Section 4025 would be a substantive change in the law.

To restate the point: under existing law a nonresidential CID that fails to prepare an annual budget report must obtain member approval of any regular assessment increase. Section 1366(a). There is an emergency exception to that

requirement, but it is not applicable to a nonresidential CID. Section 1373(a)(6). As currently drafted, the proposed law would change the law, by making the emergency exception applicable to a nonresidential CID.

That was an inadvertent change. **Nonetheless, the staff believes it would be good policy to make that change.** The emergency exception allows an association to raise assessments as necessary to address an urgent and unforeseen need, even if the members are apathetic or resistant. The staff does not see any good policy reason to deny the emergency exception to nonresidential CIDs.

The staff recommends against revising proposed Section 4025. The current version does *not* exempt a nonresidential CID from the emergency exception, which seems proper. The note following proposed Section 4025 has been revised to acknowledge that change from existing law.

Summary of Reserve Funding Plan

Existing Section 1365 specifies the required contents of the annual budget report. Subdivision (b) of that section provides as follows:

(b) Commencing January 1, 2009, a summary of the reserve funding plan adopted by the board of directors of the association, as specified in paragraph (4) of subdivision (e) of Section 1365.5. The summary shall include notice to members that the full reserve study plan is available upon request, and the association shall provide the full reserve plan to any member upon request.

The Legislative Counsel staff pointed out that the cross-reference to Section 1365.5(e)(4) seems misplaced, because that paragraph does not describe the summary of the reserve funding plan adopted by the board. Instead, the section should probably refer to Section 1365.5(e)(5), which does describe the summary of the reserve funding plan.

The staff agrees and recommends that the error be noted and corrected. That is the approach taken in the attached draft. See proposed Section 5300(b)(3), which now refers to proposed Section 5550(b)(5) (which would continue Section 1365.5(e)(5)).

Parenthetical References

With some specific exceptions not relevant here, California's legislative drafting style disfavors the use of parenthetical references.

The proposed law uses parentheticals as a shorthand reference to the provisions governing delivery of notice to an association (Section 4035), individual delivery of notice to a member (Section 4040), general delivery of notice to the members (Section 4045), approval “by a majority of all members” (Section 4065), and approval by “a majority of a quorum of the members” (Section 4070).

Strictly speaking, those parentheticals are not necessary. For example, the revision set out below would not affect the meaning of the section:

5615. The association shall provide individual notice (~~Section 4040~~) to the members of any increase in the regular or special assessments of the association, not less than 30 nor more than 60 days prior to the increased assessment becoming due.

The parenthetical in that section is unnecessary because proposed Section 4040 provides:

4040. (a) If a provision of this part requires “individual delivery” or “individual notice,” the notice shall be delivered to the member to be notified by one of the following methods:

...

That point could be reinforced by adding Comment language to all sections that use one of the parenthetical references, to provide equivalent guidance in the Comment.

The Legislative Counsel staff unanimously suggested that the parentheticals be removed from the proposed law. It would be simple to do so, and the meaning of the revised provisions would not be affected. **Should the parenthetical references be deleted? Should the Comments to the affected sections be revised to refer to the provisions referenced in the parentheticals?**

GENERAL COMMENT

Dick Preuss writes on behalf of the California Legislative Action Committee of the Community Associations Institute (“CLAC-CAI”). He makes a general observation that the attached draft is an improvement over earlier versions of the proposed law:

There is no question that Memorandum 2009-33 Statutory Clarification and Simplification of CID Law (Staff Draft), dated August 8, 2009, and the suggested changes in the other drafts since that date, are a better tool than we previously had. The Detailed Contents pages 1-6, and the Disposition of Former Law, pages 126-

128, are two of the best tools contained therein, but I understand will not be part of the Bill when one is introduced. That is unfortunate, as for the first time, the material is drawn together by subject, and is well cataloged in the Detailed Contents, and the cross referencing to the old Davis-Stirling Act, pages 126-128, should be a great help to those with good memories of the old Section numbers.

See Exhibit p. 18.

While it is true that the table of contents and disposition table in the staff draft will not be part of statutory law, they will be part of the Commission's recommendation. Based on our past experience with recodification projects of this type, it is likely that legal publishers will print the disposition table in their annotated codes as well. Consequently, that useful information should be available to many people throughout the state.

NEW ISSUES: ORGANIZATION OF DISCUSSION

The remainder of this memorandum discusses new issues raised in the attached letters or informally with the staff. In order to expedite consideration of the numerous suggestions that were made, the memorandum organizes the issues into four groups, as follows: (1) objections to proposed substantive changes to existing law, (2) objections to perceived technical errors, (3) proposals for new nonsubstantive changes, and (4) proposals for new substantive changes.

That organization is helpful because each of those four groups calls for a different type of analysis, as indicated below:

- (1) *Objection to substantive change.* If the objection has merit, the Commission should consider deleting the substantive change. This would be consistent with the Commission's general approach of omitting controversial substantive proposals from the proposed law, while noting them for possible future study.
- (2) *Technical objection.* If the objection is correct, the technical problem should be corrected.
- (3) *New nonsubstantive change.* If the proposed change would be a clear improvement and is straightforward in its effect (i.e., it presents little risk of unintended consequences), the Commission should consider adding it to the proposed law.
- (4) *New substantive change.* If a proposed substantive change meets the criteria stated in (3) above *and* it is clearly uncontroversial, the Commission should consider adding it to the proposed law. Otherwise, it should be set aside for possible future study by the Commission.

In many cases, the application of those criteria leads to a clear and straightforward answer, which probably does not require discussion at the meeting. The staff proposes to treat those cases as “consent items,” which are presumed approved without discussion, unless a Commissioner asks for discussion. These consent items are identified by the following bracketed note at the beginning of the heading for the item: [CONSENT].

SUBSTANTIVE OBJECTIONS

Kazuko K. Artus writes as an individual. She disapproves of the definitions of the terms “reserve accounts” and “reserve account requirements” in proposed Sections 4177 and 4178:

4177. “Reserve accounts” means both of the following:

(a) Moneys that the association’s board of directors has identified for use to defray the future repair or replacement of, or additions to, those major components that the association is obligated to maintain.

(b) The funds received, and not yet expended or disposed of, from either a compensatory damage award or settlement to an association from any person or entity for injuries to property, real or personal, arising from any construction or design defects. These funds shall be separately itemized from funds described in subdivision (a).

4178. “Reserve account requirements” means the estimated funds that the association’s board of directors has determined are required to be available at a specified point in time to repair, replace, or restore those major components that the association is obligated to maintain.

Those definitions were drawn verbatim from existing Section 1365.5(f) and (g), respectively. However, under existing law they only apply to Section 1365.5. In the proposed law, the definitions are placed with the general provisions and would therefore apply to the act as a whole.

Ms. Artus suggests that those definitions should not be generalized until after the Commission has had a chance to do a thorough review of the accounting terminology used in the Davis-Stirling Act. She believes that the terminology used in the definitions is not ideal and should not be given any broader use or prominence. See Exhibit p. 3.

Generalization of the definitions would have very little substantive effect, because there is only one use of a defined term outside of Section 1365.5 (to

which the definitions already apply). Section 1365.2(a)(1)(G), provides for member inspection of an association's "[r]eserve account balances and records of payments made from reserve accounts." Under the proposed law, the term "reserve accounts" in that sentence would be governed by the definition in Section 4177.

The staff does not see any obvious problem that would result from application of the definition of "reserve accounts" to that provision.

However, if the Commission decides that the language used in those definitions is so unsatisfactory that it should not be given any wider application, the draft could easily be amended to restore the existing application of the two definitions at issue here.

On a related point, Ms. Artus suggests that the last sentence of proposed Section 4177(b) ("These funds shall be separately itemized from funds described in subdivision (a).") should be moved elsewhere, because that provision states a substantive rule rather than an element of the definition. See Exhibit p. 3.

It is generally better drafting practice to exclude substantive rules from definition sections, where they are easily overlooked. If the Commission decides to apply that drafting principle here, it could do so by deleting the sentence in Section 4177(b), and adding a substantively equivalent sentence to proposed Section 5500(e), as follows:

5500. Unless the governing documents impose more stringent standards, the board of directors of the association shall do all of the following:

...
(e) Review an income and expense statement for the association's operating and reserve accounts on at least a quarterly basis. The income and expense statement for the reserve accounts shall separately itemize the funds described in subdivision (a) of Section 4177 from the funds described in subdivision (b) of that section.

The staff invites comment on whether that would cause any problems or result in a substantive change in the law.

TECHNICAL OBJECTIONS

Member Approval Thresholds

Proposed Sections 4065 and 4070 provide rules of construction for use when a provision of the Davis-Stirling Act requires approval by a majority of *all* members or a majority of *a quorum* of the members. Thus:

§ 4065. Approved by majority of all members

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

§ 4070. Approved by majority of quorum of members

4070. If a provision of this part requires that an action be approved by a majority of a quorum of the members, the action shall be approved or ratified by an affirmative vote of members representing more than 50 percent of the votes cast in an election at which a quorum is achieved, or if the governing documents of an association divide the members into two or more classes for the purposes of voting, by an affirmative vote of members representing more than 50 percent of the votes cast in an election at which a quorum is achieved, in each class that is required to approve the action.

Those provisions are similar to Corporations Code Sections 5033 and 5034, governing member votes in a nonprofit corporation.

Duncan McPherson, an attorney whose practice includes CID and other real property law matters, is concerned that those provisions cause problems with respect to class voting within an association:

This definition could potentially cause substantial problems. Many voting classes set up in master planned subdivision give certain classes the right to vote on matters affecting certain parts of the common area. For instance the owners of lots inside a separate gated area may be given rights to vote on changes to the common area streets and landscaping and recreational areas within that area or on increases in assessments for that area. Any definition of classes must be careful to not unintentionally give a veto power to such "classes". The definition must deal with classes within the

membership entitled to vote on a particular issue. The same issue exists with 4070.

See Exhibit p. 8.

The staff is not sure that the proposed sections would cause the problem described by Mr. McPherson. In both of those sections, it is clear that a majority is only required *for those classes that are required to approve the matter at issue*. For example, suppose that a CID is divided into Class A voters who live within a gated portion of the development and Class B voters who live outside the gated portion. The governing documents provide that only Class A voters may vote on changes to the common area within the gated portion. Under either of the proposed sections, Class B votes would not be included because Class B voters are not a “class that is required to approve the action.” Given that limitation, there shouldn’t be any way that Class B voters would be relevant in determining whether the required threshold of member approval was achieved.

Also, recall that Section 4065 and 4070 are rules of construction that only apply to member approval pursuant to “a provision of this part.” Those sections would therefore have no effect on a vote that is required by the governing documents rather than the Davis-Stirling Act. The governing documents could provide special class voting rules for such elections.

However, it is difficult to entirely dismiss concern that the class voting language might cause confusion or unintended problems. **To avoid that risk, the staff recommends that the class language be deleted from proposed Sections 4065 and 4070, as follows:**

§ 4065. Approved by majority of all members

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

§ 4070. Approved by majority of quorum of members

4070. If a provision of this part requires that an action be approved by a majority of a quorum of the members, the action shall be approved or ratified by an affirmative vote of members representing more than 50 percent of the votes cast in an election at

~~which a quorum is achieved, or if the governing documents of an association divide the members into two or more classes for the purposes of voting, by an affirmative vote of members representing more than 50 percent of the votes cast in an election at which a quorum is achieved, in each class that is required to approve the action.~~

That is the approach taken in the proposed law.

Deletion of the class voting language shouldn't cause any new problems, because the Davis-Stirling Act does not currently address class voting issues in any of the provisions that require the approval of the members. See Sections 1355.5 (deletion of developer provisions in declaration), 1357.140 (rule change reversal), 1364 (assumption of responsibility for termite control), 1366 (assessment increase). With respect to those votes, deletion of the class voting language would restore the status quo.

Judicial Review of Rulemaking Violation

Kazuko Artus believes that existing Section 1363.09 provides for judicial review in any case where an association violates the rulemaking procedures specified in Sections 1357.100-1357.150. She bases that conclusion on a close reading of Section 1363.09(a) (and related provisions), with particular emphasis on the language italicized below:

1363.09. (a) A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by an association of which he or she is a member, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues. Upon a finding that the election procedures of this article, *or the adoption of and adherence to rules provided by Article 4 (commencing with Section 1357.100) of Chapter 2*, were not followed, a court may void any results of the *election*.

(Emphasis added.) See Exhibit pp. 2-3.

Ms. Artus maintains that the italicized reference to the rulemaking procedure means that Section 1363.09 was meant to apply to *all* violations of the rulemaking procedure. She further maintains that the term "election" is not limited to a vote of the membership, but also includes any vote by the board of directors (including a vote to approve a rule change).

In support of that second point, she notes that Section 1363.03(m) limits the application of the election procedure to a vote of the membership, expressly providing that the procedure does not apply to "votes cast by delegates or other

elected representatives.” Given that the Legislature saw the need to expressly limit Section 1363.03 in that way, she infers that they must have intended the unqualified reference to an “election” in Section 1363.09 to include votes cast by elected representatives (i.e., directors). There is no reported appellate decision discussing this issue.

With respect, the staff disagrees with Ms. Artus’ conclusion. By its terms, Section 1363.09 applies to a violation of “this article,” which includes member election procedures (Section 1363.03-1363.04), open meeting requirements (Section 1363.05), and special rules for a grant of exclusive use of the common area (Section 1363.07). The rulemaking procedure is not part of “this article.”

In the staff’s view, the key to understanding the section’s reference to rulemaking can be found in Section 1363.03(a), which requires that every association adopt detailed election rules, using the operating rule procedure. The Commission has heard testimony on more than one occasion, from a sponsor of the bill that added Section 1363.03 (the California Association of Retired Americans), on how crucial the election rule requirement is to the whole member election process.

With the importance of the election rule requirement in mind, the meaning of the last sentence of Section 1363.09(a) seems straightforward. It authorizes nullification of a member election if the court finds that the association violated the statutory election procedure, failed to adopt election rules as required, or violated those election rules.

That interpretation is also consistent with legislative analysis of the bill that added Sections 1363.03 and 1363.09 (SB 61 (Battin) (2005)). For example, the Assembly Floor Analysis summarizes the effect of the bill as establishing “procedures for elections in common interest developments (CIDs).” Assembly Floor Analysis of SB 61 (July 12, 2005), p. 3. The analysis lists over a dozen specific effects of the bill, primarily focusing on the details of the member election procedure. In describing the effect of Section 1363.09, the analysis states that the bill would provide “a remedy for any violation of election procedures.” *Id.* In context, it seems plain that Section 1363.09 was intended to provide a remedy for a violation of the new member election procedures that were proposed in the bill.

Based on her analysis of Section 1363.09, Ms. Artus believes that the substance of that section should be included in the rulemaking article, in order to expressly provide for judicial review of rulemaking actions. The staff believes

that would be a significant change in the law, because existing Section 1363.09 only applies to member elections, board meetings, and a grant of exclusive use common area. The attached draft is consistent with the staff's understanding of Section 1363.09. **The staff recommends against making any change on this point.**

Procedural Prerequisite to Discretionary Assessment Increase

Under proposed Section 5605(a), if an association fails to prepare and distribute the pro forma annual budget (as required by proposed Section 5300), the association cannot increase regular assessments without the approval of the members (subject to an emergency exception that is not relevant here). In other words, the discretion to increase regular assessments without member approval is lost if the association violates the annual budget distribution requirements.

Kazuko Artus suggests that proposed Section 5605(a) be revised to more clearly state what is required in order to increase regular assessments without member approval. Specifically, she notes that the annual budget report must include a summary of the association's reserves (proposed Section 5300(b)(2)), which must be prepared pursuant to proposed Section 5565. That summary must be based on a study conducted pursuant to proposed Sections 5550 and 5555. Proposed Section 5550 requires an inspection of the major components of the association every three years.

Ms. Artus believes those dots should be connected more directly. See Exhibit pp. 4-5.

The staff recommends retaining the existing approach of using cross-references to draw the necessary connections between the related requirements. While the use of cross-references does burden a reader, who must follow the thread of references to find all of the relevant requirements, it is the only practical way to incorporate the complex and lengthy reserve study elements of the annual budget report.

However, the staff does see one organizational improvement that could be made without changing the language of existing law: proposed Sections 5550 and 5555, which both govern the same study requirement, could be combined. That would eliminate one of the connections between related provisions, and would probably be a better way to organize that material, given the very close connection between Sections 5550 and 5555. **The staff recommends that those sections be combined as follows:**

5550. (a) At least once every three years, the board of directors shall cause to be conducted a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore, or maintain as part of a study of the reserve account requirements of the common interest development, if the current replacement value of the major components is equal to or greater than one-half of the gross budget of the association, excluding the association's reserve account for that period. The board shall review this study, or cause it to be reviewed, annually and shall consider and implement necessary adjustments to the board's analysis of the reserve account requirements as a result of that review.

(b) The study required by this section shall at a minimum include:

(1) Identification of the major components that the association is obligated to repair, replace, restore, or maintain that, as of the date of the study, have a remaining useful life of less than 30 years.

(2) Identification of the probable remaining useful life of the components identified in paragraph (1) as of the date of the study.

(3) An estimate of the cost of repair, replacement, restoration, or maintenance of the components identified in paragraph (1).

(4) An estimate of the total annual contribution necessary to defray the cost to repair, replace, restore, or maintain the components identified in paragraph (1) during and at the end of their useful life, after subtracting total reserve funds as of the date of the study.

(5) A reserve funding plan that indicates how the association plans to fund the contribution identified in paragraph (4) to meet the association's obligation for the repair and replacement of all major components with an expected remaining life of 30 years or less, not including those components that the board has determined will not be replaced or repaired.

Comment. Section 5550 continues ~~the first paragraph of former Section 1365.5(e)(1)-(4) and the first sentence of (e)(5)~~ without change.

~~5555. The study required by Section 5550 shall include, at a minimum:~~

~~(a) Identification of the major components that the association is obligated to repair, replace, restore, or maintain that, as of the date of the study, have a remaining useful life of less than 30 years.~~

~~(b) Identification of the probable remaining useful life of the components identified in subdivision (a) as of the date of the study.~~

~~(c) An estimate of the cost of repair, replacement, restoration, or maintenance of the components identified in subdivision (a).~~

~~(d) An estimate of the total annual contribution necessary to defray the cost to repair, replace, restore, or maintain the components identified in subdivision (a) during and at the end of~~

~~their useful life, after subtracting total reserve funds as of the date of the study.~~

~~(e) A reserve funding plan that indicates how the association plans to fund the contribution identified in subdivision (d) to meet the association's obligation for the repair and replacement of all major components with an expected remaining life of 30 years or less, not including those components that the board has determined will not be replaced or repaired.~~

This change would also require adjustment of cross-references in proposed Sections 5300, 5560, and 5565. **The changes described above have been implemented in the attached draft.** If the Commission decides against making these changes, they can be reversed in the next version of the draft.

NEW NONSUBSTANTIVE PROPOSALS

Consistent Terminology

As discussed in Memorandum 2009-44, the staff has examined ways in which to standardize the terminology used in the Davis-Stirling Act. Some of those efforts were prompted by public comments. Others arose through staff review of the attached draft. The results of those efforts are discussed below.

[CONSENT] Articles and Bylaws

Under general corporations law, the governing documents of a nonprofit corporation include its "articles of incorporation" and "bylaws." Neither term is defined in the Davis-Stirling Act, but the definition of "governing documents" expressly includes them. See proposed Section 4150.

There are a handful of sections that use one or both of the two terms. See proposed Sections 4160 ("member" defined), 4200 (document hierarchy), 4225 (deletion of unlawful covenants), 4280 (content of articles), 4350 (validity of operating rule), 4365 (reversal of rule change), 4715 (pets), 5130 (use of proxies), 5405 (state registry).

Duncan McPherson notes some inconsistency in the use of those terms (i.e., "articles of incorporation," "articles of incorporation of the association," "bylaws," "bylaws of the association"). He suggests using the simplest versions of the terms consistently. He also suggests adding language to provide that the Corporations Code definitions of those terms apply. See Corp. Code §§ 5035, 5037; Exhibit pp. 7-8.

The staff recommends against making those changes. It is not clear that the occasional use of “of the association” in those provisions would lead to any misunderstandings or cause any problems. The articles and bylaws necessarily relate to the association.

The Corporations Code definitions of “articles” and “bylaws” do not actually define the nature of those documents. They simply make clear that the term includes amended or restated versions of those documents. It isn’t clear that this clarification would be helpful in the Davis-Stirling Act. It seems plain from the context of the Davis-Stirling Act (which discusses amendment of governing documents at length) that amended forms of the documents retain their identity as governing documents. If such a clarification were added for the articles and bylaws, but not for the declaration or operating rules, the distinction might lead to a problematic negative inference. On balance, the staff is not persuaded that the proposed changes would be a net improvement.

[CONSENT] “Board”

There are a number of provisions that use variants of the term “board” in referring to the board of directors.

Duncan McPherson suggests that those references should be made uniform. More specifically, he suggests that a provision be added to define the term “board” and that the defined term be used consistently. See Exhibit p. 7. He proposes that the definition be modeled after the definition provided in Corporations Code Section 5038: “‘Board’ means the board of directors of the corporation.”

The staff agrees that this would be a nonsubstantive improvement to the draft and recommends making the proposed changes. Specifically, proposed Section 4085 would be added to define “board,” as follows:

4085. “Board” means the board of directors of the association.

The following sections would be revised to use the defined term: Sections 4165, 4177, 4178, 4180, 4205, 4225, 4230, 4350, 4360, 4365, 4370, 4525, 4600, 4765, 4925, 4930, 4935, 4950, 5100, 5105, 5110, 5120, 5200, 5215, 5240, 5300, 5375, 5380, 5400, 5500, 5510, 5550, 5560, 5570, 5605, 5673, 5705, 5730, 5850, 5855, 5865, 5910, 5915, 6000, 6150.

[CONSENT] “Board Meeting”

In reviewing the “board” related provisions above, the staff also found two sections that use nonstandard language when referring to a board meeting. **In the attached draft, the staff replaced that nonstandard language with the defined term “board meeting.”** See proposed Sections 4360 and 4925.

[CONSENT] “Common Area”

Duncan McPherson points out that there are some provisions that use the plural “common areas” when referring to the common area within a CID. For example, proposed Section 4360 provides:

4630. In a condominium project the *common areas* are not subject to partition, except as provided in Section 4610. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the separate interest includes the undivided interest in the *common areas*. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the owner’s entire estate also includes the owner’s membership interest in the association.

Other provisions use the defined term “common area” (singular) when referring to the common area within a CID. The defined term encompasses all of the common area property within an association, without regard for whether it is in one parcel or more than one. See proposed Section 4095.

This inconsistency should not give rise to any interpretative problems. The Civil Code, like many other codes, includes a general rule of construction providing that the plural includes the singular and vice versa.

Nonetheless, it would be tidier to use the defined term consistently. **The plural version of the term has been changed to the singular in the attached draft.** See proposed Sections 4110, 4145, 4185, 4265, 4500, 4505, 4510, 4610, 4615, 4630, 4635, 4730, 4775, 4790, 5725, 5730, 5805.

[CONSENT] “Declarant”

The Davis-Stirling Act defines the term “declarant” as follows:

4130. “Declarant” means the person or group of persons designated in the declaration as declarant, or if no declarant is designated, the person or group of persons who sign the original declaration or who succeed to special rights, preferences, or privileges designated in the declaration as belonging to the signator of the original declaration.

Proposed Section 4130.

Duncan McPherson points out a few provisions that use other terms as synonyms of “declarant.” He suggests that those terms be replaced with the defined term “declarant.” See Exhibit pp. 11, 16.

The staff believes that the proposed substitution would be appropriate in proposed Section 4230, which addresses amendment of the declaration to remove obsolete provisions designed to facilitate construction and marking of the development. **That change is made in the attached draft.**

The staff also recommends that “declarant” be used in proposed Section 4250(b), as follows:

(b) The declaration may contain any other matters the ~~original signator of the declaration~~ declarant or the members consider appropriate.

That would seem to be a slight substantive change, as the existing language could be read to apply only to the *original* declarant (as opposed to any successor declarant). However, the staff does not see any good policy reason to preclude a successor declarant, who may own a large percentage of the separate interests within a CID, from having a say as to what is appropriate for inclusion in the declaration. The attached draft includes the change shown above.

Finally, Mr. McPherson suggests that the undefined terms “developer” and “builder” be replaced in proposed Section 6000. **The staff recommends against doing so.** Proposed Section 6000 is part of the existing series of sections governing construction defect litigation in a CID. Any changes to those provisions (especially changes to key terms), might well be too controversial for inclusion in the proposed law. If the proposed law is enacted, the Commission could revisit those provisions and see whether there would be consensus for improving their consistency with the remainder of the Davis-Stirling Act.

[CONSENT] “Director”

There are some provisions that refer to a “member” of the board. That usage could lead to confusion between a “member” of the board and a “member” of the association. For a concrete example of this problem, see First Supplement to Memorandum 2009-33, pp. 4-5 (involving existing Section 1363.05(i)(4)(A)(ii)):

(ii) Upon a determination made by the board by a vote of two-thirds of the *members* present at the meeting, or, if less than two-thirds of total membership of the board is present at the meeting, by a unanimous vote of the *members* present, that there is a need to take immediate action and that the need for action came to the

attention of the board after the agenda was posted and distributed pursuant to subdivision (f).

(Emphasis added.) In that paragraph, it is arguably ambiguous whether use of the italicized terms is meant to refer to a member of the board (i.e., a director) or a member of the association.

Duncan McPherson suggests that it would be helpful if the proposed law were to include a definition of the term “director.” See Exhibit p. 7. He proposes using a definition modeled after Corporations Code Section 5047, which provides:

Except where otherwise expressly provided, “directors” means natural persons, designated in the articles or bylaws or elected by the incorporators, and their successors and natural persons designated, elected or appointed by any other name or title to act as members of the governing body of the corporation.

The staff agrees that definition of the term “director” could be helpful, especially because the term is already used without definition in the proposed law. See proposed Sections 5215, 5350, 5375, 5800. However, it would be even more useful as a way of eliminating the potentially ambiguous variants of the term “board member.”

The first version of the proposed law, which was introduced as AB 1921 (Saldaña), addressed that issue by adding the following definition of “director,” which is substantively similar to the Corporations Code definition, but simpler:

§ 4140. “Director”

4140. “Director” means a natural person elected, designated, or selected to serve on the board.

Comment. Section 4140 is new. It is added for drafting convenience.

That definition was not continued in the attached draft, as a result of the generally conservative approach taken in preparing the draft.

The staff now believes that it would be helpful to restore that definition to the proposed law, to facilitate uniform use of the defined term as a substitute for variants of “board member.” **That is the approach taken in the attached draft.** See proposed Sections 4090, 4930, 5100, 5110, 5240, 5665, 5673, 5705, 5915.

[CONSENT] “Governing Documents”

Proposed Section 4150 continues the existing definition of “governing documents” verbatim:

“Governing documents” means the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association, which govern the operation of the common interest development or association.

Some provisions of existing law use extra language when using the defined term. See, e.g., Section 5115(b) (“the governing documents *of the association*”), 5865 (“the governing documents *or rules* of the association”) (emphasis added).

Occasional use of the qualifier “of the association” could imply that some sort of distinction is being drawn between the governing documents *of the association* (which might be construed to describe only those documents that relate to the operation of the governing association) and the governing documents *of the CID* (which would also include documents that govern property ownership rights and restrictions, unrelated to the operation of the governing association). The staff does not believe that distinction was intended.

In the attached draft, qualifiers of the type discussed above have been deleted. See proposed Sections 4010, 4065, 4070, 4215, 4230, 4765, 5115, 5130, 5915, 5925.

In addition, redundant references to specific types of governing documents that are expressly mentioned in the definition of “governing documents” are unnecessary and can lead to problematic interpretive inferences. **Redundant references of that type are deleted in the attached draft.** See proposed Sections 4525, 4710, 5865. An exception is made in proposed Section 4715 (pets), due to the controversy surrounding that section and the centrality of the definition of “governing documents” in that controversy. See discussion in First Supplement to Memorandum 2009-33, pp. 3-4.

“Member” v. “Owner”

Existing law seems to use the terms “member,” “owner,” and variants of those terms interchangeably, without any obvious substantive distinction being drawn between them.

That usage could be problematic. The Commission has been informed that, in some CIDs, the governing documents confer limited membership on a person other than an owner of a separate interest in the CID. This means that a statutory

reference to an “owner” would not encompass a non-owner granted membership rights under the governing documents.

The first version of the proposed law, which was introduced as AB 1921 (Saldaña), addressed that issue by adding the following definition of “member.” That definition made clear that the term encompasses both an owner and, to a limited extent, a person designated as a member by the governing documents:

§ 4160. “Member”

4160. “Member” means either of the following persons:

(a) An owner of a separate interest in a common interest development.

(b) A person that is designated as a member in the declaration, articles, or bylaws. The incidents of a membership established under this paragraph may be limited by the document that establishes the membership.

Comment. Section 4160 is new. It is added for drafting convenience.

Subdivision (b) recognizes that the governing documents may designate a non-owner as a member for a limited purpose. For example, an association may have a cooperative or reciprocal relationship with another entity (e.g., an affiliated resort) and the governing documents may provide that a member of that entity has limited membership rights within the association.

That definition was not continued in the attached draft, as a result of the generally conservative approach taken in preparing the draft.

However, the Commission has since received input suggesting that the terminology used to describe a member or owners should be made uniform. See, e.g., Exhibit p. 11 (noting inconsistent usage within single subdivision — proposed Section 4725(a)).

It appears that the inconsistent usage of the terms “member” and “owner” is largely the result of the piecemeal development of the Davis-Stirling Act and its close connections to nonprofit corporations law (which concerns “members”) and real property law (which concerns “owners”).

To the extent that “owner” is used as a synonym for “member,” it would be useful to standardize the terminology. That could be done by adding the proposed definition of “member” and then substituting the defined term for “owner” in sections where the terms seem synonymous (i.e., where there is no need to distinguish between a property owner and a non-owner member).

While it would be cleaner to use a single term in every case, some distinctions between owners and non-owner members probably need to be preserved. For that reason, the term “member” should not be used in sections that appear to primarily address issues of property ownership. For example, proposed Section 4525 requires that the “owner of a separate interest” disclose specified information to a prospective purchaser of that interest. Clearly, that provision is concerned only with the duties of a property owner involved in a transfer of ownership. The term “owner” is apt in that context.

The approach described above is taken in the attached draft. See proposed Section 4160 (“member” defined). For sections revised to use “member” rather than “owner,” see proposed Sections 4225, 4230, 4265, 4270, 4275, 4705, 4710, 4725, 4760, 4765, 4790, 4810, 5605, 5930, 5935.

For sections that were left unchanged because of their connection to property ownership issues, see proposed Sections 4145, 4175, 4190, 4500, 4525, 4530, 4535, 4610, 4615, 4625, 4630, 4635, 4640, 4720, 4730, 4775, 4780, 4785, 5140, 5570, 5650, 5655, 5658, 5660, 5665, 5670, 5675, 5685, 5700, 5705, 5710, 5720, 5730, 5800, 5805, 5975.

Proposed Section 4715 (precluding some restrictions on pets) is left unchanged due to the controversy surrounding that section.

On a related issue, the staff draft revises proposed Sections 4230(d) and 5605(c), to change a quorum rule based on the presence of “more than 50 percent of the owners” so that it instead depends on the presence of “more than 50 percent of the voting power.” (Emphasis added.) That is a useful clarification because, under existing law, a separate interest is typically only entitled to a single vote, but can be owned by any number of co-owners. For example, suppose that a small 5-unit association has a rule of one vote per separate interest. All of the separate interests are the joint community property of married or domestic partners. In this association, there are 5 votes to be cast and 10 owners. The quorum for an election should be three, not 6.

Mr. McPherson also suggests that a number of references to a member “of the association” can be simplified to “member” without affecting their meaning. See, e.g., Exhibit p. 13. **The staff agrees and has made those changes in the attached draft.** See proposed Sections 4040, 4275, 4365, 4525, 4605, 4925, 4930, 4950, 4955, 5105, 5110.

Finally, Mr. McPherson suggests the possibility of defining the term “owner.” See Exhibit p. 10. The Commission had previously considered defining “owner”

but concluded that doing so might risk inadvertent change or confusion (because of the complexity inherent in the concept of property ownership). **The staff believes that was the correct decision.** The generally understood meaning of the term, especially when tied to the specific context of ownership of a separate interest, seems unproblematic.

“Residents” and “Occupants”

There are two sections of the proposed law that use the term “occupant.” See proposed Sections 4510, 4785. Proposed Section 4785(d) defines the term for the purposes of that section only, as follows:

For purposes of this section, “occupant” means an owner, resident, guest, invitee, tenant, lessee, sublessee, or other person in possession on the separate interest.

There are five sections of the proposed law that use the term “resident.” See proposed Sections 4110, 4760, 4930, 5725, 5860. Although that term is not defined in the Davis-Stirling Act, it appears to mean essentially the same thing as “occupant” (i.e., an owner or non-owner who is in lawful possession of a separate interest).

Duncan McPherson seems to agree that the terms are synonymous. He suggests that the existing definition of “occupant” be generalized, so that it applies to all uses of that term in the Davis-Stirling Act. Further, he suggests that the term “resident” be replaced with “occupant” throughout the Davis-Stirling Act. See Exhibit p. 13.

As used in the Davis-Stirling Act, the staff believes that the terms are synonymous and that Mr. McPherson’s proposals would be an improvement. Those suggestions are implemented in the attached draft.

Kazuko Artus raises a related point. She notes that proposed Section 4930(a), one of the provisions governing board meeting notice, includes a reference to a “resident”:

Except as described in paragraphs (b) to (e), inclusive, the board may not discuss or take action on any item at a nonemergency meeting unless the item was placed on the agenda included in the notice that was distributed pursuant to subdivision (a) of Section 4920. This subdivision does not prohibit a *resident* who is not a director from speaking on issues not on the agenda.

(Emphasis added.) She is concerned that use of “resident” in this section could be read as excluding non-resident members. Because she believes that non-resident

members should not be denied the same meeting participation rights as resident members, she proposes changing “resident” to “member.” See Exhibit p. 4.

While the staff understands Ms. Artus’ concern, her proposed change would cause a new problem.

As a general matter, a non-owner “resident” of a common interest development does not have the same rights as a member. See, e.g., *Martin v. Bridgeport Community Ass’n, Inc.*, 173 Cal. App. 4th 1024, 93 Cal. Rptr. 3d 405 (2009) (non-owner resident does not have standing to enforce association’s governing documents).

By contrast, proposed Section 4930(a) expressly applies to a “resident,” rather than a “member.” For that reason, the section appears to confer rights on a non-member resident (e.g., a tenant). If the provision were revised to use the term “member” instead of “resident,” non-member residents would lose those rights.

It would be possible to *add* non-resident members to Section 4930(a), as follows:

Except as described in paragraphs (b) to (e), inclusive, the board may not discuss or take action on any item at a nonemergency meeting unless the item was placed on the agenda included in the notice that was distributed pursuant to subdivision (a) of Section 4920. This subdivision does not prohibit a member or resident who is not a director from speaking on issues not on the agenda.

That change would make sense as a matter of policy — the staff sees no reason why nonresident members who wish to speak at a meeting should have fewer rights than resident members. It also seems likely that the omission of non-resident members was accidental. **The staff recommends the change set out above.** It is implemented in the attached draft.

[CONSENT] “*Separate Interest*”

Proposed Section 4730 refers to the “owner’s interest” in a common interest development:

4730. (a) Any governing document of an association that arbitrarily or unreasonably restricts an owner’s ability to market the *owner’s interest* in a common interest development is void.

(b) No association may adopt, enforce, or otherwise impose any governing document that does either of the following:

(1) Imposes an assessment or fee in connection with the marketing of an *owner’s interest* in an amount that exceeds the association’s actual or direct costs. That assessment or fee shall be

deemed to violate the limitation set forth in subdivision (b) of Section 5600.

(2) Establishes an exclusive relationship with a real estate broker through which the sale or marketing of *interests* in the development is required to occur. The limitation set forth in this paragraph does not apply to the sale or marketing of separate interests owned by the association or to the sale or marketing of common area by the association.

(c) For purposes of this section, “market” and “marketing” mean listing, advertising, or obtaining or providing access to show the *owner’s interest* in the development.

(d) This section does not apply to rules or regulations made pursuant to Section 712 or 713 regarding real estate signs.

(Emphasis added.)

Duncan McPherson suggests that it would be better to use the defined term “separate interest” in place of the italicized language above. See Exhibit p. 13.

Implicit in that suggestion is the notion that “separate interest” would be a complete synonym for the italicized terms. The staff is not convinced that this is the case. An owner’s property interest in a common interest development is not limited to the owner’s separate interest. It also includes an appurtenant ownership share in the common area (and possibly exclusive use common area as well). Because the broader language used in proposed Section 4730 is not plainly meant to have the same meaning as separate interest, **the staff recommends against making any change.**

Improvement of Existing Terminology

Some comments suggest improvements to existing definitions or existing undefined terminology. Those suggestions are discussed below.

[CONSENT] “Development”

A number of provisions use the undefined term “development.” See proposed Sections 4105, 4125, 4175, 4190. For example:

4105. “Community apartment project” means a development in which an undivided interest in land is coupled with the right of exclusive occupancy of any apartment located thereon.

Duncan McPherson believes that the term “development,” as used in the Davis-Stirling Act, “really has no meaning” and should perhaps be replaced with “real property” (i.e., “‘Community apartment project’ means real property in which...”). See Exhibit pp. 9-10.

There are no appellate decisions interpreting the meaning of “development” as it is used in the Davis-Stirling Act. Nor is there a definition of the term in the CID-related provisions of the Business and Professions Code. Black’s Law Dictionary defines “development” as follows:

1. A human-created change to improved or unimproved real estate, including buildings or other structures, mining, dredging, filing, grading, paving, excavating, and drilling.
2. An activity, action, or alteration that changes undeveloped property into developed property.

Black’s Law Dictionary (8th ed. 2004) (Westlaw).

The first definition makes sense in the context in which the term is used in the Davis-Stirling Act. Consequently, there doesn’t seem to be any gap in meaning that needs to be filled by replacing the term with some other term. Absent demonstrated need, it would not be prudent to introduce a change that could have some unintended effect. **The staff recommends against making any change to the term.**

[CONSENT] “Condominium Plan”

Proposed Section 4120 continues the existing definition of “condominium plan.” The plan must include a description of “a condominium project.” See also proposed Section 4125 (“condominium project” defined).

Duncan McPherson explains that, in practice, a condominium plan may describe *more than one* condominium project. For that reason, he is concerned that the use of the singular in proposed Section 4120 could be problematic. See Exhibit p. 9.

On the narrow question of statutory interpretation, that should not be a problem. Like many codes, the Civil Code includes a general rule of construction providing that the singular includes the plural, and vice versa. See Section 14. Under that rule, Section 4120 would apply to a condominium plan that describes one condominium project, or more than one.

Despite the lack of any technical problem in the language, it could perhaps be rephrased to be more readily understandable. The staff experimented with various changes to address the point raised by Mr. McPherson, without reaching a satisfactory result. For each alternative, the staff was concerned that there might be some unintended effect.

The staff understands that Mr. McPherson is organizing an informal group of real property law experts to provide advice on terminology, especially as it

relates to the property aspects of the Davis-Stirling Act (as opposed to association governance). **The staff recommends against making any change to Section 4120 without first hearing that group's specific suggestion as to how the section should be revised.**

[CONSENT] *"Board Meeting"*

Proposed Section 4090 defines "board meeting" for the purposes of the Davis-Stirling Act:

4090. "Board meeting" includes any congregation at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business scheduled to be heard by the board, except those matters that may be discussed in executive session.

Mr. McPherson believes that this definition "does not make much sense." He believes it would be better to simply define "board meeting" as a properly noticed meeting of the board. Another provision could then state an affirmative prohibition on a quorum of the board gathering and discussing association business. See Exhibit p. 9.

While there might be a more direct way to express the law on this issue, **the staff recommends against making any change.** The open meeting provisions, from which this definition is drawn, are modeled loosely after the local and state government open meeting acts, which use similar language in defining "meeting." For example, Government Code Section 11122.5(a) defines "meeting" for the purposes of the Bagley-Keene Open Meeting Act, as follows:

As used in this article, "meeting" includes any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains.

That parallelism is important, as it permits the courts to interpret the similar provisions similarly. Absent some clear evidence that the existing language is causing problems, the definition should be left unchanged.

[CONSENT] *"Common Area"*

The existence of common area is a necessary element of a common interest development. See proposed Section 4015. "Common area" is defined in proposed Section 4095:

4095. (a) "Common area" means the entire common interest development except the separate interests therein. The estate in the common area may be a fee, a life estate, an estate for years, or any combination of the foregoing.

(b) Notwithstanding subdivision (a), in a planned development described in subdivision (b) of Section 4175, the common area may consist of mutual or reciprocal easement rights appurtenant to the separate interests.

Subdivision (b) of that definition applies to a particular type of CID, the planned development. Under that subdivision, the common area in a planned development can consist of mutual or reciprocal easements appurtenant to the separate interest. For example, a development may consist of houses lining both sides of a private street. Each lot includes fee ownership of the portion of the street in front of the house, out to the center line of the street. Each lot also has an appurtenant easement granting the right to travel over all of the other separately owned portions of the street. The staff has been told that such an arrangement could constitute "common area" under proposed Section 4095(b).

Duncan McPherson suggests that the definition of "mutual or reciprocal easements" be made more precise, to specify exactly what types of easements would qualify.

The staff recommends against doing so in connection with the current study. The Commission has expressed interest in studying problems involving the application of the Davis-Stirling Act. The question of when a development with common area consisting of mutual or reciprocal easements should be considered a CID is one of the specific issues identified for study. The issue is complex enough (and potentially controversial enough) to warrant separate study.

[CONSENT] "Rule Change"

Duncan McPherson believes that use of the term "rule change" in proposed Section 4360 is ambiguous because it would only apply to changes to existing rules. He suggests that the language be revised to encompass the enactment of new rules as well. See Exhibit p. 12.

This issue is already adequately addressed by the definition of "rule change" provided in proposed Section 4180, which includes the "adoption" of a rule:

"Rule change" means the adoption, amendment, or repeal of an operating rule by the board.

The staff recommends against making any change to that definition.

[CONSENT] Financial Terminology

Duncan McPherson suggests the following changes to financial terminology used in existing law:

- Proposed Section 5380(a) should be revised to improve a reference to an account that is “insured by the federal government.” He believes that language is inaccurate when used to describe an account insured by the FDIC, which is “a stand alone entity not an agency.” Instead he recommends referring to an account insured “by an agency or entity of the federal government.”
- The term “reserve fund” should be defined.
- The term “levy” should be defined.

See Exhibit p. 14.

Those are reasonable suggestions. However, the Commission intends to examine the financial and accounting language used in the Davis-Stirling Act as part of a separate study. **For that reason, the staff recommends against making those changes in the attached draft.**

Governing Documents

The following comments relate to issues involving an association’s governing documents.

[CONSENT] Recordation of Condominium Plan

Duncan McPherson offers some suggestions for how to improve proposed Section 4290 (recordation of condominium plan). See Exhibit p. 11.

The definition of “condominium plan” lists the documents that must be included in the plan. One of those documents is a certificate consenting to recordation of the plan. See proposed Section 4120(c).

Proposed Section 4290 lists the persons who must sign and acknowledge such a certificate.

Mr. McPherson suggests that proposed Section 4290 be revised to include a cross-reference to proposed Section 4120, to make the connection between those two provisions clearer. **The staff agrees that the proposed cross-reference would make the proposed law easier to understand on this point. In the attached draft, proposed Section 4290 is revised as follows:**

4290. (a) A The certificate consenting to the recordation of a condominium plan that is required by subdivision (c) of Section

4120 shall be signed and acknowledged by all of the following persons:

(1) The record owner of fee title to that property included in the condominium project.

(2) In the case of a condominium project that will terminate upon the termination of an estate for years, by all lessors and lessees of the estate for years.

(3) In the case of a condominium project subject to a life estate, by all life tenants and remainder interests.

(4) The trustee or the beneficiary of each recorded deed of trust, and the mortgagee of each recorded mortgage encumbering the property.

(b) Owners of mineral rights, easements, rights-of-way, and other nonpossessory interests do not need to sign the certificate.

(c) In the event a conversion to condominiums of a community apartment project or stock cooperative has been approved by the required number of owners, trustees, beneficiaries, and mortgagees pursuant to Section 66452.10 of the Government Code, the certificate need only be signed by those owners, trustees, beneficiaries, and mortgagees approving the conversion.

Amendment or Revocation of Condominium Plan

Proposed Section 4295 lists the persons who must sign a recorded instrument amending or revoking a condominium plan:

4295. A condominium plan may be amended or revoked by a recorded instrument that is acknowledged and signed by all the persons whose signatures are required pursuant to Section 4290.

In other words, an amendment or revocation must be signed by the same people who must sign the originally recorded plan.

Mr. McPherson is concerned that Section 4295 could be read to require the signatures of the same *individuals* who signed the original certificate. He thinks it should be made clear that the section instead requires the signatures of those who fall into the groups described in Section 4290, at the time that the amendment or revocation is recorded (e.g., the fee owners *at the time of amendment*, rather than those who were fee owners at the time of formation).

The staff did not find any case law interpreting the provision at issue here, but the construction offered by Mr. McPherson makes sense as a matter of policy. Only those who have a present interest in a condominium plan should be required to approve an amendment or revocation of that plan.

The staff recommends that Section 4295 be revised to eliminate the potential for misunderstanding, as follows:

4295. A condominium plan may be amended or revoked by a recorded instrument that is acknowledged and signed by all the persons who, at the time of amendment or revocation, are the types of persons whose signatures are required pursuant to under Section 4290.

While that revision is included in the attached staff draft, the staff invites input on how the idea might be expressed more clearly.

Transfer Disclosure

Proposed Section 4525 requires that an owner of a separate interest provide certain documents to a prospective purchaser. Duncan McPherson has two suggestions for improvement of that section.

First, he believes that the introductory paragraph is very confusing and should be restated to make it easier to understand. See Exhibit p. 12. The language at issue reads:

4525. As soon as practicable before the transfer of title to a separate interest or the execution of a real property sales contract for a separate interest, as defined in Section 2985, the owner of the separate interest, other than an owner subject to the requirements of Section 11018.6 of the Business and Professions Code, shall provide the following documents to the prospective purchaser:

...

The staff invites comment on whether the following language would be an improvement and whether it would cause any substantive change in meaning:

4525. (a) The owner of a separate interest shall provide the following documents to a prospective purchaser of the separate interest, as soon as practicable before the transfer of title or the execution of a real property sales contract, as defined in Section 2985:

...

(b) This section does not apply to an owner that is subject to the requirements of Section 11018.6 of the Business and Professions Code.

One of the documents that must be provided to a prospective purchaser is described in proposed Section 4525(d):

(d) A *true* statement in writing obtained from an authorized representative of the association as to the amount of the association's current regular and special assessments and fees, any assessments levied upon the owner's interest in the common interest development that are unpaid on the date of the statement,

and any monetary fines or penalties levied upon the owner's interest and unpaid on the date of the statement. The statement obtained from an authorized representative shall also include *true* information on late charges, interest, and costs of collection which, as of the date of the statement, are or may be made a lien upon the owner's interest in a common interest development pursuant to Article 5 (commencing with Section 5650) of Chapter 6.

(Emphasis added.)

Mr. McPherson questions the need for the word "true" in that provision. What does it add? Does its use in that provision imply that other documents may be untrue? See Exhibit p. 12.

There is no case law interpreting the meaning of "true" in this context. The staff is not aware of any special technical meaning that would attach in this context. It seems likely that "true" was meant in its ordinary sense. If so, Mr. McPherson's criticisms are persuasive and it might make sense to delete the word.

However, it is possible that some special meaning or import was attached to the word when the provision was drafted. Perhaps the word could be stricken in the tentative recommendation, with a note soliciting comment on whether it serves some useful purpose. **Should that approach be taken?**

Assessment Increase

Existing Section 1366(b) provides, in relevant part, as follows:

Notwithstanding more restrictive limitations placed on the board by the governing documents, the board of directors may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding fiscal year or impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses of the association for that fiscal year without the approval of owners, constituting a quorum, casting a majority of the votes at a meeting or election of the association conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations Code and Section 7613 of the Corporations Code. For the purposes of this section, quorum means more than 50 percent of the owners of an association. This section does not limit assessment increases necessary for emergency situations. ...

Proposed Section 5605(b) would continue that provision without significant change (with some exceptions not relevant to this discussion).

Duncan McPherson notes “the **famous double negative** that people have been pointing out for years” and suggests that the provision be revised for clarity See Exhibit p. 15 (emphasis in original).

In fact, the Commission itself pointed out the confusing phrasing of Section 1366(b) years ago. See Memorandum 2006-33, p. 5. As noted there, the staff’s research into the legislative intent behind Section 1366(b) revealed that the “notwithstanding” language was intended to override governing documents that purport to place a cap on how much an assessment may be increased in a year. For example, a provision limiting regular assessment increases to 5% per year would be overridden.

The Commission recommendation that formed the basis for AB 1921 (Saldaña) significantly rephrased Section 1366(b) in order to avoid the double negative construction and to state its meaning more directly and clearly. The language used in the bill was, in relevant part, as follows:

5580. (a) Subject to ... subdivision (b), the board may increase the regular assessment by any amount that is required to fulfill its obligations and may impose a special assessment of any amount that is required to fulfill its obligations. This subdivision supersedes any contrary provision of the governing documents.

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

...

(2) The total increase in the regular assessment for the fiscal year would be more than 20 percent of the regular assessment for the preceding fiscal year.

(3) The total for all special assessments imposed in the fiscal year would be more than 5 percent of the budgeted gross expenses of the association for the fiscal year in which the special assessment would be imposed.

Unfortunately, the attorney group that opposed AB 1921 criticized that proposed change in its letter to key persons in the Senate, writing:

New Section 5580’s provisions regarding assessments state that they “[supersede] any *contrary* provision of the governing documents.” Current law provides that Section 1366 prevails “notwithstanding *more restrictive* provisions in the governing documents.” (Emphasis added.) This new change ignores the fact that CC&Rs may currently contain more liberal assessment provisions, approved by the owners. This principle is seen most often (although certainly not exclusively) in so-called “damage and

destruction” provisions, where reconstructing a damaged building after a major loss is mandatory, as are the assessments, if needed, to pay for it. We are unaware of any policy basis for such a dramatic change, certainly not in a measure billed merely as “clarification.” Because it has paraphrased the law where it does not need changing, the CLRC has proposed a new principle that would override long-standing, beneficial CC&R provisions. Such provisions are designed to promote certainty, they identify important risk-sharing principles among co-owners of property, and they are good public policy.

The CLRC’s comment on new Section 5580(a) states that “[s]ubdivision (a) makes clear that a board’s authority to impose an assessment increase that is required to fulfill its legal obligations may not be limited by the governing documents.” The Commission is incorrect: subdivision (a) does exactly the opposite, both by overriding more liberal provisions in the governing documents that are intended to help a board “fulfill its legal obligations” and by cross-referencing/incorporating subdivision (b) which is the essence of limitations.

Memorandum 2008-43, Exhibit p. 10 (emphasis in original). The attorney group assertion that Section 1366(b) “does not need changing” is clearly at odds with Mr. McPherson’s suggestion that it be revised to correct a long-recognized defect.

Although the staff believes that the interpretation of Section 1366(b) relied on in the attorney group letter is incorrect, it seems very likely that any significant rephrasing of the provision would lead to opposition on the grounds that the meaning of the provision had been changed.

For that reason, the current draft did not attempt to improve the phrasing of Section 1366(b). **The staff believes that was the correct decision, notwithstanding the obvious flaws in the existing language.** The issue is too controversial and complex to be addressed in the proposed law. The Commission should examine it as part of a separate study of the financial provisions of the Davis-Stirling Act.

“Overnight” Delivery of Assessment Payment

Proposed Section 5655(c) provides as follows: “The association shall provide a mailing address for overnight payment of assessments.”

Duncan McPherson asks:

What does “overnight” have to do with this provision? Overnight seems to denote a drop box of some kind but then why a “mailing address.” Whatever was intended this provision does not make complete sense.

See Exhibit p. 15.

There are no reported decisions construing the meaning of this provision. However, the staff reads the provision as requiring specification of an address for receipt of packages delivered by an overnight delivery service, such as UPS, FedEx, or the United States Postal Service.

The staff recommends that the provision be revised as follows, to clarify its meaning:

(c) The association shall provide a mailing address for overnight ~~payment of assessments~~ delivery of an assessment payment, whether by mail or by an express service carrier.

However, if the Commission finds that the provision might refer to a drop box, it might be more prudent to leave the language as is in order to avoid any unintended change in meaning.

[CONSENT] Document Recordation Fee

Proposed Section 4205 authorizes an association to record a statement providing basic information about a CID, in order to facilitate the collection of assessments and fees. Subdivision (b) of that section reiterates general law authorizing the recorder to charge a fee for recording documents:

The county recorder is authorized to charge a fee for recording the document described in subdivision (a), which fee shall be based upon the number of pages in the document and the recorder's per-page recording fee.

Duncan McPherson questions the need for such a provision, especially since it is not included in other Davis-Stirling Act provisions that relate to the recording of documents. See Exhibit p. 10.

This is a good point. The provision doesn't seem to be necessary or particularly helpful. **The staff recommends that it be deleted.** That change is made in the attached draft.

[CONSENT] Discipline "Policy"

Proposed Section 5850 imposes certain duties on an association that has "adopted a *policy* imposing any monetary penalty, including any fee, on an association member for a violation of the governing documents...." (Emphasis added.)

Duncan McPherson asks whether the word "policy" should be replaced with "rule." See Exhibit p. 16.

The staff recommends against doing so. The word “rule” might be read narrowly to mean only an operating rule, which is one specific type of governing document. If so, one could argue that the section does not apply to an association that has adopted a discipline policy as part of its declaration, articles, or bylaws. That would narrow the scope of application of the provision. “Policy” is broad enough to cover disciplinary rules expressed in any type of governing document. Although the term “policy” is not defined in the Davis-Stirling Act, its meaning seems sufficiently clear in this context.

[CONSENT] Internal Dispute Resolution

Duncan McPherson raises two technical issues relating to the provisions that require an association to provide an internal dispute resolution (“IDR”) process.

Who is Bound?

Proposed Section 5910 states basic requirements for an association’s IDR procedure. Subdivision (e) of that section states the effect of a decision or agreement reached through IDR:

A resolution of a dispute pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the association and is judicially enforceable. An agreement reached pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the parties and is judicially enforceable.

Duncan McPherson questions whether this provision makes sense. “If the resolution binds the association and is judicially enforceable would it not bind both parties?” See Exhibit p. 16.

Proposed Section 5910 continues existing Section 1363.830, which was enacted on Commission recommendation. See *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm’n Reports 689 (2003). The Commission recommended only the second sentence of subdivision (e), relating to an agreement. The first sentence was added by the Legislature. *Id.* at 713.

The apparent purpose of the first sentence is to describe the binding effect of an association decision that is not based on mutual agreement — such a unilateral decision binds the association, but not the members. By contrast, a decision reached through mutual agreement binds all parties to the agreement. **That distinction makes sufficient sense that the staff recommends against making any change to language that was specifically added by the Legislature.**

Drafting Suggestion

Proposed Section 5915 provides a default IDR process for an association that does not adopt a procedure of its own. The first sentence of the section states: “This section applies in an association that does not otherwise provide a fair, reasonable, and expeditious dispute resolution procedure.”

Duncan McPherson questions whether the preposition is proper in the phrase “in an association” and suggests that the sentence be rewritten. See Exhibit p. 16.

The staff does not believe that “in an association” is technically incorrect or confusing. Nonetheless, use of “to an association” might be more consistent with general statutory drafting practice. **In the attached draft, the provision has been revised nonsubstantively, as follows:**

This section applies ~~in~~ to an association that does not otherwise provide a fair, reasonable, and expeditious dispute resolution procedure.

[CONSENT] Drafting Error

Duncan McPherson correctly points out that the reference to “this title” in proposed Section 5900(a) is erroneous. See Exhibit p. 16. The provision should have been changed to refer to “this part,” to reflect the proposed reorganization of the Davis-Stirling Act. The error is corrected in the attached draft.

NEW SUBSTANTIVE PROPOSALS

Many of the comments received by the Commission propose *new* substantive reforms, to address perceived problems with existing law rather than problems that would be caused by the attached draft’s recodification of the Davis-Stirling Act.

The staff recommends taking a conservative approach to those suggestions. A proposed change should only be considered for inclusion in the proposed law if it meets all three of the following criteria:

- (1) It is plainly beneficial.
- (2) It does not present a significant risk of unintended consequences (i.e., its effects seem straightforward and circumscribed).
- (3) It is not likely to be controversial.

Those criteria reflect the Commission’s past practice in developing the proposed law. They are grounded in pragmatic concerns about the difficulty of

achieving enactment of the proposed law. With a proposal of this type and size, the Legislature needs to receive a noncontroversial bill, so that it can focus its analytical resources on the primary purpose of the bill: to make the Davis-Stirling Act easier to use and understand.

In the interests of conserving Commission time and resources, the proposed substantive reforms have been organized into two groups: (1) those that appear to meet all three criteria and should therefore be considered for inclusion in the proposed law, and (2) those that fail one or more of the criteria and should probably not be included in the proposed law.

Proposals that Appear to Meet All Three Criteria

“Telephone” Wiring

The existing definition of “exclusive use common area” includes the following:

Notwithstanding the provisions of the declaration, internal and external telephone wiring designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common areas allocated exclusively to that separate interest.

Proposed Section 4145(c) continues that provision, but adds the following clarification: “For the purposes of this section, ‘wiring’ includes nonmetallic transmission lines.”

Duncan McPherson questions limiting that provision to “telephone” wiring. As communication technologies change and converge, the limitation may be obsolete. For example, many people now receive telephone service from their cable television provider. See Exhibit p. 9.

This is a good point. The language does seem to hinge on an obsolete distinction. **The staff recommends that the language be revised to refer to “communication” wiring, rather than “telephone” wiring.** That would seem to be a noncontroversial improvement, with little risk of unintended effects. The attached draft includes this change.

Physical Boundaries of Condominium

Section 1371 provides that the “existing physical boundaries” of a condominium unit that is “reconstructed in substantial compliance with the

original plans” are conclusively presumed to be that unit’s boundaries. That presumption is continued in proposed Section 4220, which provides:

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

Duncan McPherson and Dick Preuss suggest that proposed Section 4220 should be revised so that it clearly applies in circumstances where the original plans cannot be followed because they are unavailable, are incompatible with current building codes, or require unavailable materials. See Exhibit pp. 10, 20.

The staff does not agree that the presumption should apply where the original plans are unavailable. In that circumstance, there is no justification for conclusively presuming that the boundaries have not changed.

However, it might be helpful to clarify that minor design changes necessary to conform to contemporary building standards are compatible with “substantial accordance with the original plans.” Considering that the presumption is used to determine the *boundaries* of the unit, it would seem that minor design differences should have no effect on the presumption, *so long as the outside dimensions of the unit are consistent with those shown in the original plan.*

The following revision might be sufficient to express that point:

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

(b) For the purposes of this section, a unit is deemed to have been reconstructed in substantial accordance with the original plans if the outside dimensions of the unit are the same as those shown in the original plan.

Comment. Subdivision (a) of Section 4220 continues former Section 1371 without change.

Subdivision (b) is new. It makes clear that minor deviations from the original plan do not affect the presumption provided in subdivision (a), so long as those deviations do not affect the outside dimensions of the unit.

Should that change be made?

Correction of Statutory Cross-Reference in Governing Documents

Proposed Section 4235 would be a new section that allows an association to inexpensively revise its governing documents to correct cross-references to provisions that are renumbered by the proposed law:

Notwithstanding any other provision of law or provision of the governing documents, if the governing documents include a reference to a provision of the Davis Stirling Common Interest Development Act that was repealed and continued in a new provision by the act that added this section, the board may amend the governing documents, solely to correct the cross-reference, by adopting a board resolution that shows the correction.

Duncan McPherson suggests that proposed Section 4235 should also expressly authorize recordation of the corrected documents. See Exhibit p. 11.

The staff believes that the proposed change would be a noncontroversial improvement, which could be effectuated by revising proposed Section 4235 as follows:

(a) Notwithstanding any other provision of law or provision of the governing documents, if the governing documents include a reference to a provision of the Davis Stirling Common Interest Development Act that was repealed and continued in a new provision by the act that added this section, the board may amend the governing documents, solely to correct the cross-reference, by adopting a board resolution that shows the correction.

(b) A governing document that is corrected under this section may be restated in corrected form and recorded, provided that a copy of the board resolution authorizing the corrections is recorded along with the restated governing document.

The last clause would make sure that the authority for the revision is included in the title records. **Should that change be made?**

Declaration Amendment

Section 1355(a) provides that a declaration may be amended “pursuant to the governing documents” and requires “the approval of the percentage of owners

required by the governing documents.” That language is continued in proposed Section 4270(a).

Duncan McPherson suggests that the language be revised to replace “governing documents” with “declaration.” See Exhibit p. 11. Presumably, he is concerned that a document of lesser dignity might control the procedure used to amend the declaration.

That is a legitimate concern. The declaration is a recorded document that imposes enforceable restrictions on property ownership. It would be odd if that founding document could be amended pursuant to procedures stated in an unrecorded document of lesser dignity (e.g., a board-adopted operating rule).

That problem is partially addressed by proposed Section 4200, which would establish a clear hierarchy of authority between different types of governing documents. Under that section, the declaration controls and cannot be contradicted by the bylaws, articles, or operating rules. The articles of incorporation are next in authority, then the bylaws, and finally the operating rules. Under that scheme, if an association’s declaration states a procedure for its own amendment, contrary procedures could not be adopted in “lesser” documents.

However, if the declaration, articles, and bylaws happen to be silent on the procedure for amending the declaration, Section 1355 would seem to permit the board to invent a procedure and adopt it as an operating rule. That could be problematic. For example, the controlling effect of the declaration could be undermined if the board were to adopt an operating rule that permits amendment of the declaration by a majority vote of the board.

To address that problem, the staff recommends that proposed Section 4270 be revised as follows:

4270. (a) A declaration may be amended pursuant to the ~~governing documents~~ declaration or this part. Except as provided in Section 4275, an amendment is effective after (1) the approval of the percentage of members required by the ~~governing documents~~ declaration has been given, (2) that fact has been certified in a writing executed and acknowledged by the officer designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association, and (3) that writing has been recorded in each county in which a portion of the common interest development is located.

(b) If the ~~governing documents~~ declaration does not specify the percentage of members who must approve an amendment of

the declaration, an amendment may be approved by a majority of all members (Section 4065).

Grant of Exclusive Use Common Area

With specified exceptions, Section 1363.07 requires a two-thirds vote of the members in order for an association to designate part of the common area as “exclusive use common area” appurtenant to a specific separate interest.

Duncan McPherson and Dick Preuss both suggest that this provision is overly strict. See Exhibit pp. 12, 20. For example, Mr. McPherson suggests that the current provision could interfere with the following types of grants:

- (1) Assignment of exclusive use common area as required to accommodate a disability.
- (2) Routine assignment of parking spaces or storage spaces, as authorized under the declaration.
- (3) The granting of a utility easement over the common area.

While the first two examples do appear to be problems, the third does not. By definition, exclusive use common area is designated for the use of owners of separate interests, not non-owner third parties such as a public utility. See proposed Section 4145.

Mr. McPherson also notes that, by its terms, the provision only restricts the power of the *board* to grant exclusive use common area. He wonders whether the section would restrict a developer or other third party from doing so, if the declaration authorized that person to do so.

The staff agrees that the provision may be both overly strict and inadvertently lenient. Those problems could perhaps be addressed by revising proposed Section 4600 as follows:

4600. (a) Unless the governing documents specify a different percentage, the affirmative vote of members owning at least 67 percent of the separate interests in the common interest development shall be required before the ~~board~~ association may grant exclusive use of any portion of the common area to a member.

(b) Subdivision (a) does not apply to the following actions:

(1) A reconveyance of all or any portion of that common area to the subdivider to enable the continuation of development that is in substantial conformance with a detailed plan of phased development submitted to the Real Estate Commissioner with the application for a public report.

(2) Any grant of exclusive use that is in substantial conformance with a detailed plan of phased development submitted to the Real Estate Commissioner with the application for a public report or in accordance with the governing documents approved by the Real Estate Commissioner.

(3) Any grant of exclusive use that is for any of the following reasons:

(A) To eliminate or correct engineering errors in documents recorded with the county recorder or on file with a public agency or utility company.

(B) To eliminate or correct encroachments due to errors in construction of any improvements.

(C) To permit changes in the plan of development submitted to the Real Estate Commissioner in circumstances where the changes are the result of topography, obstruction, hardship, aesthetic considerations, or environmental conditions.

(D) To fulfill the requirement of a public agency.

(E) To transfer the burden of management and maintenance of any common area that is generally inaccessible and not of general use to the membership at large of the association.

(F) To accommodate a disability.

(G) To assign a parking space, storage unit, or other amenity that is designated in the declaration as exclusive use common area, but is not assigned by the declaration to a specific separate interest.

(c) Any measure placed before the members requesting that the ~~board~~ association grant exclusive use of any portion of the common area shall specify whether the association will receive any monetary consideration for the grant and whether the association or the transferee will be responsible for providing any insurance coverage for exclusive use of the common area.

Should those changes be made?

[CONSENT] Proposals that Probably Fail One or More Criteria

The staff believes that the proposals listed in this section fail one or more of the above-stated criteria for inclusion in the current study. **The staff recommends against attempting to address these matters in the context of the current study. Instead, they should be added to the list of topics for possible future study.**

In many cases, a proposal is not ripe for consideration in the current proposal because it lacks sufficient detail to permit action without further study. For example, Duncan McPherson writes that the definition of “planned development” should be revised to resolve differing interpretations of the phrase “an obligation of an owner ... with respect to the beneficial use and enjoyment of

the common area.” But his comment does not explain how the provision has been interpreted or include any suggestion for how it should be resolved. See Exhibit p. 10. Mr. McPherson may be correct that there is a problem with that language that could be addressed by the Commission, but more information is required for the Commission to properly evaluate the issue. That precludes action at this time. That said, the staff invites reform proponents to provide more supporting information for their proposals. Even if it is not possible to include a proposal in the current draft, additional information could be helpful to the Commission in prioritizing its future work on CID law.

The staff intends to treat all of the following items as consent items.

- *Definition of “Declarant.”* Duncan McPherson questions whether certain persons exercising privileges assigned to them by the declarant should be included in the definition. See Exhibit p. 9. **It is not clear to the staff that the definition is causing a problem that requires study.**
- *Definition of “Governing Documents.”* Duncan McPherson suggests that the definition of “governing documents” be broadened to include other development-related documents. See Exhibit p. 9. The current definition includes a broad catchall, which the staff believes is probably broad enough to encompass all relevant documents. See Section 1351(j). **The staff recommends against changing such a fundamental definition without more thorough study than could be conducted as part of the current process.**
- *Definition of “Managing Agent.”* The existing definition of “managing agent” refers to a person who exercises control over an association’s “assets.” See Section 1363.1. Duncan McPherson wonders whether “assets” includes common area property as well as funds. See Exhibit p. 10. **The staff believes that it could include both, which does not appear to be a problem.**
- *Definition of “Planned Development.”* As discussed in the introduction to this section, Duncan McPherson believes that the definition of “planned development” should be clarified. See Exhibit p. 10. **The staff recommends against changing such a fundamental definition without more thorough study than could be conducted as part of the current process.**

Duncan McPherson also points out that there are circumstances where a particular development could be characterized as either a planned development or a condominium project, under the definitions of those terms. **The Commission considered this issue earlier in the study and concluded that the overlap did not seem to be causing problems in practice.**

- *Definition of “Reserve Accounts.”* Existing law defines reserve accounts as including funds that have been “identified for use” to

defray future repair and replacement of major components. See Section 1365.5(f). Duncan McPherson believes that language is inappropriate because reserve funds must be segregated into a separate bank account, and not just “identified for use.” The Commission has heard testimony in the past that suggests otherwise. Expressly requiring segregation where it is not currently required could cause unanticipated problems. **The staff recommends that this issue be included in a general review of association accounting provisions.**

- *Creation of a CID.* Duncan McPherson raises a number of questions relating to the timing of CID creation under Section 1352. See Exhibit p. 8. **It appears that those questions should be examined, but are too complex to be addressed as part of the current proposal.**
- *Inadmissibility of Summary of Reserves.* Kazuko Artus objects to an existing rule in Section 1365(a)(4), which prohibits the introduction of an association’s summary of reserves in court, as evidence of financial mismanagement by the association. See Exhibit p. 5. **The staff is not convinced that this provision is causing any problems,** as other sources of evidence exist. The Legislature expressly chose to shield that particular document from use as evidence, probably as a way of promoting candor.
- *Request for Internal Dispute Resolution.* CID community manager Trudy Morrison has informally suggested that the law require a statement of a reason when a member requests a hearing under an association’s internal dispute resolution process. **The staff believes that change would be opposed in some quarters and would be too controversial for inclusion in the proposed law.**
- *Multiple Addresses for Notice Delivery.* Under existing Sections 1365.1(c) and 1367.1(k) a member may request that certain notices be sent to two different addresses. See also proposed Section 4040(b). Duncan McPherson wonders how those rules would work where a separate interest is owned by more than one person. See Exhibit p. 8. **It is not clear to the staff that the rules are causing a problem that requires immediate study.**
- *Common Walls, Floors, and Ceilings.* Existing Section 1351(l) provides a default rule for determining which part of walls, floors, and ceilings dividing separate interests are common area and which parts are included within the adjacent separate interests. Duncan McPherson suggests modifying that rule to specify that some of those structures are exclusive use common area. See Exhibit p. 10. However, he does not offer a specific proposal or explain what problem such a change would address. **The staff does not believe this proposal is ripe for consideration.**
- *Document Hierarchy.* Proposed Section 4200 provides guidance as to the hierarchy of authority between an association’s principal governing documents (i.e., the declaration, articles, bylaws, and

operating rules). In response to concern that the new provision could cause problems in stock cooperatives, the Commission decided to expressly exempt stock cooperatives from the section. Duncan McPherson suggests that the provision be revised to affirmatively state the rules governing stock cooperatives. See Exhibit p. 10. **The staff recommends against doing so at this time.** The Commission previously decided to postpone resolution of some thorny issues involving stock cooperatives until it could conduct a comprehensive study of those issues.

- *Discriminatory Covenants.* Section 1352.5 requires that the board of directors of an association amend its governing documents to delete any restrictive covenants that violate Government Code Section 12955. Duncan McPherson sees this as problematic because a board may not be able to determine definitively whether a particular restriction violates Section 12955. Declaratory relief might be required to settle the question. See Exhibit p. 11. It is not clear that this is a problem. The Department of Fair Employment and Housing has jurisdiction over Section 12955 and could probably be approached for reliable advice on whether a particular provision should be revised. **Given the importance and sensitivity of Section 1352.5, and the lack of a clearly demonstrated problem, the staff recommends against making any change.**
- *Content of Declaration.* Section 1353(a)(1) specifies the minimum content requirements for a CID's declaration. Duncan McPherson questions the legal effect of an incomplete declaration. See Exhibit p. 11. The staff does not believe that this is a significant problem in practice, because the Department of Real Estate must review and approve the declarations of newly created CIDs. **Therefore, the staff recommends against making any change to this section at this time.**
- *Authority to Amend Declaration.* The first sentence of Section 1355(b), which is continued in proposed Section 4260, authorizes the amendment of any declaration unless the declaration itself expressly provides that it is not amendable. Duncan McPherson believes that this provision is unnecessary, because *any* declaration can be amended with the unanimous approval of the owners. See Exhibit p. 11. The staff does not follow that argument. Section 4260 authorizes the amendment of any declaration and does *not* require unanimous approval to do so. **The staff does not see a problem with this provision.**

On a related point, Mr. McPherson wonders about the relationship between proposed Section 4260 (which authorizes the amendment of any declaration that is not, by its express terms, non-amendable) and proposed Section 4265 (which authorizes amendment of a declaration to extend its termination date, when the declaration is silent as to whether that date may be extended). See Exhibit p. 11.

The staff believes that proposed Section 4265 is somewhat redundant, as it seems to address a specific example of the general principle addressed by proposed Section 4260. **Despite that, the staff recommends that Section 4265 be retained.** Existing law includes a lengthy statement of legislative intent explaining the need for the provision. See proposed Section 4265(a). That legislative judgment should be respected.

- *Validity of Operating Rule.* Section 1357.110 provides that an operating rule must be within the authority conferred by and not inconsistent with the “declaration, articles of incorporation or association, or bylaws of the association.” Duncan McPherson is concerned that the reference to “articles of incorporation” might be unduly limiting, since an unincorporated association will not have articles of incorporation. See Exhibit p. 12. **That should not be a problem, because the provision expressly refers to articles of association.** The section should adequately encompass the relevant documents for an unincorporated association.

On a related point, Duncan McPherson objects to the provision requiring that an operating rule be adopted in “good faith.” See Exhibit p. 12. That provision was added on the Commission’s recommendation. **The staff recommends that it be retained.**

- *Partition of Condominium Project.* Section 1359 restricts the availability of partition in a condominium project. Partition is only available when the project is damaged in specified ways, and can only be effected through the sale of the entire condominium project. Duncan McPherson wonders whether the existing provision is adequate with respect to a condominium project that is part of a larger master development. See Exhibit p. 12. **More information is required in order to evaluate this issue.**
- *Ownership in a Stock Cooperative.* Section 1358(d) provides: “In a stock cooperative, any conveyance, judicial sale, or other voluntary or involuntary transfer of the separate interest includes the ownership interest in the corporation, however evidenced. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the owner’s entire estate also includes the owner’s membership interest in the association.” Duncan McPherson asserts that the two sentences are saying the same thing. See Exhibit p. 12. **Perhaps, but the staff is not sufficiently sure that the meaning of the two sentences is identical to risk deleting one of them.** It is conceivable that one’s “ownership interest in the corporation” is somehow different from one’s “membership interest in the association.” (There is no reported decision on point.) It would be more prudent to preserve a possible redundancy than to risk eliminating a distinction that has some obscure relevance.
- *Modification of Separate Interests and Sound-Proofing.* Within specified limits, Section 1360 authorizes an owner of a separate

interest to make physical changes to that separate interest. Duncan McPherson and Dick Preuss both suggest that the section be revised to add an additional limitation: the change must not increase sound transmission between units. See Exhibit pp. 13, 20. **That is a reasonable suggestion, but it is not clear whether it would be a controversial change in the law that might lead to unintended consequences (e.g., how would the rule relate to accommodation of a disability?).**

- *Character of Association.* Section 1363(a) requires that a CID be governed by an association, which may be incorporated or unincorporated. Duncan McPherson raises a number of questions about the character of the association (e.g., what happens if its corporate status is suspended?). See Exhibit p. 13. **These issues require more study to determine the extent to which they pose real problems, and if so, how best to address them.**
- *Board Action Without a Meeting.* Corporations Code Section 7211(b) provides that the board of a nonprofit mutual benefit corporation can act outside of a board meeting, so long as the directors unanimously consent to the action in writing. Kazuko Artus believes that Section 7211(b) is incompatible with provisions of the Davis-Stirling Act that expressly require action at a board meeting. She recommends that it be made expressly inapplicable to those types of actions. See Exhibit pp. 3-4. **The staff recommends against addressing this issue in the proposed law.** The staff could not find clear authority discussing this issue, so it is not clear that Ms. Artus' suggested changes are consistent with legislative intent.
- *Member Election Procedure.* Duncan McPherson and Dick Preuss raise a number of concerns about the existing member election provisions. See Exhibit pp. 13-14, 18-19. The election provisions were the product of stakeholder compromise. **Any change to the substance of those provisions would be too controversial for inclusion in the proposed law.**
- *Member Discipline Procedure.* Section 1363(h) specifies the procedure to be used when "the board of directors meets to consider or impose discipline upon a member...." Duncan McPherson asks how the section would apply to a committee granted disciplinary authority under the governing documents (or delegated those powers by the board). See Exhibit p. 16. The staff agrees that the Davis-Stirling Act should better address the issue of committees exercising board powers, not just here, but elsewhere in the Act as well (e.g., the open meeting rules). The recommendation that would have been implemented by AB 1921 had language expressly addressing this issue. However, that provision was criticized by some as inappropriately diluting consumer protections (on the theory that homeowners are better served by requiring the full board to act, rather than a committee of the board). **For that reason, the issue raised by Mr. McPherson**

is probably too controversial to be addressed in the proposed law.

- *Accrual Accounting.* Section 1365.2(a)(1) specifies which association records are subject to member inspection. It provides that the association's general ledger is subject to inspection and then adds: "The records described in this paragraph shall be prepared in accordance with an accrual or modified accrual basis of accounting." Duncan McPherson finds it strange for a provision on record inspection to include a provision mandating a particular method of accounting, and further objects to requiring that all associations use accrual accounting. See Exhibit p. 14. The Commission has heard many complaints about this provision, but has also heard that it was preserved in the legislative process, despite express opposition at that time. **The issue is probably too controversial for inclusion in the proposed law. It should be examined when the Commission does a comprehensive review of accounting provisions.**
- *Record Redaction.* Section 1365.2 provides for the redaction of specified information from records that are inspected by members. It also limits an association's ability to recover the cost of redaction. Dick Preuss renews CAI-CLAC's suggestion that they be revised. See Exhibit p. 20. **The staff recommends against doing so in the current study. The changes would be too controversial for inclusion in the proposed law.**
- *Annual Budget Report.* Section 1365(a)(2) requires that the annual budget report to the membership include a summary of the association's reserves based on the most recent review or study conducted pursuant to Section 1365.5. That review is based in part on a visual inspection of the major components of the association that the board must conduct every three years. Section 1365.5(e). Kazuko Artus suggests that the law be revised to require a statement in the annual budget certifying that the board is in compliance with the visual inspection duty and stating the date of the last inspection. See Exhibit p. 5. **The staff recommends against doing so, for two reasons:** (1) The idea of adding a new attestation to a report has surface appeal, but it may not be worth the added administrative burden, and (2) the Commission intends to do a comprehensive review of the finance and accounting provisions of the Davis-Stirling Act. This issue would be better addressed as part of that review.
- *Assessment Increase Procedure.* Section 1366(a) provides that a board must have member approval to increase regular assessments if the board did not comply with Section 1365(a) (distribution of annual pro forma budget). Duncan McPherson suggests that there should be an alternative: member approval should not be required if the board corrects its error by sending out a *late* pro forma budget. See Exhibit p. 15. That could make sense if the sole purpose of the

requirement is to ensure that the members have access to the budget information *before* assessments are increased. But the Legislature may have intended the member approval requirement as an incentive to encourage boards to prepare budgets before the beginning of the new fiscal year. If so, the proposed reform would undermine the provision's purpose. **The staff recommends against making the proposed change.** Its implications are not fully understood and it could prove to be controversial.

Mr. McPherson also suggests that there should be an exception if the failure to comply with Section 1365(a) was the responsibility of a "former board." *Id.* This would be a difficult concept to capture in a rule, as changes in a board will often be incremental, with fewer than all of the seats open in any particular election. Also, it is not clear whether the proposal makes sense as a matter of policy. The answer depends on the Legislature's reasons for requiring member approval when a budget is not circulated. That question requires careful study. **The proposed exception should not be added to the current proposal at this time.**

- *"Reasonable" Costs.* Section 1367.1(a)(2) provides that notice of overdue assessments delivered to a member include, among other things: "An itemized statement of the charges owed by the owner, including items on the statement which indicate the amount of any delinquent assessments, the fees and reasonable costs of collection, reasonable attorney's fees, any late charges, and interest, if any." Duncan McPherson objects to use of the word "reasonable" in that provision, believing that the amount of costs and fees should be determined in a separate provision addressing that issue. See Exhibit p. 15. **The staff recommends against making any change to that language at this time.** The language parallels the language used in the introductory clause of Section 1367.1(a) and so should not be changed lightly. Further, this language is an integral part of the assessment collection provision, which is the product of political compromise. Any change is likely to be controversial.
- *Foreclosure Threshold.* Section 1367.4 precludes the use of foreclosure to collect assessment debt until the debt is at least 12 months overdue or the total amount owed is at least \$1,800. Duncan McPherson suggests that the \$1,800 threshold should be aggregated for all separate interests owned by a delinquent owner, and not determined separately for each separate interest. See Exhibit p. 15. The staff sees considerable merit in that suggestion. The \$1,800 limit seems to be a "consumer protection" provision, aimed primarily at protecting individual homeowners. A developer, speculator, foreclosing financial institution, or other owner of multiple units does not necessarily need the same protection. Aggregating the delinquency for all delinquent units would allow an association to act more quickly in dealing with an institutional owner who has decided to stop paying assessments. However, the proposed change would present significant policy

issues, and could require considerable legislative fine-tuning to avoid unanticipated consequences. **For that reason, it should not be included in the proposed law.**

On a related point, Mr. McPherson suggests that the foreclosure limits should not apply to a nonresidential CID. **This issue should not be addressed in the proposed law, because the Commission is actively considering the matter as part of a concurrent study.**

- *Right of Redemption.* Section 1367.4(c)(4) provides a right of redemption after the sale of a separate interest through nonjudicial foreclosure. Duncan McPherson states that the provision is incomplete because it does not specify who holds the right of redemption: “Is it only the former owner or any one of the owners or does it include lenders or transferees of the former owner?” See Exhibit p. 16. **The staff recommends against addressing this in the proposed law.** The foreclosure provisions of the Davis-Stirling Act were the product of extensive political negotiations. They should not be changed without an opportunity for full public input and debate.
- *Lender Responsibility for Assessments.* Dick Preuss suggests that mortgage lenders be responsible for the payment of up to six months of assessment debt, either by holding that sum in escrow from the time of the original purchase, or by the creation of a “super-lien” that would have priority over the lender’s interest in the property. **These proposals are clearly too controversial for inclusion in the proposed law.** The super-lien concept was introduced in legislation this year. It was removed from the bill before the first policy hearing. See discussion in First Supplement to Memorandum 2009-38.
- *Developer Abandonment.* Dick Preuss is concerned about the possibility that a financially troubled developer will abandon an unfinished CID, leaving the owners with operational problems. He wonders whether the law should allow the association to dissolve and be reformed in those circumstances. See Exhibit p. 19. It would be helpful to study and clarify the law governing dissolution of a troubled CID. **However, that is too complex and important a topic to be addressed in the proposed law.**
- *Enforcement of Governing Documents.* Section 1354 provides for the enforcement of an association’s governing documents, by an owner or by the association. Duncan McPherson suggests that “owner” be expanded to include a “tenant.” It is not clear whether he intends that the tenant should be a valid target of enforcement, or should have standing to enforce, or both. See Exhibit p. 16. **The staff recommends against making that change in the proposed law.** The rights and duties created by the declaration are incidents of property ownership. See *Martin v. Bridgeport Community Ass’n, Inc.*, 173 Cal. App. 4th 1024, 93 Cal. Rptr. 3d 405 (2009) (non-owner resident does not have standing to enforce association’s governing

documents). It is not clear that those rights and duties should be shared or transferred to a tenant or other non-owner occupant. The issue is too complex and important to be addressed in the proposed law.

Mr. McPherson raises a related point regarding enforcement of governing documents other than the declaration. He explains that some types of governing documents are designed to be enforced by the owner, *but not by the association*. He is concerned that this practice might be trumped by Section 1354(b), which provides: "A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association." See Exhibit p. 16. **The staff sees the problem, but recommends against addressing it in the proposed law.** The issue is complicated and depends on practical knowledge that would need to be collected from subject matter experts. It should be studied separately.

- *Volunteer Director or Officer Liability.* Section 1365.7 limits the liability of a volunteer director or officer, in specified circumstances. Duncan McPherson objects to the scope of the term "volunteer" as it is used in that section. It excludes the declarant, as well as any person who received "direct or indirect compensation" from the declarant or from a financial institution that purchased any separate interest in the CID at a foreclosure sale. Mr. McPherson seems to be concerned that the exception is overbroad and could sweep in a person who happens to be a low level employee of a bank that acquired a separate interest, even without any reasonable basis for inferring some sort of conflict of interest. The staff sees the problem, but does not see a straightforward way of addressing it, without undermining legislative policy. **The issue requires further study and should not be included in the proposed law.**
- *Alternative Dispute Resolution.* Sections 1369.510-1369.590 require that a person offer alternative dispute resolution ("ADR") involving a neutral, as a precondition to filing an action to enforce the governing documents, the Davis-Stirling Act, or the Nonprofit Mutual Benefit Corporation Law. Sections 1363.810-1363.850 require an association to offer its members an internal dispute resolution ("IDR") procedure to informally discuss disputes between a member and the association. Duncan McPherson suggests that the ADR provisions "should be properly integrated with the IDR provisions." See Exhibit p. 16. It is not clear what type of integration Mr. McPherson favors. The purpose and character of the ADR and IDR provisions are significantly different. **The proposal is not sufficiently well explained to be addressed in the proposed law.**

CONCLUSION

The Commission needs to decide whether to approve the attached draft, with or without changes, for inclusion in a tentative recommendation.

This will be the second time that the Commission has been asked to make this type of decision in connection with the current draft. The Commission approved an earlier version of the draft at its August 2009 meeting, but received numerous comments after that date. Those comments were discussed at the October 2009 meeting and in this memorandum.

In order to keep on a track that will lead to possible introduction of implementing legislation in 2011, **the staff strongly recommends that the Commission decline to consider any further comments on this draft prior to distribution of a tentative recommendation.** That should enable the Commission to approve a tentative recommendation at its February 2010 meeting. Further comments on the draft would be accepted during the public comment period for that tentative recommendation and considered in the meetings that follow.

Respectfully submitted,

Brian Hebert
Executive Secretary

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4 September 2009

Mr. Brian Hebert
Executive Secretary
California Law Revision Commission

Mr. Hebert:

Re: Statutory Clarification and Simplification of CID Law

I am still reading your draft, with your “principal question” in mind.

Drafting Style

Under a different circumstance, I would welcome your suggestion made in the Second Supplement to Memorandum 2009-33, p. 4. However, when the state’s budgetary resources are as limited as they are now, I prefer that the resources available to the Commission be devoted to improving law.

An interested person can create documents in the style suggested in the Second Supplement because the bulk of the proposed text is copied from the present text of the Davis-Stirling Act and because one can download the latter from the website maintained by the Legislative Counsel of California, www.leginfo.ca.gov, and edit it to incorporate the proposed language. I have experimented it with three proposed sections, including proposed Section 5145, whose text is derived from the text of Civil Code § 1363.09, available at

<<http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=60703612999+0+0+0&WAIAction=retrieve>>

Proposed Section 5145. Judicial enforcement

5145 ~~1363.09~~ (a) A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by ~~the an association of which he or she is a member~~, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues. Upon a finding that the election procedures of this article, or the adoption of and adherence to rules provided by Article ~~5~~ 4 commencing with Section ~~4350~~ 4357.100) of Chapter 2, were not followed, a court may void any results of the election.

(b) A member who prevails in a civil action to enforce ~~the member’s his or her~~ rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars (\$500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

(c) A cause of action under Sections 5100 to 5130, inclusive, 1363.03 with respect to access to association resources by a candidate or member advocating a point of view, the receipt of a ballot by a member, or the counting, tabulation, or reporting of, or access to, ballots for inspection and review after tabulation may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court.

I appreciate your approach of incorporating successor provisions into each of proposed sections to which they apply. It makes the proposed sections much more user-friendly than they would be otherwise. There is a cost in the sense that the restated Act would contain a somewhat larger number of words than would be the case if a provision applicable to several sections were stated only in one section and referred in other sections. However, that cost is far more than offset by the benefit of the enhanced user-friendliness.

Proposed Article 5 (Operating Rules) of Chapter 2

That said, I note that successors to § 1363.09(a) and (b) are missing from proposed Chapter 2, Article 5 (Operating Rules) (commencing with proposed Section 4350). The second sentence of § 1363.09(a) says, “Upon a finding that . . . the adoption of and adherence to rules provided by Article 4 (commencing with Section 1357.100) of Chapter 2, were not followed, a court may void any results of the election.” I understand this text--not a model of clarity--to mean that the court may void any “rule change” decision of the board if the adoption of rules or adherence to rules provided by §§ 1357.100 *et seq.* were not followed. Having found no case law construing § 1363.09(a), I consulted the professional, who endorsed my understanding of the text.

The word “election” at the end of the sentence quoted above is not qualified to mean only elections by members, which is done for the entirety of § 1363.03 (Adoption of rules regarding election procedures; appointment of election inspectors; voting by secret ballot; proxy and ballot instructions; publication of election results; retention of ballots; application of article) by § 1363.03(m): “The procedures set forth in this section shall apply to votes cast directly by the membership, but do not apply to votes cast by delegates or other elected representatives.” Underline added.

Sections 1363.03 and 1363.09, enacted in 2005, are in the same article, and § 1363.03(m), along with several other subdivisions, was added in 2006. Had the Legislature intended the word “election” in § 1363.09(a) to mean only elections by members, it would have introduced into § 1363.09(a) some language similar to § 1363.03(m), either in 2005 or when it added § 1363.03(m). The fact that the Legislature did not do so shows that by “election” it meant elections by members as well as the board and any other organs of CID associations. Therefore, I believe that successors to § 1363.09(a) and (b) should be included in proposed Article 5, perhaps after proposed Section 4350.

Present Chapter 2, Article 4 (Operating Rules) requires the board to solicit input from members and to consider their input before making an election on important operating rules (§ 1357.130(b)). Some other provisions of the present Davis-Stirling Act require member approval, e.g., on amendment of the declaration (§ 1355), grant of exclusive use common area (§ 1363.07), annual increases in regular assessments if certain conditions are not met (2d sentence of § 1366(a)), and an increase in regular assessment that is more than 20 percent and imposition of special assessments “which in the aggregate exceed 5 percent of the budgeted expenses . . . for that year” except in emergency (§ 1366(b)). But they allow the board to present *fait accompli*, in effect to tell members to “approve or reject,” which is an excellent way to promote member apathy.

The explicit threat of possible civil actions for the violation of the statutory mandate for member participation should be retained in the restated statute. I hope that you will take up the education and enforcement issues again, in response to the popular demand. But, please do not remove at this time the link which now exists between the present “operating rules” provisions and § 1363.09(a) and (b).

Proposed Sections 4177 and 4178 (definitions of certain terms)

I welcome your suggestion to undertake a separate review of the accounting terminology used in the Davis-Stirling Act (The First Supplement to Memorandum 2009-33, p. 7), which I believe that the Commission has endorsed. I suggest that proposed Sections 4177 (definition of “reserve accounts”) and 4178 (definition of “reserve account requirements”) be kept out of proposed Chapter 1, Article 1 (and, if necessary, placed in the proposed section(s) in which they are used) for now. I am particularly troubled by proposed Section 4177, because it continues the confusion of “account” and “funds/money” in § 1365.5(f). Moreover, it would be wise to refrain from giving terms containing the word “reserve” a prominent place because the envisaged review of the accounting terminology is likely to raise the question whether the word should be used at all,

Incidentally, the last sentence of proposed Section 4177(b), “These funds shall be separately itemized from funds described in subdivision (a),” should be relocated to conform to your drafting policy of separating substantive provisions and definitions (Memorandum 2009-33, p. 4), which is sound. I would place it in proposed Chapter 6 (Finances), perhaps in proposed Article 2 (Use of Reserve Funds).

Proposed Section 4230 (Deletion of developer provisions in governing documents)

Proposed Section 4230(a) authorizes the board, after the developer phase of a CID project, to adopt an amendment deleting from governing documents developer provisions. Proposed Section 4230(c) requires the board to consider the subject

matter “only at a meeting which is open to all owners . . . , who shall be given opportunity to make comments thereon,” while Corporations Code § 7211(b) provides, “An action required or permitted to be taken by the board may be taken without a meeting,” subject to certain procedural requirements. Proposed Section 4230(c), being more specific, would control the more general Corporations Code § 7211(b). Nevertheless, I believe that the intention to supersede the latter should be stated, as done in proposed Section 5240(a) with respect to Corporations Code §§ 8330 and 8333. It would entail no substantive change, would only make explicit what is already in the present Davis-Stirling Act.

The same applies to other proposed provisions which require the board to act in a meeting, e.g., proposed Sections 4360(b) (certain rule changes), 4765(a)(5) (architectural review), 5120(a) (counting ballots in member elections), 5560(b) (reserve funding plan) and 5673 (decision to record a lien). It applies also to proposed Section 5515 (temporary transfer of reserve funds). Its text, while containing no language requiring the board to act in a meeting, requires procedures which Corporations Code § 7211(b) does not prescribe, e.g., the condition that “the board has provided notice of the intent to consider the transfer in a notice of meeting” (proposed Section 5515(a)).

Proposed Section 4930 (Limitation on meeting content)

The word “resident” in the last sentence of proposed Section 4930(a) seems to be incongruent with proposed Section 4925, which guarantees “any member” (not “any resident”) the right to attend and speak at board meetings other than executive session, and also with proposed Section 4930(e), which requires the board to “openly identify the item to the members in attendance at the meeting,” underline added. An association member does not necessarily reside on the CID premises. The word “resident” should be changed to “member” to clarify that the section does not prevent nonresident members from speaking on off-agenda issues.

Visual Inspection of “Major Components”

There is a chain connecting subdivision (a) of proposed Section 5605 (Assessment approval requirement) and proposed Section 5550 (Inspection of major components), which one has to trace in order to determine whether the board may impose an increase in regular assessments for the forthcoming fiscal year or has to seek members’ approval. That chain is hard to follow largely (but not exclusively) due to the terminological problems, even though you have made it a little easier than in the existing version by better organizing the sections concerned.

Proposed Section 5605(a) conditions, subject to the emergency exception in proposed Section 5610, annual increases in regular assessments by the board on its compliance with proposed Section 5300 (Annual budget report). Proposed Section

5300(b) requires the annual budget report to include, *inter alia*, a summary of the association's reserves prepared pursuant to proposed Section 5565 (5300(b)(2)).

Proposed Section 5565 (Summary of association reserves), referred in proposed Section 5300(b)(2), in turn requires the summary of association reserves to be based, *inter alia*, on "the most recent review or study conducted pursuant to Sections 5550 and 5555."

Proposed Section 5550 in its turn requires the board to have conducted, at least every three years, a reasonably competent and diligent visual inspection of the "major components" as part of "a study of the reserve account requirements" and to "review this study, or cause it to be reviewed, annually," while proposed Section 5555 specifies the minimum required contents of "the study required by Section 5550." It took me a few minutes to determine that "the study required by Section 5550" is the same thing as "a study of the reserve account requirements" and that the study has to include the visual inspection of the major components, which has to be conducted at least every three years.

I suggest that "the most recent review or study conducted pursuant to Sections 5550 and 5555" in proposed Section 5565 be rephrased to make it clear that the "most recent review or study" must be based on the visual inspection of the major components conducted within three years preceding the date of the summary of association reserves, e.g., "the most recent study or review of the reserve account requirements which shall be based on the visual inspection of the major components conducted within three years preceding the date of the study or review."

I further suggest that proposed Section 5300 list a statement by the board certifying that it is in compliance with proposed Section 5550 and giving the date of the most recent visual inspection of the major components. This would let directors and other members know, without tracing the chain running from proposed Section 5605(a) through proposed Section 5300(b)(2) and proposed Section 5565 to proposed Section 5550, that the board's failure to have conducted the visual inspection of the major components for over three years would prevent the board from increasing the regular assessments at its discretion.

Proposed Section 5300(d)

Proposed Section 5300(d) declares that the summary of the reserves disclosed pursuant to Proposed Section 5300(b)(2) "shall not be admissible in evidence to show improper financial management of an association, provided" I believe that its present version, i.e. the second paragraph of § 1365(a)(4), was placed in § 1365(a) by oversight because it is unreasonable. That oversight should be corrected at this time.

Since the board's full compliance with proposed Section 5300 is, under proposed Section 5605(a), one of the necessary conditions for non-emergency imposition by the board of annual increases in regular assessments for any fiscal year, the provisions of proposed Section 5300 should be limited to matters over which the board has the power to control. The board would not be the party to offer anything in evidence "to show improper financial management" of the association it serves. It would be member(s) of the association or some other party who seeks to show improper management of the association, and the board would generally have no control over the evidence that party offers. The board could at best object to the admission of the summary of the association's reserves when an adverse party offers it.

If proposed Section 5300(d) is left in proposed Section 5300, and if a careless judge admits the summary of the association's reserves that an adverse party has offered to show improper financial management, proposed Section 5605(a) would require the board to choose between foregoing an increase in regular assessment and seeking members' approval of the increase. It is unreasonable for the Legislature to leave open such a possibility.

Sincerely,

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October 13, 2009

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

Re: CLRC Memorandum 2009-33
Statutory Clarification and Simplification of CID Law

Dear Mr. Hebert:

Pursuant to the request contained in your e-mail of September 21, 2009, I have spent a number of evenings reviewing the draft proposed reorganization of the Davis-Stirling Common Interest Development Act (“Act”) contained in Memorandum 2009-33 to identify the “known and correctable problems” with the draft (which problems are for the most part picked up from the existing Act). Generally I have attempted to identify problems with definitions and language which do not appear to create substantive changes. However I have also pointed out problems with some provisions that may raise substantive issues due to problems built into the existing statutory language. I have also used as a resource documents in my possession dating back as far as the Lee Commission in 1997, which contain comments by lawyers and managers who practice in this field, on problems in the definitions and other provisions of the Act. Many of these comments were either given directly to the Lee Commission or used as the basis of letters sent to the Lee Commission by various organizations. This letter is of course an imperfect effort and is based on my personal review and interpretation of the Act and other materials and notes that I had previously annotated to a copy of the existing Act. I am sure there are other problems in the Act similar to the ones set out in this letter.

Many of the problems highlighted in this letter are caused by an inconsistent use of defined terms or the inconsistent use of undefined but generally understood terms. The terms “board of directors” and “director” which are not defined in the Act are good examples since these terms are rendered in numerous ways all through the Act. The variations of board of directors in the Act are, “directors”, “board of directors” and “board of directors of the association” and “governing body”. These terms are defined in the non-profit corporation law which uses the terms, “board” and “director”, *California Corporations Code Sections 5038 and 5047*. The same is true with

“articles of incorporation and bylaws” which terms are defined in the non-profit law as “articles” and “bylaws”, *Sections 5035 and 5037*. These terms are rendered variously as “articles” or “bylaws” or “articles of incorporation” or “articles of incorporation of the association” or “bylaws of the association”. It would seem to make good drafting sense to stick with those terms as defined in the Corporation Code perhaps to provide that certain terms are as defined in the non-profit corporation’s law. In almost all cases the term “of the association” can be eliminated when used in the Act.

1. 4030(a). This definition of the creation of a CID raises the question as to what is property status of property that can become a CID before the conveyance of a separate interest. This is an issue especially with condominiums. If no CID exists prior to a conveyance how can the first conveyance of a condominium be made? The effect of the condominium plan is obviously to allow conveyance of a condominium but this inherently seems to mean that the condominium project can exist before the CID which includes the project. None of this has ever been carefully thought through. Also what is the effect of conveying a security interest in the condominiums before the first “fee” conveyance is made to a buyer? Is conveyance of a security interest a “conveyance” that creates the CID? What happens if all of the separate interests come under a single ownership? Does the CID continue as a CID, or is it merged and ceases to be a CID? These questions occur especially in financing transactions where a lender takes a deed of trust which describes the condominiums by unit number prior to the conveyance of a fee title to a unit. Title companies routinely insure such transactions even though there appears to be a question as to whether these condominiums exist at that time. This appears to be a straightforward provision but it is actually quite uncertain. See also the comments on 4080.
2. 4040(b). A member may request that a notice be sent to two different addresses. Does this mean that if there are multiple members due to tenancy in common or community property ownership that each of the members can request two addresses?
3. 4045(5). This definition seems to leave out the internet completely including web sites as a method of notice.
4. 4065. This definition could potentially cause substantial problems. Many voting classes set up in master planned subdivision give certain classes the right to vote on matters affecting certain parts of the common area. For instance the owners of lots inside a separate gated area may be given rights to vote on changes to the common area streets and landscaping and recreational areas within that area or on increases in assessments for that area. Any definition of classes must be careful to not unintentionally give a veto power to such “classes”. The definition must deal with classes within the membership entitled to vote on a particular issue. The same issue exists with 4070.
5. 4080. What is the status of an association set up or incorporated prior to the first conveyance of a separate interest which forms the CID? Can the association take actions such as adopt by-laws, appoint directors and officers and adopt rules prior to the first conveyance under 4030(a)? There is also no real understanding of the tie between a CID and its association. Can a CID set up a new association and if so under what

circumstances. What happens to the obligations of the old association? Again these are questions that are coming up with broken subdivisions.

6. 4090. This definition does not make much sense. A board meeting should be a properly noticed meeting or an otherwise authorized meeting. Somewhere in the Act but probably not in this definition there should just be a prohibition of quorums of directors discussing association business. Why should an illegal meeting be treated as a meeting as it is in this definition?
7. 4095(b). The “mutual or reciprocal easements” referred to here have always been somewhat of an unknown. We think we know what is included but this provision really require a more precise definition of what easements qualify.
8. 4105. The term “development” is used in many of the basic definitions of the types of CIDs. It really has no meaning. Would it make more sense to just say, “...means real property in which an undivided interest in land is coupled with the right...”?
9. 4120. The term “project” by its definition refers to each separate area of real property which is subdivided into units and common area. Most phased condominium subdivisions consist of multiple “condominium projects” and may be bundled together in a planned development where the association also owns common area but not necessarily the common area within a project. This definition should be revised to make it clear that there is not necessarily a single project included in a plan. One of the problems raised by this is that you may have a condominium plan showing a number of projects some of which are CIDs because a condominium within that project has been conveyed and some of which are not CIDs because no condominium has been conveyed. One other issue here is whether these coupled projects should be treated as a single CID or a series of CIDs with a single association.
10. 4125(a). Here again the term “development” is used. This probably should be written, “...real property divided into condominiums.” Note in 41259(b) the definition of “condominium” refers to it being an interest in a portion of real property and not being a portion of a development. The two parts do not fit as presently written. The same is true with subsection (d) which also refers to portions of the real property.
11. 4030. It is common in master planned subdivision to allow the assignment of certain of the declarant’s special rights to builders for the purpose of building and marketing portions of the subdivision. Should each of these persons be treated as the “declarant” as they are under this definition?
12. 4145(c). This is a piece of special legislation. However since it is in the Act does it make sense to limit its reach to only telephone lines? What does telephone wiring mean now that TV and internet services are delivered by telephone providers and telephone services by cable t.v. providers?
13. 4150. This definition is much too limited. Master Declarations, REAs which are senior to the specific project CC&Rs and ground leases are often governing documents. Note however that some of these documents cannot be amended by the voting power of the

association which requires revision of some other provisions, such as 5975. The definition should allow the declaration to define what are considered governing documents beyond the declaration, articles, bylaws and rules.

14. 4155(a). Why the use of “the assets”. Does this refer to common area as well as the association’s funds? There are cases where a manager does not control the money but manages the common area and provides the other services.
15. It may be a good idea to consider the inclusion of a definition of an “occupant” that would cover both residential and commercial applications and a definition of an “owner”.
16. 4175. Again the term “development” is used and could probably be better replaced with “real property”. Subsection (b). There has always been a concern as to what the words, “...an obligation of an owner...with respect to the beneficial use and enjoyment of the common area...” mean and at times the DRE has interpreted this provision differently than many practitioners in this area. This is a provision that should be cleaned up and written in a way that is clear.
17. 4177(a). What does “identified for use” mean. The reserves are supposed to be deposited in a separate account. It would seem better to identify “reserves” as money deposited in that account or identified in the current operating statements as money to be so deposited before or at the end of the fiscal year.
18. 4185(a)(3). It would appear that a condominium unit could also be the separate interest of a planned development if a series of condominium projects have a single association which also owns common area in its own name or where the owners of the separate project also have an undivided interest in the overall common area.
19. 4185(b). It may make sense to identify some of these areas adjacent to units as exclusive use common area.
20. 4190(a). Here again the term “development” is used and could probably be replaced by “real property”.
21. 4200(d). This subsection should probably state what rules do apply to cooperatives.
22. 4205(b). Is there any reason to have this in this section? This seems like a statement that could be made regarding each document that could be recorded. The recorder can always charge its normal fee unless the statute provides otherwise.
23. 4215. Why is this section limited only to recorded documents?
24. 4220. This provision contains a major flaw in that it contains language that limits its application to units reconstructed in substantial accordance with the original plans. This is almost impossible nonsense under current conditions where building codes require substantial deviations from original plans (if the original plans are even available). This should include reconstruction done in accordance with current building codes as of the time of the reconstruction.

25. 4225. This is a really a catch-22 type of provision. If the directors (note here called “board of directors of an association”) make changes to change something which turns out not to be in violation of 12955 then no change has actually been made. The reality of this provision is that an association is almost required to get a judicial approval of the change since it is extremely difficult to know what is included in GC 12955 and many people assert that the scope is wider than commonly understood.
26. 4230. The term “developer” is used throughout this section. Should “developer” be “declarant”? Certainly developer is not a defined term in the Act or even the Subdivided Lands Act. In line 27 there is reference to meetings open to the owners and later approval of the owners. The rest of the Act makes reference to meetings of the members.
27. 4235. This provision should allow for the restatement and rerecording of the whole document or an amendment of the document.
28. 4250(a). What is the effect if the declaration does not contain the necessary information such as the name of the association? Does this give the right to owners to force inclusion of the correct language or is the project outside of the Act (if it puts the project outside the Act this would be a simple method of opting out of the Act). (b) This subsection does not seem to be correct. The reference to “original signator” is not language used elsewhere in the Act. Should this be “declarant”? If the declaration is old and has been amended the original declarant would not necessarily have anything to do with the amendment. Perhaps (b) would be better served by stating, “(b) the declaration may contain any other matters considered appropriate.”, and not stating who is signing.
29. 4260. In some respects this provision has never made sense. All declarations can be amended if all owners agree to amend. Thus a declaration which provides it is not subject to amendment is no different that a declaration requiring unanimous consent for amendment or which does not contain any provision for amendment.
30. 4265. How does this section interrelate with Section 4260? Does 4265 override the provisions of 4260?
31. 4270(a). The term “governing documents” in the 3d line should be “declaration”. Subsection (b) also raises the question as to how this interrelates with Section 4260.
32. 4275(a). How does this interrelate to Section 4260? Subsection (c)(3) and (4). Note in these subsections and under later subsections there is a swing between members and owners.
33. 4290. This provision must be read with Sections 4120 and 4295. It should include provisions for the amendment of a condominium plan and refer to Section 4120(c). It should make it clear that the persons who sign the plan are the fee owner, lessors, lessees and trustees and beneficiaries and mortgagees who are in title as of the date of the recording of the original plan or its amendment. Otherwise 4295 appears to require the original persons who may no longer be in title to sign the plan. It would be a good

idea to allow the association to record an amended plan to show changes allowed by 4220 in the case of a reconstruction of a building.

34. 4350. Note in (b) and (c) the use of “articles of incorporation”. Also note that the term in the existing Act of “articles of association” are used. This is an unfortunate limiting usage since many unincorporated associations use other documents such as bylaws as their governing document. The Corporations Code Title 3, starting with Section which was revised at the request of the Commission in 2004, uses the term “governing documents” and includes articles of association, bylaws, or other writings. The section should refer to that term as used in the Corporations Code. Also the word “governing” in Subsection (c) is not necessary and the use of “good faith” in Subsection (d) adds an issue of subjective intent not generally found elsewhere in corporation or CID law.
35. 4360. The use of the word “change” is ambiguous since it seems to refer only to changes in existing rules. Perhaps the terms “adoption” and “amendment” should be used.
36. 4525. The language of the opening paragraph is very confusing as written and probably should be revised. In Subsection (d) there is also the use of “true” statement. There is no need to use the word “true” unless it implies that other statements and documents given under the Act may not be true.
37. 4600. This provision as currently worded could be quite damaging. In many sets of CC&Rs the Association is given the right to assign parking and sometimes storage to owners. This section allows this during the initial sell out under a public report but not otherwise. This issue also comes up in connection with ADA requirements and demands made by handicapped persons for closer parking. The Association has no right here without a vote. Subsection (a) seems to allow a lower or higher percentage requirement but there is no provision for assignment of areas intended for exclusive use without a vote even if that concept is in the declaration or other governing documents. This provision should clearly allow the assignment of parking, storage and other places in the manner set out in the declaration. There is also a common provision in CC&Rs allowing the Association to grant easements over common area for utility and service line purposes. This provision would even seem to prevent this type of grant. This provision does not even recognize the assignment of areas that are designated as exclusive use common areas in the declaration or condominium plan without a vote. There is also an issue here whether the governing documents can allow a developer or other 3d party to assign common area use even if the board cannot do so since it only refers to the board of directors. Note the term “board of directors” rather than “director”.
38. 4610(b). Note the way this is drafted an owner can only sue for partition as to the condominium project in which the owner owns a condominium. The overall development may include a series of separate condominium projects.
39. 4630. 4th line uses term “common areas” as opposed to “common area”.
40. 4640. The two sentences of this section seem to state the exact same concept.

41. 4715(a). This provision sounds as if an owner is allowed to permanently keep a pet in common area as opposed to the owner's separate interest. This provision should probably be reworded. In Subsection (d) the terms "conditions, covenants, and restrictions" should probably be "declaration" and the words, "of the common interest development" can be eliminated.
42. 4730. The term "owner's interest" in (a) and (b)(1) should be "separate interest" and the same applies to the use of "interests in (a) and (b)(2).
43. 4760. This provision in (a)(1) should also include under the "do not impair" alterations provisions alterations that increase sound transmission between separate interests. Note that the existing Section 1360 (a)(2)(C) contained a reference to "dwelling" which is not noted in your comments. This former reference made it appear that the provision did not apply to non-residential CIDs.
44. 4785(d). This provision defines "occupant" only for the purposes of this section. The term is used elsewhere and this subsection should be moved to a definitional section for the whole Act. It would also then replace the undefined term "resident" which shows up in the Act.
45. 4800. This section raises the same issues discussed above about the relationship of the association to the CID and whether the association can be changed or what happens if the association powers are suspended or the corporation is terminated. Can a new association just be started and if so what is its relationship with the prior association? Also what is the status of an entity set up to be an "association" prior to the CID being formed by the conveyance of a separate interest? Can directors and officers be appointed and rules adopted and other business transacted? None of this is clear.
46. 4815. This uses the term "managing agents" instead of "agent" which is the defined term except in one place in (d).
47. 4920. This section uses "board" and "governing body" in (b).
48. 4925(b). This provision uses "of the association" a number of times.
49. 4930. This section uses "of the association" the term "resident" which is not defined and is a problem when this provision applies to commercial CIDs. This section also uses the term "board of directors" and "a member of the board of directors" (instead of director).
50. 4935. Uses "of the association" as does 4950 and 4955. Sections 5000 and 5100 use the term "members of the association".
51. 5100 and following. The election provisions need substantial revision which revisions are beyond the intent of this letter. I want to point out a few issues in line with this letter's intent. 5105(a). Why should this provision require rules to be adopted if the matters are covered by other governing documents? I have run into several situations where we have to adopt rules restating provisions of the declaration or bylaws. Section 5105(a)(1) states that the association shall not edit or redact any content but what

happens if there is a limit on length which may have to occur in print media. This may force an association to deny any media coverage to any candidate. In 5110(b) the use of “business entity, or subdivision of a business entity” does not make sense. I think it was meant to apply to an employee of such an entity. Also how in 5110(c)(4) can an election inspector possibly hear and determine all challenges arising out of or in connection with the right to vote, which question may raise complex legal issues.

52. 5120. The use of the term inspector of election’s designee is uncertain. Is this a person appointed under 5105(a)(6)? It is not at all clear.
53. 5140(b). This provision and Subsection (a) do not account for ownership by corporations, partnerships, LLCs and trusts which are frequent in commercial CIDs but also are frequent in residential CIDs due to estate planning transfers. It would be good practice to cover these situations.
54. 5145(a). This provision leaves open the validity of all board decisions made since the election which could even invalidate assessments or assessment increases. This problem needs urgently to be fixed.
55. 5200. This provision under (a)(3)(D) contains one of the strangest provisions in the Act. It requires that records turned over be prepared in accordance with GAAP. Many small associations use the cash method of accounting. What this seems to require that if there is an inspection the actual records have to be converted to GAAP and that the person inspecting the records is not allowed to see the actual general ledger. This makes no sense at all. If the Act is going to require GAAP record keeping (which would be highly controversial) it should do so directly otherwise the provision should provide for disclosure of the documents maintained by the Association in the form actually maintained.
56. 5240. Use of “members of the board of directors of the association”.
57. 5380(a). The verbiage, “kept in this state in a financial institution, as defined...which is insured by the federal government...” does not make sense. It should refer to an account which is insured by an agency or entity of the federal government (the FDIC is a stand alone entity not an agency). Note Subsection (b)(2) is more accurate.
58. 5400. In the 3d line it should read, “...course for boards regarding the role...”
59. 5510. This section and 5515 use the term “reserve fund” which is not defined. The only defined term is “reserve account” which is defined in Section 4177. The term “reserve fund” occurs in following sections as well.
60. 5600. What does levy mean? Does the board have to do anything to continue the assessment from the prior year or does it need to act? What happens if there is a break down in the board and it does not act. Is the Assessment levied once for each fiscal year and then collected in installments? All of these questions need to be answered to make the process understandable.

61. 5605. This provision contains a number of problems. First of all if there is a glitch in complying with the provisions of Section 5300 there should be a method of going back and redoing the disclosures rather than getting a vote which can be almost impossible. These same issues apply to the time limits of 5615. What happens if the former board was controlled by a bankrupt developer and that board failed to make the proper disclosures? Subsection (b) contains **the famous double negative** that people have been pointing out for years. Perhaps (b) could read, “Notwithstanding restrictive limitations contained in the governing documents, the board may impose a regular assessment that is not more than twenty percent greater than the regularand may impose special assessment which are not in the aggregate greater than 5 percent of the budgeted gross expenses with the approval. . . .” There is also a basic problem with this section in dealing with phased projects where the assessment increases due to the annexation of common areas in a later phase even if that is shown in the budget for the project. This has caused budgets to artificially show the costs and then defer assessments due to the common area not being maintained in the early phases. This provision should provide for those circumstances and also for increases in lower tier CIDs due to approved increases in assessments in higher tier CIDs being passed through in cases where the subordinate CIDs pay the assessment for their members to the higher tier association.
62. 5610. This provision should contain an exception if the problem is caused by the inaction of the previous board.
63. 5650. This section raises the question as to what is the “levy” and when does the levy occur. If the levy is at the beginning of the fiscal year what are the rights and duties of the owner at the time of the levy and a transferee during the fiscal year. Is the transferee not liable to pay assessments during the remainder of the year because the transfer took place after the levy? These questions need to be thought through because of the real estate downturn we are getting new owners taking control of large groups of separate interests during the fiscal year. The late charge provision raises the same questions. It says the late charge is 10% of the delinquent assessment. What this probably means and what is used in practice is 10% of a delinquent installment which is a concept not even in these provisions. Many declarations attempt to fill in these gaps in the law by defining when levy occurs and defining installments but it is not at all clear if these provisions work without the ability to know what this provision actually means and what it requires to set assessments and installments.
64. 5655(c). What does “overnight” have to do with this provision? Overnight seems to denote a drop box of some kind but then why a “mailing address”. Whatever was intended this provision does not make complete sense.
65. 5660(b). This is not the place for the use of “reasonable”. That provision should be under the general right to collect legal fees and costs.
66. 5675. When there is the default of an owner who was the developer or a builder or an owner who owns rental units within a project and the default includes multiple units should the notices and collection rights allow proceeding against the separate interests as a group? These same issues applies to the \$1,800 limitation in Section 5720.

67. 5715. This provision is defective in that it does not specify who has the right of redemption. Is it only the former owner or any one of the owners or does it include lenders or transferees of the former owner?
68. 5720. A number of the provisions of this section do not make sense in the case of commercial CIDs where the actual office or commercial space being used may for instance be made up of a series of condominium units and the charges are based on square footage and not on units.
69. 5725. Perhaps this provision should use the term “occupant”.
70. 5800. Subsection (a). The language, “which manages a common interest development that” is not necessary. Subsection (c) has always had the problem that it could take people outside the coverage who are just ordinary house owners who just happen to work for an entity that falls under this definition. Why should a bank employee who is an ordinary buyer be exempted from this coverage because his or her bank foreclosed on a separate interest. The use of “on real property” is not clear here. The exclusion of a person who owns two interests is a problem here for that reason.
71. 5850. Should “policy” be “rule”?
72. 5855(b). Suppose the association has a judicial committee? Should this apply? The interrelation of the board, the association and any committee should be examined here.
73. 5865. Delete “of the association”.
74. 5900(a). In the 2d line “title” should probably be “part” and the words, “of the common interest development or association” should be deleted.
75. 5910(e). This does not seem to make sense. If the resolution binds the association and is judicially enforceable would it not bind both parties?
76. 5915(a). This language does not read correctly, “in an association”. This should be rewritten.
77. Article 3 dealing with ADR should be properly integrated with the IDR provisions.
78. 5975. In Subsection (a) why is the enforcement limited to “covenants and restriction” and do we really know what that means. Perhaps “covenants and restrictions” should be replaced by “provisions”. Also in Subsection (a) the term “owners” should be cleared up. Should the declaration bind tenants as well as owners? Subsection (b) is a real problem. There are documents such as ground leases and REAs which may be designed to be only enforced by the owners and not by an association and this section should be careful not to cut off rights of owners under these documents. How this works is going to have to be integrated with the definition of “governing documents”.
79. 6000. The persons covered by 6000(a) are not clear. The terms “developer” is not defined and perhaps should be “declarant” and it should be clear that the general contractors are persons who performed construction services within the CID. The term

“builder” is quite ambiguous. I do not know if this refers to a contractor of some type or a person who is developing a portion of a CID. This should be made clear.

Hopefully this list can serve as a start to cleaning up some of the long time problems and issues with the Act and will serve to generate other comments and corrections to supplement or modify this list.

Very truly yours,

DUNCAN R. McPHERSON

DRM/clm
cc: Mr. Steve Cohen [scohen@clrc.ca.gov]

October 15, 2009

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

via e-Mail [bhebert@clrc.ca.gov]
and via U.S. Mail

Dear Brian,

In reviewing the CLRC website, clicking on Common Interest Development Law, then Staff Memoranda, brings up twenty-three Memorandums drafted in 2009, following twenty Staff Memorandums in 2008. The output by you and your Staff astounds and at the same time overwhelms me.

Memorandums 2009-44 and 2009-38, both written in preparation of the upcoming October 22, 2009 meeting, total 178 pages. And since they were written, Duncan McPherson has sent a detailed letter of other items he believes need review.

My conclusion is there is so much attention to the smaller details in the Recodification of the Davis-Stirling Act, that perhaps we should all start looking at the substantive changes that are needed to make this piece of legislation a more useful tool for the some 46,000 Common Interest Developments that must read and understand the Act in order to effectively run their associations.

There is no question that Memorandum 2009-33 **Statutory Clarification and Simplification of CID Law (Staff Draft)**, dated August 8, 2009, and the suggested changes in the other drafts since that date, are a better tool than we previously had. The Detailed Contents pages 1-6, and the Disposition of Former Law, pages 126-128, are two of the best tools contained therein, but I understand will not be part of the Bill when one is introduced. That is unfortunate, as for the first time, the material is drawn together by subject, and is well cataloged in the Detailed Contents, and the cross referencing to the old Davis-Stirling Act, pages 126-128, should be a great help to those with good memories of the old Section numbers.

1. Should we not help the associations that are expending large sums of time and money complying with Chapter 5, Article 4, Member Election?
 - a. When there are as many candidates as open board seats, the candidates should be elected by acclamation, making the process simple and lower cost.
 - b. When the signatures inside sealed envelopes, held by a proxy, cannot be verified, why should proxies be allowed?

- c. If ballots are mailed in, they should be counted in both the election and for purposes of obtaining a quorum.
- d. In large associations the only group that can verify signatures is the management company, who are excluded from doing so by Sections 5110 (a) and 5115 (a) (2).
- e. Article 4, Member Elections takes up seven pages of the Proposed Recodification. Surely, a more succinct election law can be written, that will also reduce the current expense of elections to the associations.
 - 1. Annual Meetings used to be meaningful. Candidates could extol their virtues, and write-in candidates could make their pitch. With this complicated two envelope mail in voting system that has disappeared. Replaced by a long evening of waiting for envelopes to be opened, ballots extracted and counted.
 - 2. Electronic voting must become available. Many associations have web pages where candidates could campaign, the issues they feel strong about spelled out.
 - (a). There should be an "Opt in/out" clause to those not wishing to vote electronically.
 - (b). The ballots could be tabulated directly into a spreadsheet, and results announced much sooner.
 - (c). If association members feel comfortable paying their monthly dues via the internet, and its gets credited to their account, why would they not feel that their votes could be counted via the same mechanism

2. Sections 4080 and 4800

- a. An issue that is not addressed, is Developers who are defaulting on unfinished projects, leaving those who purchased into the CID in a position that they belong to an association, still controlled by a developer, who has basically disappeared.
 - 1. Is there a way the owners can form a new CID and protect their investment?
 - 2. If a separate CID was in place which owned the recreation facilities such as swimming pools and tennis courts, how do the members get access to them, and can they take over such a CID?
- b. At our October 2, 2009 Statewide CLAC Planning Conference, with some thirty-eight representatives from all eight CAI Chapters attending, when the question went around the room as to "What percent of the associations' your firm represents are in serious financial health"?
 - 1. Which I believe meant that fifty percent or more of the owners are seriously delinquent, a Delegate from Stockton replied "Seventy Percent"! And others were as high as twenty-five percent.
- c. We believe that lending institutions are in no hurry to foreclose, and believe this is even truer in CIDs where they would be obligated to pay assessments going forward. There were instances cited of owners being three years in arrears on assessments, and due to the high degree to which the mortgage was "upside-down", it made no sense for the association to foreclose on the unit, which is the only long term collection tool an association has.
 - 1. Do you see any place in the DSA that language could be inserted that would help remedy this situation?

d. Such as a requirement that lending institutions would, after a mortgagee is more than six months delinquent in payments, be required to pay that mortgagees' association dues, until such time as the mortgage payments are timely made?

1. The bank could collect (impound) during escrow, an amount equal to six months' CID assessments, available to the association should the owner become delinquent.
2. Some other states allow a six-month priority lien over the first mortgage.

3. Section 4220

a. Expand the definition of unit boundaries to include deviations from the original plans when:

1. The original plans are not available
2. Allow for reconstruction to current building codes
3. Allow use of currently available building materials

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

4. Section 4600 Grant of Exclusive Use

a. Currently, Parking Spaces can only be assigned to specific units during the initial sell out period, according to many CC & Rs.

1. Due to ADA requirements it sometimes is necessary to reassign spaces to meet the demands of a handicapped person.
2. Other areas such as storage should be allowed to be exclusively assigned, other than at original sell out.

b. Ambiguity might not allow the developer to assign exclusive use common area.

5. Section 4760 Improvements to separate interest

a. A new Section should be added which allows a unit owner to add other things, such as "hard surface floors" on units above the first floor, that stipulates:

1. Must meet current sound transmission requirements of the (1) town, (2) City or (3) State, whose Building Code has jurisdiction where the unit is located.
2. If the association has CC & Rs or Rules & Regulations which are more stringent than the local building code, they shall be met.
3. An owner who has installed a new surface, which does not meet the sound specification test, shall remove the floor at their expense, and install carpeting or other flooring satisfactory to the association.
4. Any costs involved in enforcing these provisions shall be reimbursed to the prevailing party.

6. Chapter 5, Article 5 Record Inspection

a. There are no records that an association is not required to make available to members, except for the Redaction of information allowed in Section 5215.

1. 5205 (g) allows the association to bill a member an amount not in excess of \$10 per hour, and not to exceed \$200 per written request, for the time "actually and reasonably involved in redacting the records".

(a). \$10 per hour was probably written into the DSA in 1985, but is unrealistic 24 years later.

(b). There appears to be no time allowed to gather the records, make an estimate of the expenses, and have the member sign an agreement to pay that amount, which must be done before copying starts. This is unreasonable.

(c). With a \$200 cap, the association must have the ability to limit the size of the request for documents, as without that, a vindictive member could keep a clerk busy for days copying the material from one request.

(d). There must be a limit placed on the number of requests a member can make monthly and annually. Perhaps once monthly, not to exceed ten times annually. There are people who play games, and believe it is acceptable to keep the staff tied up fulfilling their requests.

7. Section 4045 General Notice

a. (a) (3) allows posting on an internet website, but does not speak to sending direct e-mail messages to owners. If owners are capable of reaching a website, they have internet and can receive direct messages. Email messages should be included as an approved method of receiving "general notice".

8. Non-residential Associations Study H-856

a. Per the Minutes of the August 28, 2009 Commission Meeting, pg. 5:

"The Commission expressed a preference that the proposed law be drafted as a separate stand-alone body of law governing nonresidential CIDs, rather than as a set of exemptions from the provisions of the Davis-Stirling Act."

1. This would appear to be an acceptable approach, but CAI-CLAC cautions that without defining "Mixed Use Association", those organizations could be left high and dry. Those associations would fall totally under the laws of the Residential CID, or under the Non-Residential laws.

(a). If there were a Mixed Use Association, consisting of a Residential association occupying the floors above ground level, and a Nonresidential Association consisting of commercial shops on the ground floor, with parking for residents, owners and customers on the below ground levels, how do they sort out how to run the combined associations which occupy one contiguous building?

(b). And if the two associations are joined together in a Master Association, which set of laws prevails?

b. The rights of the owners, the maintenance of the common building, and how they manage the associations when there are substantial vacant units or shops in either association, are complicated issues that must be dealt with.

These suggested New or Revised Sections address real issues facing CIDs today, which were not anticipated when the Davis-Stirling Act was enacted in 1985.

We appreciate your consideration of these observations, and await your responses at the October 22, 2009, Commission meeting.

Respectfully,

Dick Pruess, Vice Chair
CAI-CLAC Executive Committee

Cc: Steve Cohen via email (scohen@clrc.ca.gov)

PROPOSED RECODIFICATION OF DAVIS-STIRLING COMMON
INTEREST DEVELOPMENT ACT [REVISED]

Staff Note. Each of the provisions below has a parenthetical description following the section number in its heading. The descriptions have the following meanings:

(UNCHANGED). A section with this description would continue existing law almost verbatim. Minor technical changes might be made to (1) correct a cross-reference to reflect the new number of the referenced provision, (2) add or modify subdivision or paragraph designators (e.g., unnumbered paragraphs might be designated as subdivisions), or (3) conform to technical stylistic conventions (e.g., to avoid use of the word “such” or the phrase “he or she”). If any of these changes are made, they will be clearly identified in the Comment following the section.

(REVISED). A section with this description will continue existing law verbatim, except as specifically indicated in the Comment and “Staff Note” that follow the section. Changes made to a “(REVISED)” section may include the rewording of ambiguous or confusing language or minor substantive improvements to existing law. Any such changes will be expressly identified.

(NEW). A section with this description will be largely new. A boxed “Staff Note” following the Comment will explain the purpose of the new section.

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1 PART 5. COMMON INTEREST DEVELOPMENTS

2 CHAPTER 1. GENERAL PROVISIONS

3 Article 1. Preliminary Provisions

4 **§ 4000 (UNCHANGED). Short title**

5 4000. This part shall be known and may be cited as the Davis-Stirling Common
6 Interest Development Act.

7 **Comment.** Section 4000 continues former Section 1350 without change.

8 **§ 4005 (REVISED). Effect of headings**

9 4005. Division, part, title, chapter, article, and section headings do not in any
10 manner affect the scope, meaning, or intent of this part.

11 **Comment.** Section 4005 continues former Section 1350.5 without change, except that “article”
12 has been added to the list of headings and the last word of the sentence is replaced with “part.”

13 Section 4005 is a standard provision found in many codes. See, e.g., Evid. Code § 5; Fam.
14 Code § 5; Prob. Code § 4.

15 **☞ Staff Note.** Proposed Section 4005 would add “article” to the list of headings in existing
16 Section 1350.5. The omission of articles from that list appears to have been inadvertent.

17 **§ 4010 (NEW). Continuation of prior law**

18 4010. (a) A provision of this part, insofar as it is substantially the same as a
19 previously existing provision relating to the same subject matter, shall be
20 construed as a restatement and continuation thereof and not as a new enactment,
21 and a reference in a statute to the provision of this part shall be deemed to include
22 a reference to the previously existing provision unless a contrary intent appears.

23 (b) A reference in the governing documents, to a former provision that is
24 restated and continued in this part, is deemed to include a reference to the
25 provision of this part that restates and continues the former provision.

26 **Comment.** Section 4010 is new. Subdivision (a) is a standard provision found in many codes.
27 See, e.g., Bus. & Prof. Code § 2; Corp. Code § 2; Fam. Code § 2; Prob. Code § 2(a); Veh. Code §
28 2. See also Gov’t Code §§ 9604 (construction of restatements and continuations), 9605
29 (construction of amended statutory provision). The last clause of subdivision (a) makes clear that
30 a statutory reference to a provision within this part includes a reference to the former law from
31 which it is drawn. *Cf.* Gov’t Code § 9604 (reference to previously existing provision deemed
32 reference to restatement or continuation).

33 Subdivision (b) adapts the general principle of subdivision (a) to a statutory reference in an
34 association’s governing documents.

35 **☞ Staff Note.** This is a standard transitional provision. It clarifies that a new provision that
36 restates the substance of a former provision is to be treated as a continuation of that former
37 provision, and not as a new enactment. Thus, a reference to the former provision in a court
38 opinion is to be treated as a reference to the provision that continues the former provision.

1 Subdivision (b) would expressly extend that principle to references in an association's
2 governing documents.

3 **§ 4015 (UNCHANGED). Application of part**

4 4015. Nothing in this part may be construed to apply to a development wherein
5 there does not exist a common area as defined in Section 4095. This section is
6 declaratory of existing law.

7 **Comment.** Section 4015 continues former Section 1374 without change, except that the term
8 "title" is replaced with "part" and a cross-reference is updated to reflect the new location of the
9 referenced provision.

10 **§ 4020 (UNCHANGED). Construction of zoning ordinance**

11 4020. Unless a contrary intent is clearly expressed, a local zoning ordinance is
12 construed to treat like structures, lots, parcels, areas, or spaces in like manner
13 regardless of whether the common interest development is a community apartment
14 project, condominium project, planned development, or stock cooperative.

15 **Comment.** Section 4020 continues former Section 1372 without change.

16 **§ 4025 (REVISED). Nonresidential development**

17 4025. (a) The following provisions do not apply to a common interest
18 development that is limited to industrial or commercial uses by zoning or by a
19 declaration of covenants, conditions, and restrictions that has been recorded in the
20 official records of each county in which the common interest development is
21 located:

22 (1) Section 4275.

23 (2) Article 5 (commencing with Section 4350) of Chapter 2.

24 (3) Article 2 (commencing with Section 4525), and Article 3 (commencing with
25 Section 4575), of Chapter 3.

26 (4) Section 4600.

27 (5) Section 4765.

28 (6) Sections 5300, 5305, 5565, and 5810, and paragraph (7) of subdivision (a) of
29 Section 5310.

30 (7) Sections 5500 through 5560, inclusive.

31 (8) Subdivision (b) of Section 5600.

32 (9) Subdivision (b) of Section 5605.

33 (b) The Legislature finds that the provisions listed in subdivision (a) are
34 appropriate to protect purchasers in residential common interest developments,
35 however, the provisions may not be necessary to protect purchasers in commercial
36 or industrial developments since the application of those provisions could result in
37 unnecessary burdens and costs for these types of developments.

38 **Comment.** Section 4025 continues former Section 1373 without change, with the following
39 exceptions: (1) Former Section 1373(a)(3) is superfluous and is not continued. (2) Cross-
40 references are updated to reflect the new location of the referenced provisions. (3) Subdivision
41 (a)(4) is added to continue the substance of former Section 1363.07(a)(3)(F). (4) Subdivision

1 (a)(9) refers only to Section 5605(b). It does not refer to the emergency exception provisions of
2 Section 5610, which were also part of former Section 1366(b).

3 **Staff Note.** (1) Existing Section 1373(a)(3) exempts a nonresidential CID from the
4 requirements of Section 1363(b). The proposed law would not continue Section 1363(b), which
5 requires that an association comply with Sections 1365 and 1368. Section 1363(b) is unnecessary,
6 because Sections 1365 and 1368 apply to an association by their own terms. For that reason,
7 Section 1363(b) would not be continued in the proposed law. Therefore, it would not be
8 necessary to continue Section 1373(a)(3).

9 (2) Proposed Section 4025(a)(4) continues the substance of existing Section 1363.07(a)(3)(F),
10 which exempts nonresidential CIDs from special rules for approving a grant of exclusive use
11 common area.

12 (3) Proposed Section 4025(a)(9) continues only part of the substance of existing Section
13 1373(a)(6). It would exempt a nonresidential CID from the member approval requirement of
14 Section 1366(b), but would not exempt a nonresidential CID from the emergency exception
15 provided in Section 1366(b).

16 That emergency exception also applies to the member approval requirement of Section
17 1366(a). For that reason, it should continue to apply to a nonresidential CID. That is the approach
18 taken in Section 4025(a)(9). The Commission invites comment on whether that substantive
19 change would cause any problems.

20 **§ 4030 (REVISED). Creation of common interest development**

21 4030. (a) This title applies and a common interest development is created
22 whenever a separate interest coupled with an interest in the common area or
23 membership in the association is, or has been, conveyed, provided all of the
24 following are recorded:

25 (1) A declaration.

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

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

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

32 **Comment.** Subdivision (a) of Section 4030 continues former Section 1352 without change.

33 Subdivision (b) is new. It reflects the fact that some stock cooperatives are created without a
34 recorded declaration.

35 **Staff Note.** Proposed Section 4030(b) is new. It preserves the application of the Davis-
36 Stirling Act to a stock cooperative in the fairly common circumstance where a cooperative lacks a
37 recorded declaration.

38 **§ 4035 (NEW). “Delivered to the association”**

39 4035. If a provision of this part requires that a document be “delivered to the
40 association,” the document shall be delivered by first-class mail, postage prepaid,
41 or by certified mail, to the person designated in the annual policy statement,
42 prepared pursuant to Section 5310, to receive documents on behalf of the
43 association. If no person has been designated to receive documents, the document
44 shall be delivered to the president or secretary of the association.

1 **Comment.** Section 4035 is new. It provides a standard rule for delivery of a document to the
2 association.

3 **Staff Note.** Proposed Section 4035 is new. It would provide a clear rule for official
4 communication with the association.

5 **§ 4040 (NEW). Individual notice**

6 4040. (a) If a provision of this part requires “individual delivery” or “individual
7 notice,” the notice shall be delivered to the member to be notified by one of the
8 following methods:

9 (1) First-class mail, postage prepaid, addressed to the member at the address last
10 shown on the books of the association or otherwise provided by the member.

11 (2) E-mail, facsimile, or other electronic means, if the recipient has agreed to
12 that method of delivery. The agreement obtained by the association shall be
13 consistent with the conditions for obtaining consumer consent described in Section
14 20 of the Corporations Code.

15 (b) A member may request in writing that a notice to that member be sent to up
16 to two different addresses.

17 (c) For the purposes of this section, an unrecorded provision of the governing
18 documents providing for a particular method of delivery does not constitute
19 agreement by a member to that method of delivery.

20 **Comment.** Section 4040 is new. It specifies acceptable methods for delivery of a notice to an
21 individual member, as distinguished from a notice that is to be delivered to every member. See
22 Section 4045 (general notice). The methods listed in subdivision (a) are drawn from former
23 Section 1350.7(b)(2)-(3).

24 Subdivision (b) generalizes the substance of former Sections 1365.1(c) and 1367.1(k) without
25 substantive change.

26 Subdivision (c) continues former Section 1350.7(d). It precludes use of electronic delivery
27 methods when the recipient has not consented to use of those methods or has withdrawn such
28 consent.

29 **Staff Note.** Proposed Section 4040 is new. It is drawn from and generalizes much of the
30 substance of existing Section 1350.7.

31 **§ 4045 (NEW). General notice**

32 4045. (a) If a provision of this part requires “general delivery” or “general
33 notice,” the notice shall be provided by one or more of the following methods:

34 (1) Any method provided for delivery of an individual notice (Section 4040).

35 (2) Inclusion in a billing statement, newsletter, or other document that is
36 delivered by one of the methods provided in this section.

37 (3) Posting in a location that is accessible to all members, if the location has
38 been designated for the posting of general notices by the association in the annual
39 policy statement, prepared pursuant to Section 5310.

40 (4) Publication in a periodical that is circulated primarily to members of the
41 association.

1 (5) If the association broadcasts television programming for the purpose of
2 distributing information on association business to its members, by inclusion in the
3 programming.

4 (b) Notwithstanding subdivision (a), if a member requests to receive general
5 notices by individual delivery, all general notices to that member shall be
6 delivered pursuant to Section 4040. The option provided in this subdivision shall
7 be described in the annual policy statement, prepared pursuant to Section 5310.

8 **Comment.** Section 4045 is new. It specifies acceptable methods for delivery of a notice to the
9 membership generally, as distinguished from a notice that is to be delivered to a specific member.
10 See Section 4040 (individual notice). Nothing in this section prevents an association from using
11 supplemental notice methods, such as posting on an Internet website, so long as one or more
12 methods authorized by this section are also used.

13 Subdivision (b) reserves the right of any member, on request, to receive general notices by the
14 delivery methods provided for delivery of an individual notice. Thus, in an association that posts
15 general notices to its website, individual members would still have the right, on request, to
16 receive those notices by mail.

17 **Staff Note.** Proposed Section 4045 is new. It would enhance efficiency by allowing an
18 association to “broadcast” notices of general interest, while reserving the right of individual
19 members to receive those notices as individual notices on request.

20 **§ 4050 (NEW). Time and proof of delivery**

21 4050. (a) This section governs the delivery of a document pursuant to this part.

22 (b) If a document is delivered by mail, delivery is deemed to be complete on
23 deposit into the United States mail.

24 (c) If a document is delivered by electronic means, delivery is complete at the
25 time of transmission.

26 **Comment.** Section 4050 is new. Subdivision (b) generalizes the second sentence of former
27 Section 1350.7(b)(2).

28 Subdivision (c) generalizes the second sentence of former Section 1350.7(b)(3).

29 **Staff Note.** Proposed Section 4050 is new. It would generalize the timing rules provided in
30 existing Section 1350.7, so that they would apply to any notice delivered by the specified
31 methods. This will provide greater certainty in resolving timing disputes.

32 **§ 4060 (NEW). Minimum font size**

33 4060. In any notice, ballot, report, or other writing that the association is
34 required to prepare and deliver to a member pursuant to this part, the text shall be
35 printed in a 12 point font or larger.

36 **Comment.** Section 4060 is new. This section does not apply to an association record that was
37 not prepared for delivery to a member, merely because the record may be subject to inspection
38 under Section 5205.

39 **Staff Note.** Proposed Section 4060 is new. It would generalize and standardize the minimum
40 font size rules provided in existing Sections 1365(d) and 1365.1(a), so that they would apply to
41 any notice or report delivered to a member pursuant to this part.

1 **§ 4065 (NEW). Approved by majority of all members**

2 4065. If a provision of this part requires that an action be approved by a majority
3 of all members, the action shall be approved or ratified by an affirmative vote of
4 members representing more than 50 percent of the total voting power of the
5 association.

6 **Comment.** Section 4065 is new. It is added for drafting convenience.

7 **Staff Note.** Proposed Section 4065 is new. It would add guidance on the procedure for
8 approval of a proposed action that must be approved “by a majority of all members.”

9 **§ 4070 (NEW). Approved by majority of quorum of members**

10 4070. If a provision of this part requires that an action be approved by a majority
11 of a quorum of the members, the action shall be approved or ratified by an
12 affirmative vote of members representing more than 50 percent of the votes cast in
13 an election at which a quorum is achieved.

14 **Comment.** Section 4070 is new. It is added for drafting convenience.

15 **Staff Note.** Proposed Section 4070 is new. It would add guidance on the procedure for
16 approval of a proposed action that must be approved “by a majority of a quorum of the
17 members.”

18 **Article 2. Definitions**

19 **§ 4075 (REVISED). Application of definitions**

20 4075. The definitions in this article govern the construction of this part.

21 **Comment.** Section 4075 restates the substance of the introductory clause of former Section
22 1351.

23 **Staff Note.** Proposed Section 4075 recasts the introductory clause of Section 1351 to better
24 fit within the new organization, without any substantive change in its meaning.

25 **§ 4080 (UNCHANGED). “Association”**

26 4080. “Association” means a nonprofit corporation or unincorporated
27 association created for the purpose of managing a common interest development.

28 **Comment.** Section 4080 continues former Section 1351(a) without change.

29 **§ 4085 (NEW). “Board”**

30 4085. “Board” means the board of directors of the association.

31 **Comment.** Section 4085 is new.

32 **§ 4090 (REVISED). “Board meeting”**

33 4090. “Board meeting” includes any congregation at the same time and place, of
34 a sufficient number of directors to establish a quorum of the board, to hear,
35 discuss, or deliberate upon any item of business scheduled to be heard by the
36 board, except those matters that may be discussed in executive session.

1 **Comment.** Section 4090 continues former Section 1363.05(j) without change, with the
2 following exceptions: (1) The term “board meeting” is used in place of the more general
3 “meeting,” to distinguish between a board meeting and member meeting. (2) The defined term
4 “director” is used in place of “board member.” See Section 4140 (“director” defined). (3) The
5 number of directors required to establish a board meeting has been changed from a majority of
6 the members to a number constituting a quorum.

7 **Staff Note:** Proposed Section 4090 would change the meaning of “meeting” to include any
8 congregation of a *quorum* of the directors, rather than a *majority* of the directors. The purpose of
9 the definition is to encompass a gathering of board members *at which board business might be*
10 *conducted*. For that purpose, the presence of a quorum is the more appropriate measure, because
11 in some associations the quorum may be different from a simple majority.

12 **§ 4095 (REVISED). “Common area”**

13 4095. (a) “Common area” means the entire common interest development
14 except the separate interests therein. The estate in the common area may be a fee,
15 a life estate, an estate for years, or any combination of the foregoing.

16 (b) Notwithstanding subdivision (a), in a planned development described in
17 subdivision (b) of Section 4175, the common area may consist of mutual or
18 reciprocal easement rights appurtenant to the separate interests.

19 **Comment.** Subdivision (a) of Section 4095 continues the first sentence of former Section
20 1351(b) without change.

21 Subdivision (b) continues the substance of the second sentence of former Section 1351(b), but
22 restates it for clarity.

23 **Staff Note.** Proposed Section 4095(b) would restate the second sentence of existing Section
24 1351(b), to improve its clarity without changing its meaning.

25 **§ 4100 (UNCHANGED). “Common interest development”**

26 4100. “Common interest development” means any of the following:

- 27 (a) A community apartment project.
- 28 (b) A condominium project.
- 29 (c) A planned development.
- 30 (d) A stock cooperative.

31 **Comment.** Section 4100 continues former Section 1351(c) without change.

32 **§ 4105 (UNCHANGED). “Community apartment project”**

33 4105. “Community apartment project” means a development in which an
34 undivided interest in land is coupled with the right of exclusive occupancy of any
35 apartment located thereon.

36 **Comment.** Section 4105 continues former Section 1351(d) without change.

37 **§ 4110 (UNCHANGED). “Community service organization or similar entity”**

38 4110. (a) “Community service organization or similar entity” means a nonprofit
39 entity, other than an association, that is organized to provide services to occupants
40 of the common interest development or to the public in addition to the occupants,
41 to the extent community common area or facilities are available to the public.

1 (b) “Community service organization or similar entity” does not include an
2 entity that has been organized solely to raise moneys and contribute to other
3 nonprofit organizations that are qualified as tax exempt under Section 501(c)(3) of
4 the Internal Revenue Code and that provide housing or housing assistance.

5 **Comment.** Section 4110 continues former Section 1368(c)(3) without change, except that it
6 has been divided into subdivisions, the defined term “occupant” is used to replace “resident,” and
7 the reference to “common areas” is singularized. See Section 4163 (“occupant” defined).

8 **§ 4120 (REVISED). “Condominium plan”**

9 4120. “Condominium plan” means a plan consisting of:

10 (a) A description or survey map of a condominium project, which shall refer to
11 or show monumentation on the ground.

12 (b) A three-dimensional description of a condominium project, one or more
13 dimensions of which may extend for an indefinite distance upwards or
14 downwards, in sufficient detail to identify the common area and each separate
15 interest.

16 (c) A certificate consenting to the recordation of the condominium plan pursuant
17 to this part that is signed and acknowledged as provided in Section 4290.

18 **Comment.** Section 4120 continues the introduction of former Section 1351(e) without change,
19 with the following exceptions: (1) The enumerated items are set out as subdivisions. (2) A
20 reference to “this title” has been changed to “this part.” (3) The list of persons who must sign and
21 acknowledge the certificate consenting to recordation of the condominium plan has been replaced
22 with a reference to the section governing the creation and recordation of a condominium plan.

23  **Staff Note.** Proposed Section 4120 would include only the definition of the term
24 “condominium plan.” Procedural provisions in Section 1351, relating to the creation or
25 amendment of a condominium plan, would be located elsewhere. See proposed Sections 4290 and
26 4295.

27 **§ 4125 (UNCHANGED). “Condominium project”**

28 4125. (a) A “condominium project” means a development consisting of
29 condominiums.

30 (b) A condominium consists of an undivided interest in common in a portion of
31 real property coupled with a separate interest in space called a unit, the boundaries
32 of which are described on a recorded final map, parcel map, or condominium plan
33 in sufficient detail to locate all boundaries thereof. The area within these
34 boundaries may be filled with air, earth, or water, or any combination thereof, and
35 need not be physically attached to land except by easements for access and, if
36 necessary, support. The description of the unit may refer to (1) boundaries
37 described in the recorded final map, parcel map, or condominium plan, (2)
38 physical boundaries, either in existence, or to be constructed, such as walls, floors,
39 and ceilings of a structure or any portion thereof, (3) an entire structure containing
40 one or more units, or (4) any combination thereof.

41 (c) The portion or portions of the real property held in undivided interest may be
42 all of the real property, except for the separate interests, or may include a

1 particular three-dimensional portion thereof, the boundaries of which are described
2 on a recorded final map, parcel map, or condominium plan. The area within these
3 boundaries may be filled with air, earth, or water, or any combination thereof, and
4 need not be physically attached to land except by easements for access and, if
5 necessary, support.

6 (d) An individual condominium within a condominium project may include, in
7 addition, a separate interest in other portions of the real property.

8 **Comment.** Section 4125 restates former Section 1351(f), without change, except that the
9 section has been organized into subdivisions for ease of reference.

10 **§ 4130 (UNCHANGED). “Declarant”**

11 4130. “Declarant” means the person or group of persons designated in the
12 declaration as declarant, or if no declarant is designated, the person or group of
13 persons who sign the original declaration or who succeed to special rights,
14 preferences, or privileges designated in the declaration as belonging to the signator
15 of the original declaration.

16 **Comment.** Section 4130 continues former Section 1351(g) without change.

17 **§ 4135 (UNCHANGED). “Declaration”**

18 4135. “Declaration” means the document, however denominated, that contains
19 the information required by Sections 4250 and 4255.

20 **Comment.** Section 4135 continues former Section 1351(h) without change, except that the
21 word “which” has been replaced with “that” and the cross-reference has been updated to reflect
22 the new location of the referenced provision.

23 **§ 4140 (NEW). “Director”**

24 4140. “Director” means a natural person elected, designated, or selected to serve
25 on the board.

26 **Comment.** Section 4140 is new. It is added for drafting convenience.

27 **§ 4145 (REVISED). “Exclusive use common area”**

28 4145. (a) “Exclusive use common area” means a portion of the common area
29 designated by the declaration for the exclusive use of one or more, but fewer than
30 all, of the owners of the separate interests and which is or will be appurtenant to
31 the separate interest or interests.

32 (b) Unless the declaration otherwise provides, any shutters, awnings, window
33 boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, doorframes,
34 and hardware incident thereto, screens and windows or other fixtures designed to
35 serve a single separate interest, but located outside the boundaries of the separate
36 interest, are exclusive use common area allocated exclusively to that separate
37 interest.

38 (c) Notwithstanding the provisions of the declaration, internal and external
39 communication wiring designed to serve a single separate interest, but located

1 outside the boundaries of the separate interest, are exclusive use common area
2 allocated exclusively to that separate interest. For the purposes of this section,
3 “wiring” includes nonmetallic transmission lines.

4 **Comment.** Section 4145 restates former Section 1351(i) without change, except that the term
5 “telephone” has been replaced with “communication, the last sentence of subdivision (c) is new,
6 and several references to “common areas” are singularized.

7 **Staff Note.** (1) Proposed Section 4145(c) has been revised to refer to “communication”
8 wiring rather than “telephone” wiring. This modernization reflects the changing nature of
9 communication technology.

10 (2) The last sentence of proposed Section 4145(c) is added to include transmission media other
11 than metallic wire (e.g., fiber optic cable).

12 **§ 4150 (UNCHANGED). “Governing documents”**

13 4150. “Governing documents” means the declaration and any other documents,
14 such as bylaws, operating rules of the association, articles of incorporation, or
15 articles of association, which govern the operation of the common interest
16 development or association.

17 **Comment.** Section 4150 continues former Section 1351(j) without change.

18 **§ 4155 (REVISED). “Managing agent”**

19 4155. (a) A “managing agent” is a person or entity who, for compensation or in
20 expectation of compensation, exercises control over the assets of a common
21 interest development.

22 (b) A “managing agent” does not include any of the following:

23 (1) A full-time employee of the association.

24 (2) A regulated financial institution operating within the normal course of its
25 regulated business practice.

26 (3) An attorney at law acting within the scope of the attorney’s license.

27 **Comment.** Subdivisions (a) and (b)(1)-(2) of Section 4155 continue former Section 1363.1(b)
28 without change, except that its application is generalized so that it applies to the entire part.

29 Subdivision (b)(3) is added to generalize the last clause of former Section 1363.2(f). The
30 phrase “his or her” is replaced with “the attorney’s.”

31 **Staff Note.** Proposed Section 4155 would generalize the definition of “managing agent” so
32 that it would apply to the entire act, rather than just former Section 1363.1. For provisions that
33 use the term without any governing definition, see Sections 1363.05, 1363.5, 1366.2, and 1368.4.

34 In addition, proposed Section 4155 would harmonize the definition of “managing agent”
35 provided in Section 1363.1(b) with the definition used in Section 1363.2(f), by adding an attorney
36 as a class of person who is not included in the definition. The staff sees no good policy reason
37 why Section 1363.1 should apply to an attorney, if Section 1363.2 does not.

38 **§ 4160 (NEW). “Member”**

39 4160. “Member” means either of the following persons:

40 (a) An owner of a separate interest.

1 (b) A person that is designated as a member in the declaration, articles of
2 incorporation, or bylaws. The incidents of a membership established under this
3 paragraph may be limited by the document that establishes the membership.

4 **Comment.** Section 4160 is new. It is added for drafting convenience.

5 Subdivision (b) recognizes that the governing documents may designate a non-owner as a
6 member for a limited purpose. For example, an association may have a cooperative or reciprocal
7 relationship with another entity (e.g., an affiliated resort) and the governing documents may
8 provide that a member of that entity has limited membership rights within the association.

9 **§ 4163 (REVISED). “Occupant”**

10 4163. “Occupant” means an owner, resident, guest, invitee, tenant, lessee,
11 sublessee, or other person in possession of a separate interest.

12 **Comment.** Section 4163 generalizes former Section 1364(e), without substantive change.

13 **Staff Note.** Proposed Section 4163 would generalize an existing definition of “occupant” to
14 provide guidance with respect to other provisions that use the same term

15 **§ 4165 (REVISED). “Operating rule”**

16 4165. “Operating rule” means a regulation adopted by the board that applies
17 generally to the management and operation of the common interest development
18 or the conduct of the business and affairs of the association.

19 **Comment.** Section 4165 continues former Section 1357.100(a) without change, except that it
20 is generalized to apply to the entire part, the superfluous phrase “of the association” is not
21 continued, and “board of directors” is replaced with the defined term “board.” See Section 4085
22 (“board” defined).

23 **Staff Note.** Proposed Section 4165 would generalize the definition of “operating rule,” so
24 that it would apply to the entire act. This would facilitate the drafting of provisions that make
25 reference to operating rules.

26 **§ 4170 (NEW). “Person”**

27 4170. “Person” means an individual, corporation, government or governmental
28 subdivision or agency, business trust, estate, trust, partnership, limited liability
29 company, association, or other entity.

30 **Comment.** Section 4170 is new. It is added for drafting convenience.

31 **Staff Note.** Proposed Section 4170 is new. It reflects the standard statutory definition of
32 “person” as including both natural persons and legal entities. See, e.g., Prob. Code § 56.

33 **§ 4175 (REVISED). “Planned development”**

34 4175. “Planned development” means a development (other than a community
35 apartment project, a condominium project, or a stock cooperative) having either or
36 both of the following features:

37 (a) The common area is owned either by an association or in common by the
38 owners of the separate interests who possess appurtenant rights to the beneficial
39 use and enjoyment of the common area.

1 (b) A power exists in the association to enforce an obligation of an owner of a
2 separate interest with respect to the beneficial use and enjoyment of the common
3 area by means of an assessment that may become a lien upon the separate interests
4 in accordance with Article 5 (commencing with Section 5650) of Chapter 6.

5 **Comment.** Section 4175 continues former Section 1351(k) without change with the following
6 exceptions: (1) The cross-reference has been updated to reflect the new location of the lien
7 provisions of former Section 1367.1. (2) “Which” has been changed to “that” for grammatical
8 purposes.

9 **Staff Note.** Proposed Section 4175(b) replaces the existing reference to “Section 1367 or
10 1367.1” with a reference to “Article 5 (commencing with Section 5650) of Chapter 6.” That
11 reference encompasses all of the provisions of former Sections 1367 and 1367.1 under which an
12 “assessment ... may become a lien.”

13 **§ 4177 (REVISED). “Reserve accounts”**

14 4177. “Reserve accounts” means both of the following:

15 (a) Moneys that the board has identified for use to defray the future repair or
16 replacement of, or additions to, those major components that the association is
17 obligated to maintain.

18 (b) The funds received, and not yet expended or disposed of, from either a
19 compensatory damage award or settlement to an association from any person or
20 entity for injuries to property, real or personal, arising from any construction or
21 design defects. These funds shall be separately itemized from funds described in
22 subdivision (a).

23 **Comment.** Section 4177 continues former Section 1365.5(f) without change, except that the:
24 (1) The definition is generalized so that it applies to the entire part. (2) A cross-reference has been
25 updated to reflect the new location of the referenced provisions. (3) The term “association’s board
26 of directors” has been replaced with the defined term “board.” See Section 4085 (“board”
27 defined).

28 **Staff Note.** Proposed Section 4177 would generalize a definition that currently only applies
29 to Section 1365.5.

30 **§ 4178 (REVISED). “Reserve account requirements”**

31 4178. “Reserve account requirements” means the estimated funds that the board
32 has determined are required to be available at a specified point in time to repair,
33 replace, or restore those major components that the association is obligated to
34 maintain.

35 **Comment.** Section 4178 continues former Section 1365.5(g) without change, except the
36 definition is generalized so that it applies to the entire part, and the term “association’s board of
37 directors” has been replaced with the defined term “board.” See Section 4085 (“board” defined).

38 **Staff Note.** Proposed Section 4178 would generalize a definition that currently only applies
39 to Section 1365.5.

1 § 4180 (REVISED). “Rule change”

2 4180. “Rule change” means the adoption, amendment, or repeal of an operating
3 rule by the board.

4 **Comment.** Section 4180 continues former Section 1357.100(b), except that the definition is
5 generalized so that it applies to the entire part and the term “board of directors of the association”
6 has been replaced with the defined term “board.” See Section 4085 (“board” defined).

7 **Staff Note.** Proposed Section 4180 would generalize the definition of “rule change,” so that it
8 would apply to the entire act. This would facilitate the drafting of provisions that make reference
9 to rule changes.

10 § 4185 (UNCHANGED). “Separate interest”

11 4185. (a) “Separate interest” has the following meanings:

12 (1) In a community apartment project, “separate interest” means the exclusive
13 right to occupy an apartment, as specified in Section 4105.

14 (2) In a condominium project, “separate interest” means an individual unit, as
15 specified in Section 4125.

16 (3) In a planned development, “separate interest” means a separately owned lot,
17 parcel, area, or space.

18 (4) In a stock cooperative, “separate interest” means the exclusive right to
19 occupy a portion of the real property, as specified in Section 4190.

20 (b) Unless the declaration or condominium plan, if any exists, otherwise
21 provides, if walls, floors, or ceilings are designated as boundaries of a separate
22 interest, the interior surfaces of the perimeter walls, floors, ceilings, windows,
23 doors, and outlets located within the separate interest are part of the separate
24 interest and any other portions of the walls, floors, or ceilings are part of the
25 common area.

26 (c) The estate in a separate interest may be a fee, a life estate, an estate for years,
27 or any combination of the foregoing.

28 **Comment.** Section 4185 continues former Section 1351(l) without change, except that the last
29 two unnumbered paragraphs of former Section 1351(l) are designated as subdivisions (b) and (c),
30 cross-references are updated to reflect the new location of referenced provisions, and a reference
31 to “common areas” is singularized.

32 § 4190 (UNCHANGED). “Stock cooperative”

33 4190. (a) “Stock cooperative” means a development in which a corporation is
34 formed or availed of, primarily for the purpose of holding title to, either in fee
35 simple or for a term of years, improved real property, and all or substantially all of
36 the shareholders of the corporation receive a right of exclusive occupancy in a
37 portion of the real property, title to which is held by the corporation. The owners’
38 interest in the corporation, whether evidenced by a share of stock, a certificate of
39 membership, or otherwise, shall be deemed to be an interest in a common interest
40 development and a real estate development for purposes of subdivision (f) of
41 Section 25100 of the Corporations Code.

1 (b) A “stock cooperative” includes a limited equity housing cooperative which is
2 a stock cooperative that meets the criteria of Section 817.

3 **Comment.** Section 4190 continues former Section 1351(m) without change, except that the
4 unnumbered paragraphs have been designated as subdivisions.

5 CHAPTER 2. GOVERNING DOCUMENTS

6 Article 1. General Provisions

7 § 4200 (NEW). Document authority

8 4200. (a) The articles of incorporation may not include a provision that is
9 inconsistent with the declaration. To the extent of any inconsistency between the
10 articles of incorporation and the declaration, the declaration controls.

11 (b) The bylaws may not include a provision that is inconsistent with the
12 declaration or the articles of incorporation. To the extent of any inconsistency
13 between the bylaws and the articles of incorporation or declaration, the articles of
14 incorporation or declaration control.

15 (c) The operating rules may not include a provision that is inconsistent with the
16 declaration, articles of incorporation, or bylaws. To the extent of any inconsistency
17 between the operating rules and the bylaws, articles of incorporation, or
18 declaration, the bylaws, articles of incorporation, or declaration control.

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

20 **Comment.** Subdivision (a) of Section 4200 is new.

21 Subdivision (b) is consistent with Corporations Code Section 7151(c) providing that the bylaws
22 shall be consistent with the articles of incorporation.

23 Subdivision (c) is consistent with Section 4350(c) providing that an operating rule may not be
24 inconsistent with the declaration, articles of incorporation, or bylaws of the association.

25 Subdivision (d) reflects the fact that some stock cooperatives are created without a recorded
26 declaration.

27  **Staff Note.** Proposed Section 4200 is new. It would provide guidance in resolving conflicts
28 between different governing documents.

29 § 4205 (REVISED). Record notice of agent to receive payments

30 4205. In order to facilitate the collection of regular assessments, special
31 assessments, transfer fees, and similar charges, the board is authorized to record a
32 statement or amended statement identifying relevant information for the
33 association. This statement may include any or all of the following information:

34 (a) The name of the association as shown in the conditions, covenants, and
35 restrictions or the current name of the association, if different.

36 (b) The name and address of a managing agent or treasurer of the association or
37 other individual or entity authorized to receive assessments and fees imposed by
38 the association.

1 (c) A daytime telephone number of the authorized party identified in subdivision
2 (b) if a telephone number is available.

3 (d) A list of separate interests subject to assessment by the association, showing
4 the assessor's parcel number or legal description, or both, of the separate interests.

5 (e) The recording information identifying the declaration or declarations of
6 covenants, conditions, and restrictions governing the association.

7 (f) If an amended statement is being recorded, the recording information
8 identifying the prior statement or statements which the amendment is superseding.

9 **Comment.** Section 4205 continues former Section 1366.2(a) without change, except that the
10 superfluous phrase "of any association" is not continued and the term "board of directors" has
11 been replaced with the defined term "board." See Section 4085 ("board" defined).

12 **Staff Note.** Proposed Section 4205 would not continue Section 1366(b). That provision is
13 unnecessary, as it simply reiterates the authority of a recorder to charge for recording, using the
14 per page fee set by the recorder. In addition, it might be confusing to include that provision in this
15 section, but not in other sections that provide for document recording. See, e.g., proposed Section
16 4225.

17 **§ 4215 (UNCHANGED). Liberal construction of instruments**

18 4215. Any deed, declaration, or condominium plan for a common interest
19 development shall be liberally construed to facilitate the operation of the common
20 interest development, and its provisions shall be presumed to be independent and
21 severable. Nothing in Article 3 (commencing with Section 715) of Chapter 2 of
22 Title 2 of Part 1 of Division 2 shall operate to invalidate any provisions of the
23 governing documents.

24 **Comment.** Section 4215 continues former Section 1370 without change, except that "this
25 division" has been replaced with "Division 2" and the phrase "of a common interest
26 development" has not been continued.

27 **§ 4220 (UNCHANGED). Boundaries of units**

28 4220. In interpreting deeds and condominium plans, the existing physical
29 boundaries of a unit in a condominium project, when the boundaries of the unit are
30 contained within a building, or of a unit reconstructed in substantial accordance
31 with the original plans thereof, shall be conclusively presumed to be its boundaries
32 rather than the metes and bounds expressed in the deed or condominium plan, if
33 any exists, regardless of settling or lateral movement of the building and
34 regardless of minor variance between boundaries shown on the plan or in the deed
35 and those of the building.

36 **Comment.** Section 4220 continues former Section 1371 without change.

37 **§ 4225 (REVISED). Deletion of unlawful restrictive covenants**

38 4225. (a) No declaration or other governing document shall include a restrictive
39 covenant in violation of Section 12955 of the Government Code.

40 (b) Notwithstanding any other provision of law or provision of the governing
41 documents, the board, without approval of the members, shall amend any

1 declaration or other governing document that includes a restrictive covenant
2 prohibited by this section to delete the restrictive covenant, and shall restate the
3 declaration or other governing document without the restrictive covenant but with
4 no other change to the declaration or governing document.

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

10 (d) If after providing written notice to an association (Section 4035) requesting
11 that the association delete a restrictive covenant that violates subdivision (a), and
12 the association fails to delete the restrictive covenant within 30 days of receiving
13 the notice, the Department of Fair Employment and Housing, a city or county in
14 which a common interest development is located, or any person may bring an
15 action against the association for injunctive relief to enforce subdivision (a). The
16 court may award attorney's fees to the prevailing party.

17 **Comment.** Section 4225 continues former Section 1352.5 without change, with the following
18 exceptions: (1) Subdivision (b) is revised to replace the term "board of directors of an
19 association" with the defined term "board." See Section 4085 ("board" defined). (2) Subdivision
20 (b) is revised to replace "owners" with "members." See Section 1460 ("member" defined). (3)
21 subdivision (c) is added. (4) Subdivision (d) is revised to include a reference to the provision
22 governing notice to an association (Section 4035).

23  **Staff Note.** Proposed Section 4225(c) is added to require that a governing document that is in
24 the public record be publicly updated to reflect an amendment made pursuant to this section.

25 **§ 4230 (REVISED). Deletion of declarant provisions in governing documents**

26 4230. (a) Notwithstanding any provision of the governing documents to the
27 contrary, the board may, after the declarant has completed construction of the
28 development, has terminated construction activities, and has terminated marketing
29 activities for the sale, lease, or other disposition of separate interests within the
30 development, adopt an amendment deleting from any of the governing documents
31 any provision which is unequivocally designed and intended, or which by its
32 nature can only have been designed or intended, to facilitate the declarant in
33 completing the construction or marketing of the development. However,
34 provisions of the governing documents relative to a particular construction or
35 marketing phase of the development may not be deleted under the authorization of
36 this subdivision until that construction or marketing phase has been completed.

37 (b) The provisions which may be deleted by action of the board shall be limited
38 to those which provide for access by the declarant over or across the common area
39 for the purposes of (1) completion of construction of the development, and (2) the
40 erection, construction, or maintenance of structures or other facilities designed to
41 facilitate the completion of construction or marketing of separate interests.

42 (c) At least 30 days prior to taking action pursuant to subdivision (a), the board
43 shall deliver to all members, by individual delivery (Section 4040), (1) a copy of

1 all amendments to the governing documents proposed to be adopted under
 2 subdivision (a), and (2) a notice of the time, date, and place the board will consider
 3 adoption of the amendments. The board may consider adoption of amendments to
 4 the governing documents pursuant to subdivision (a) only at a meeting that is open
 5 to all members, who shall be given opportunity to make comments thereon. All
 6 deliberations of the board on any action proposed under subdivision (a) shall only
 7 be conducted in an open meeting.

8 (d) The board may not amend the governing documents pursuant to this section
 9 without the approval of a majority of a quorum of the members (Section 4070).
 10 For the purposes of this section, “quorum” means members representing more than
 11 50 percent of the voting power of the association, excluding members who own
 12 more than two separate interests in the development.

13 **Comment.** Section 4230 continues former Section 1355.5 without change, with the following
 14 exceptions: (1) The phrase “his or her” is not continued in subdivision (a). (2) The phrase “of a
 15 common interest development” has not been continued in subdivision (a). (3) The terms “board of
 16 directors” and “board of directors of the association” are replaced throughout with the defined
 17 term “board.” See Section 4085 (“board” defined). (4) The defined term “declarant” is used
 18 throughout, in place of “developer.” See Section 4130 (“declarant” defined). (5) Subdivision (b)
 19 has been revised to use numerals to number the listed items, rather than letters. (6) Subdivisions
 20 (c) and (d) are revised to use the defined term “member.” See Section 4160 (“member” defined).
 21 (7) Subdivision (c) is revised to provide for individual delivery of the specified notice. See
 22 Section 4040. (8) Subdivision (c) is revised to delete the unnecessary word “such.” (9)
 23 Subdivision (c) is revised to replace “which” with “that.” (10) Subdivision (d) is revised to use
 24 the standard term “approval of a majority of a quorum of the members.” See Section 4070. (11)
 25 The quorum rule provided in subdivision (d) is revised to make clear that a quorum is based on a
 26 majority of the voting power (excluding those who own more than two units), and not on a
 27 majority of the members. This avoids uncertainty about the calculation of a quorum when a single
 28 separate interest is owned by more than one person.

29  **Staff Note.** The quorum rule provided in proposed Section 4230(d) is revised to make clear
 30 that a quorum is based on a majority of the *voting power* (excluding those who own more than
 31 two units), and not on a majority of the *owners*. This avoids uncertainty about the calculation of a
 32 quorum when a single separate interest is owned by more than one person.

33 § 4235 (NEW). Correction of statutory cross-reference

34 4235. Notwithstanding any other provision of law or provision of the governing
 35 documents, if the governing documents include a reference to a provision of the
 36 Davis Stirling Common Interest Development Act that was repealed and continued
 37 in a new provision by the act that added this section, the board may amend the
 38 governing documents, solely to correct the cross-reference, by adopting a board
 39 resolution that shows the correction.

40 **Comment.** Section 4235 is new. It is intended to provide a simplified method to correct
 41 statutory cross-references in an association’s governing documents that are required as a result of
 42 section renumbering effected by the act that added this section. No other amendment can be made
 43 under this section.

44  **Staff Note.** Proposed Section 4235 is new. It would provide a simplified method to update
 45 statutory cross-references to reflect changes made by the proposed law. This would reduce the
 46 transitional complications resulting from the proposed recodification of the Davis-Stirling Act.

Article 2. Declaration

§ 4250 (REVISED). Content of declaration

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

(b) The declaration may contain any other matters the declarant or the members consider appropriate.

Comment. Subdivision (a) of Section 4250 continues the first two sentences of former Section 1353(a)(1) without change.

Subdivision (b) continues former Section 1353(b) without change, with the following exceptions: (1) The defined term “member” is used in place of “owner.” See Section 4160 (“member” defined). (2) The defined term “declarant” is used in place of “original signator of the declaration.” See Section 4160 (“member” defined).

Staff Note. Proposed Section 4250(b) would use the defined term “declarant” in place of “original signator of the declaration.” That would seem to be a slight substantive change, as the existing language could be read to apply only to the *original* declarant (as opposed to any successor declarant). However, the staff does not see any good policy reason to preclude a successor declarant, who may own a large percentage of the separate interests within a CID, from having a say as to what is appropriate for inclusion in the declaration. The Commission invites comment on whether the proposed change would cause any problems.

§ 4255 (REVISED). Special disclosures

4255. (a) If a common interest development is located within an airport influence area, a declaration, recorded after January 1, 2004, shall contain the following statement:

NOTICE OF AIRPORT IN VICINITY

This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

(c) For purposes of this section, an “airport influence area,” also known as an “airport referral area,” is the area in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses

1 or necessitate restrictions on those uses as determined by an airport land use
2 commission.

3 (d) If a common interest development is within the San Francisco Bay
4 Conservation and Development Commission jurisdiction, as described in Section
5 66610 of the Government Code, a declaration recorded on or after January 1,
6 2006, shall contain the following notice:

7 NOTICE OF SAN FRANCISCO BAY CONSERVATION AND
8 DEVELOPMENT COMMISSION JURISDICTION

9 This property is located within the jurisdiction of the San Francisco Bay
10 Conservation and Development Commission. Use and development of
11 property within the commission’s jurisdiction may be subject to special
12 regulations, restrictions, and permit requirements. You may wish to
13 investigate and determine whether they are acceptable to you and your
14 intended use of the property before you complete your transaction.

15 (b) The statement in a declaration acknowledging that a property is located in an
16 airport influence area or within the jurisdiction of the San Francisco Bay
17 Conservation and Development Commission does not constitute a title defect, lien,
18 or encumbrance.

19 **Comment.** Section 4255 continues all but the first two sentences of former Section 1353(a)(1)-
20 (4) without change, except that some references to “the property” have been replaced with “a
21 common interest development” to improve clarity. See also Bus. & Prof. Code § 11010
22 (disclosure of property within airport influence area); Pub. Util. Code § 21675 (designation of
23 “airport influence area” by county airport land use commission).

24 **Staff Note.** The language of proposed Section 4255 differs slightly from its source, in order
25 to make the provision a stand-alone section. The changes are nonsubstantive.

26 **§ 4260 (REVISED). Amendment authorized**

27 4260. Except to the extent that a declaration provides by its express terms that it
28 is not amendable, in whole or in part, a declaration that fails to include provisions
29 permitting its amendment at all times during its existence may be amended at any
30 time.

31 **Comment.** Section 4260 continues the first sentence of former Section 1355(b) without
32 change, except “which” is replaced with “that.”

33 **Staff Note.** Proposed Section 4260 continues the authority to amend a declaration that is
34 silent as to whether it may be amended, but does not continue the procedure specified for doing
35 so. Instead, the amendment would be made using the general procedure for amending a
36 declaration, which is provided in proposed Section 4270.

37 **§ 4265 (REVISED). Amendment to extend term of declaration authorized**

38 4265. (a) The Legislature finds that there are common interest developments that
39 have been created with deed restrictions which do not provide a means for the

1 members to extend the term of the declaration. The Legislature further finds that
2 covenants and restrictions, contained in the declaration, are an appropriate method
3 for protecting the common plan of developments and to provide for a mechanism
4 for financial support for the upkeep of common area including, but not limited to,
5 roofs, roads, heating systems, and recreational facilities. If declarations terminate
6 prematurely, common interest developments may deteriorate and the housing
7 supply of affordable units could be impacted adversely. The Legislature further
8 finds and declares that it is in the public interest to provide a vehicle for extending
9 the term of the declaration if members having more than 50 percent of the votes in
10 the association choose to do so.

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

14 (c) No single extension of the terms of the declaration made pursuant to this
15 section shall exceed the initial term of the declaration or 20 years, whichever is
16 less. However, more than one extension may occur pursuant to this section.

17 **Comment.** Subdivision (a) of Section 4265 continues former Section 1357(a) without change,
18 except that the defined term “member” is used and a reference to “common areas” is singularized.
19 See Section 4160 (“member” defined).

20 Subdivision (b) restates part of the substance of Section 1357(b), authorizing extension of the
21 termination date of a declaration that does not provide for extension of the termination date.

22 The procedure for extension of the termination date provided in former Section 1357(b)-(c) is
23 not continued. An extension would instead be made pursuant to the general procedure for
24 amendment of a declaration. See Section 4270.

25 Subdivision (c) continues former Section 1357(d) without change.

26 **Staff Note.** Proposed Section 4265 continues the authority to amend a declaration to extend
27 its term, but does not continue the procedure specified for doing so. Instead, the extension would
28 be made using the general procedure for amending a declaration, which is provided in proposed
29 Section 4270.

30 **§ 4270 (REVISED). Amendment procedure**

31 4270. (a) A declaration may be amended pursuant to the governing documents
32 or this part. Except as provided in Section 4275, an amendment is effective after
33 (1) the approval of the percentage of members required by the governing
34 documents has been given, (2) that fact has been certified in a writing executed
35 and acknowledged by the officer designated in the declaration or by the
36 association for that purpose, or if no one is designated, by the president of the
37 association, and (3) that writing has been recorded in each county in which a
38 portion of the common interest development is located.

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

42 **Comment.** Subdivision (a) of Section 4270 continues former Section 1355(a) without change,
43 except that the first word is replaced with “a,” “title” is replaced with “part,” and the defined term
44 “member” is used. See Section 4160 (“member” defined).

1 Subdivision (b) generalizes a rule stated in former Sections 1355(b) and 1357.

2 **Staff Note.** Proposed Section 4270(b) would provide a default rule on member approval of an
3 amendment where the governing documents are silent on the matter. That rule is drawn from
4 Sections 1355(b) and 1357.

5 **§ 4275 (REVISED). Judicial authorization of amendment**

6 4275. (a) If in order to amend a declaration, the declaration requires members
7 having more than 50 percent of the votes in the association, in a single class voting
8 structure, or members having more than 50 percent of the votes in more than one
9 class in a voting structure with more than one class, to vote in favor of the
10 amendment, the association, or any member, may petition the superior court of the
11 county in which the common interest development is located for an order reducing
12 the percentage of the affirmative votes necessary for such an amendment. The
13 petition shall describe the effort that has been made to solicit approval of the
14 association members in the manner provided in the declaration, the number of
15 affirmative and negative votes actually received, the number or percentage of
16 affirmative votes required to effect the amendment in accordance with the existing
17 declaration, and other matters the petitioner considers relevant to the court's
18 determination. The petition shall also contain, as exhibits thereto, copies of all of
19 the following:

20 (1) The governing documents.

21 (2) A complete text of the amendment.

22 (3) Copies of any notice and solicitation materials utilized in the solicitation of
23 member approvals.

24 (4) A short explanation of the reason for the amendment.

25 (5) Any other documentation relevant to the court's determination.

26 (b) Upon filing the petition, the court shall set the matter for hearing and issue
27 an ex parte order setting forth the manner in which notice shall be given.

28 (c) The court may, but shall not be required to, grant the petition if it finds all of
29 the following:

30 (1) The petitioner has given not less than 15 days written notice of the court
31 hearing to all members of the association, to any mortgagee of a mortgage or
32 beneficiary of a deed of trust who is entitled to notice under the terms of the
33 declaration, and to the city, county, or city and county in which the common
34 interest development is located that is entitled to notice under the terms of the
35 declaration.

36 (2) Balloting on the proposed amendment was conducted in accordance with all
37 applicable provisions of the governing documents.

38 (3) A reasonably diligent effort was made to permit all eligible members to vote
39 on the proposed amendment.

40 (4) Members having more than 50 percent of the votes, in a single class voting
41 structure, voted in favor of the amendment. In a voting structure with more than
42 one class, where the declaration requires a majority of more than one class to vote

1 in favor of the amendment, members having more than 50 percent of the votes of
2 each class required by the declaration to vote in favor of the amendment voted in
3 favor of the amendment.

4 (5) The amendment is reasonable.

5 (6) Granting the petition is not improper for any reason stated in subdivision (e).

6 (d) If the court makes the findings required by subdivision (c), any order issued
7 pursuant to this section may confirm the amendment as being validly approved on
8 the basis of the affirmative votes actually received during the balloting period or
9 the order may dispense with any requirement relating to quorums or to the number
10 or percentage of votes needed for approval of the amendment that would otherwise
11 exist under the governing documents.

12 (e) Subdivisions (a) to (d), inclusive, notwithstanding, the court shall not be
13 empowered by this section to approve any amendment to the declaration that:

14 (1) Would change provisions in the declaration requiring the approval of
15 members having more than 50 percent of the votes in more than one class to vote
16 in favor of an amendment, unless members having more than 50 percent of the
17 votes in each affected class approved the amendment.

18 (2) Would eliminate any special rights, preferences, or privileges designated in
19 the declaration as belonging to the declarant, without the consent of the declarant.

20 (3) Would impair the security interest of a mortgagee of a mortgage or the
21 beneficiary of a deed of trust without the approval of the percentage of the
22 mortgagees and beneficiaries specified in the declaration, if the declaration
23 requires the approval of a specified percentage of the mortgagees and
24 beneficiaries.

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

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

38 **Comment.** Section 4275 continues former Section 1356 without change, except that
39 subdivision (g) is revised to specify the procedure for individual delivery of notice and to use the
40 defined term “member.” See Section 4160 (“member” defined).

41 An incorporated association may also petition the court under Corporations Code Section 7511
42 with respect to actions governed by that provision.

1 **Staff Note.** Proposed Section 4275(g) is reworded to incorporate the “individual notice”
2 delivery method.

3 Article 3. Articles of Incorporation

4 **§ 4280 (UNCHANGED). Content of articles**

5 4280. (a) The articles of incorporation of a common interest development
6 association filed with the Secretary of State on or after January 1, 1995, shall
7 include a statement, which shall be in addition to the statement of purposes of the
8 corporation, that does all of the following:

9 (1) Identifies the corporation as an association formed to manage a common
10 interest development under the Davis-Stirling Common Interest Development Act.

11 (2) States the business or corporate office of the association, if any, and, if the
12 office is not on the site of the common interest development, states the nine-digit
13 ZIP Code, front street, and nearest cross street for the physical location of the
14 common interest development.

15 (3) States the name and address of the association’s managing agent, if any.

16 (b) The statement of principal business activity contained in the annual
17 statement filed by an incorporated association with the Secretary of State pursuant
18 to Section 1502 of the Corporations Code shall also contain the statement
19 specified in subdivision (a).

20 **Comment.** Section 4280 continues former Section 1363.5 without change, except that a cross-
21 reference to the definition of “managing agent” has not been continued. See Section 4155
22 (“managing agent”).

23 See also Corp. Code §§ 1502 (annual statement), 7130-7135 (content of articles of
24 incorporation), 7810-7820 (amendment of articles of incorporation), 7150-7153 (content and
25 amendment of bylaws).

26 Article 4. Condominium Plan

27 **§ 4290 (REVISED). Recordation of condominium plan**

28 4290. (a) The certificate consenting to the recordation of a condominium plan
29 that is required by subdivision (c) of Section 4120 shall be signed and
30 acknowledged by all of the following persons:

31 (1) The record owner of fee title to that property included in the condominium
32 project.

33 (2) In the case of a condominium project that will terminate upon the
34 termination of an estate for years, by all lessors and lessees of the estate for years.

35 (3) In the case of a condominium project subject to a life estate, by all life
36 tenants and remainder interests.

37 (4) The trustee or the beneficiary of each recorded deed of trust, and the
38 mortgagee of each recorded mortgage encumbering the property.

39 (b) Owners of mineral rights, easements, rights-of-way, and other nonpossessory
40 interests do not need to sign the certificate.

1 (c) In the event a conversion to condominiums of a community apartment
2 project or stock cooperative has been approved by the required number of owners,
3 trustees, beneficiaries, and mortgagees pursuant to Section 66452.10 of the
4 Government Code, the certificate need only be signed by those owners, trustees,
5 beneficiaries, and mortgagees approving the conversion.

6 **Comment.** Section 4290 restates former Section 1351(e)(3) without substantive change, except
7 that the last paragraph of (e)(3) is not continued in this section and a cross-reference to Section
8 4120(c) is added to the first paragraph.

9 **Staff Note.** Proposed Section 4290 would restate the procedural provisions of existing
10 Section 1351(e). Doing so necessitates a number of minor nonsubstantive language revisions.

11 **§ 4295 (REVISED). Amendment or revocation of condominium plan**

12 4295. A condominium plan may be amended or revoked by a recorded
13 instrument that is acknowledged and signed by all the persons who, at the time of
14 amendment or revocation, are the types of persons whose signatures are required
15 under Section 4290.

16 **Comment.** Section 4295 continues the last paragraph of former Section 1351(e) without
17 change, except that language is added to make clear that the persons whose signatures are
18 required for amendment or revocation of a condominium plan are the persons who fall within the
19 groups described in Section 4290 at the time of amendment or revocation.

20 **Staff Note.** Proposed Section 4295 is revised to make its meaning more clear, as described in
21 the Comment following the section.

22 **Article 5. Operating Rules**

23 **§ 4350 (UNCHANGED). Requirements for validity and enforceability**

24 4350. An operating rule is valid and enforceable only if all of the following
25 requirements are satisfied:

- 26 (a) The rule is in writing.
- 27 (b) The rule is within the authority of the board conferred by law or by the
28 declaration, articles of incorporation or association, or bylaws of the association.
- 29 (c) The rule is not inconsistent with governing law and the declaration, articles
30 of incorporation or association, and bylaws of the association.
- 31 (d) The rule is adopted, amended, or repealed in good faith and in substantial
32 compliance with the requirements of this article.
- 33 (e) The rule is reasonable.

34 **Comment.** Section 4350 continues former Section 1357.110 without change, except that the
35 term “board of directors of the association” has been replaced with the defined term “board.” See
36 Section 4085 (“board” defined).

37 **§ 4355 (UNCHANGED). Application of rulemaking procedures**

38 4355. (a) Sections 4360 and 4365 only apply to an operating rule that relates to
39 one or more of the following subjects:

- 40 (1) Use of the common area or of an exclusive use common area.

1 (2) Use of a separate interest, including any aesthetic or architectural standards
2 that govern alteration of a separate interest.

3 (3) Member discipline, including any schedule of monetary penalties for
4 violation of the governing documents and any procedure for the imposition of
5 penalties.

6 (4) Any standards for delinquent assessment payment plans.

7 (5) Any procedures adopted by the association for resolution of disputes.

8 (6) Any procedures for reviewing and approving or disapproving a proposed
9 physical change to a member's separate interest or to the common area.

10 (7) Procedures for elections.

11 (b) Sections 4360 and 4365 do not apply to the following actions by the board:

12 (1) A decision regarding maintenance of the common area.

13 (2) A decision on a specific matter that is not intended to apply generally.

14 (3) A decision setting the amount of a regular or special assessment.

15 (4) A rule change that is required by law, if the board has no discretion as to the
16 substantive effect of the rule change.

17 (5) Issuance of a document that merely repeats existing law or the governing
18 documents.

19 **Comment.** Section 4355 continues former Section 1357.120 without change, except that the
20 terms "board of directors" and "board of directors of the association" have been replaced with
21 the defined term "board." See Section 4085 ("board" defined).

22 **§ 4360 (UNCHANGED). Approval of rule change by board**

23 4360. (a) The board shall provide general notice (Section 4045) of a proposed
24 rule change to the members at least 30 days before making the rule change. The
25 notice shall include the text of the proposed rule change and a description of the
26 purpose and effect of the proposed rule change. Notice is not required under this
27 subdivision if the board determines that an immediate rule change is necessary to
28 address an imminent threat to public health or safety or imminent risk of
29 substantial economic loss to the association.

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

32 (c) As soon as possible after making a rule change, but not more than 15 days
33 after making the rule change, the board shall deliver general notice (Section 4045)
34 of the rule change. If the rule change was an emergency rule change made under
35 subdivision (d), the notice shall include the text of the rule change, a description of
36 the purpose and effect of the rule change, and the date that the rule change expires.

37 (d) If the board determines that an immediate rule change is required to address
38 an imminent threat to public health or safety, or an imminent risk of substantial
39 economic loss to the association, it may make an emergency rule change; and no
40 notice is required, as specified in subdivision (a). An emergency rule change is
41 effective for 120 days, unless the rule change provides for a shorter effective

1 period. A rule change made under this subdivision may not be readopted under
2 this subdivision.

3 **Comment.** Section 4360 restates former Section 1357.130 without change, except that (1) the
4 term “board of directors” has been replaced throughout with the defined term “board,” (2) the
5 term “meeting of the board of directors” has been replaced with the defined term “board
6 meeting,” and (3) the reference to former Section 1357.130(e) is replaced with references to the
7 provision governing general notice. Delivery of “general notice” under Section 4045 preserves
8 most of the substance of former law governing delivery of notice under this section, except that
9 Section 4045 permits the posting of notices, and requires that individual notice delivery methods
10 be used for a member who has requested that form of delivery. *Cf.* former Section 1350.7. See
11 also Sections 4085 (“board” defined), 4090 (“board meeting” defined).

12 **§ 4365 (REVISED). Reversal of rule change by members**

13 4365. (a) Members of an association owning five percent or more of the separate
14 interests may call a special meeting of the members to reverse a rule change.

15 (b) A special meeting of the members may be called by delivering a written
16 request to the president or secretary of the board, after which the board shall
17 deliver individual notice (Section 4040) of the meeting to the association’s
18 members and hold the meeting in conformity with Section 7511 of the
19 Corporations Code. The written request may not be delivered more than 30 days
20 after the members of the association are notified of the rule change. Members are
21 deemed to have been notified of a rule change on delivery of notice of the rule
22 change, or on enforcement of the resulting rule, whichever is sooner.

23 (c) For the purposes of Section 8330 of the Corporations Code, collection of
24 signatures to call a special meeting under this section is a purpose reasonably
25 related to the interests of the members of the association. A member request to
26 copy or inspect the membership list solely for that purpose may not be denied on
27 the grounds that the purpose is not reasonably related to the member’s interests as
28 a member.

29 (d) The rule change may be reversed by the affirmative vote of a majority of a
30 quorum of the members (Section 4070), or if the declaration or bylaws require a
31 greater proportion, by the affirmative vote or written ballot of the proportion
32 required. In lieu of calling the meeting described in this section, the board may
33 distribute a written ballot pursuant to Article 4 (commencing with Section 5100)
34 of Chapter 5.

35 (e) Unless otherwise provided in the declaration or bylaws, for the purposes of
36 this section, a member may cast one vote per separate interest owned.

37 (f) A meeting called under this section is governed by Chapter 5 (commencing
38 with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and
39 7613 of, the Corporations Code.

40 (g) A rule change reversed under this section may not be readopted for one year
41 after the date of the meeting reversing the rule change. Nothing in this section
42 precludes the board from adopting a different rule on the same subject as the rule
43 change that has been reversed.

1 (h) As soon as possible after the close of voting, but not more than 15 days after
2 the close of voting, the board shall provide general notice (Section 4045) of the
3 results of the member vote.

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

6 **Comment.** Section 4365 continues former Section 1357.140 without change, except for the
7 following changes: (1) Cross-references are updated to reflect the new location of referenced
8 provisions. (2) A reference to former Section 1350.7 is replaced with a reference to the provision
9 governing general notice (Section 4045). (3) A reference to voting pursuant to Corporations Code
10 Section 7513 has been replaced with a reference to the voting provisions of this part. (4) The term
11 “member” is used in place of “member of the association.” (5) the term “board” is used in place
12 of “board of directors.” See Sections 4085 (“board” defined), 4160 (“member” defined).

13 **Staff Note.** Proposed Section 4365(d) replaces a reference to the distribution of ballots under
14 Corporations Code Section 7513 with a reference to the member election provisions of this part.

15 **§ 4370 (UNCHANGED). Applicability of article to changes commenced before and after**
16 **January 1, 2004**

17 4370. (a) This article applies to a rule change commenced on or after January 1,
18 2004.

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

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

23 **Comment.** Section 4370 continues former Section 1357.150 without change, except that the
24 term “board of directors of the association” has been replaced with the defined term “board.” See
25 Section 4085 (“board” defined). See Section 4180 (“rule change”).

26 **CHAPTER 3. OWNERSHIP AND TRANSFER OF INTERESTS**

27 **Article 1. Ownership Rights and Interests**

28 **§ 4500 (UNCHANGED). Ownership of common area**

29 4500. Unless the declaration otherwise provides, in a condominium project, or in
30 a planned development in which the common area is owned by the owners of the
31 separate interests, the common area is owned as tenants in common, in equal
32 shares, one for each unit or lot.

33 **Comment.** Section 4500 restates former Section 1362 without change, except that the
34 references to “common areas” are singularized.

35 **§ 4505 (UNCHANGED). Appurtenant rights and easements**

36 4505. Unless the declaration otherwise provides:

37 (a) In a community apartment project and condominium project, and in those
38 planned developments with common area owned in common by the owners of the
39 separate interests, there are appurtenant to each separate interest nonexclusive

1 rights of ingress, egress, and support, if necessary, through the common area. The
2 common area is subject to these rights.

3 (b) In a stock cooperative, and in a planned development with common area
4 owned by the association, there is an easement for ingress, egress, and support, if
5 necessary, appurtenant to each separate interest. The common area is subject to
6 these easements.

7 **Comment.** Section 4505 restates former Section 1361 without change, except that the
8 references to “common areas” are singularized.

9 **§ 4510 (REVISED). Access to separate interest property**

10 4510. Except as otherwise provided in law, an order of the court, or an order
11 pursuant to a final and binding arbitration decision, an association may not deny a
12 member or occupant physical access to the member’s or occupant’s separate
13 interest, either by restricting access through the common area to the separate
14 interest, or by restricting access solely to the separate interest.

15 **Comment.** Section 4510 continues former Section 1361.5 without change, with the following
16 exceptions: (1) The phrase “his or her” has been replaced with “the member’s or occupant’s.” (2)
17 References to the “owner’s” separate interest have been revised to omit the word “owner’s.” This
18 will help to avoid any implication that the reference does not also apply to an “occupant” of a
19 separate interest. (3) The defined term “member” is used in place of “owner” throughout. See
20 Section 4160 (“member” defined). (4) The references to “common areas” is singularized.

21  **Staff Note.** Although it is clear that Section 1361.5 is intended to protect both owners and
22 occupants of separate interests, that section twice refers to the “owner’s separate interest,”
23 without any reference to an occupant. That could create the impression that the Legislature
24 intended to draw some sort of distinction between owners and occupants, which the staff does not
25 believe to be the case. Proposed Section 4510 would adjust the language of Section 1361.5 to
26 avoid that implication. Note also that the defined term “member” is used in place of “owner”
27 throughout.

28 **Article 2. Transfer Disclosure**

29 **§ 4525 (REVISED). Disclosure to prospective purchaser**

30 4525. As soon as practicable before the transfer of title to a separate interest or
31 the execution of a real property sales contract for a separate interest, as defined in
32 Section 2985, the owner of the separate interest, other than an owner subject to the
33 requirements of Section 11018.6 of the Business and Professions Code, shall
34 provide the following documents to the prospective purchaser:

35 (a) A copy of all governing documents. If the association is not incorporated,
36 this shall include a statement in writing from an authorized representative of the
37 association that the association is not incorporated.

38 (b) If there is a restriction in the governing documents limiting the occupancy,
39 residency, or use of a separate interest on the basis of age in a manner different
40 from that provided in Section 51.3, a statement that the restriction is only
41 enforceable to the extent permitted by Section 51.3 and a statement specifying the
42 applicable provisions of Section 51.3.

1 (c) A copy of the most recent documents distributed pursuant to Article 7
2 (commencing with Section 5300) of Chapter 5.

3 (d) A true statement in writing obtained from an authorized representative of the
4 association as to the amount of the association's current regular and special
5 assessments and fees, any assessments levied upon the owner's interest in the
6 common interest development that are unpaid on the date of the statement, and any
7 monetary fines or penalties levied upon the owner's interest and unpaid on the
8 date of the statement. The statement obtained from an authorized representative
9 shall also include true information on late charges, interest, and costs of collection
10 which, as of the date of the statement, are or may be made a lien upon the owner's
11 interest in a common interest development pursuant to Article 5 (commencing
12 with Section 5650) of Chapter 6.

13 (e) A copy or a summary of any notice previously sent to the owner pursuant to
14 Section 5855 that sets forth any alleged violation of the governing documents that
15 remains unresolved at the time of the request. The notice shall not be deemed a
16 waiver of the association's right to enforce the governing documents against the
17 owner or the prospective purchaser of the separate interest with respect to any
18 violation. This paragraph shall not be construed to require an association to inspect
19 an owner's separate interest.

20 (f) A copy of the preliminary list of defects provided to each member pursuant
21 to Section 6000, unless the association and the builder subsequently enter into a
22 settlement agreement or otherwise resolve the matter and the association complies
23 with Section 6100. Disclosure of the preliminary list of defects pursuant to this
24 paragraph does not waive any privilege attached to the document. The preliminary
25 list of defects shall also include a statement that a final determination as to
26 whether the list of defects is accurate and complete has not been made.

27 (g) A copy of the latest information provided for in Section 6100.

28 (h) Any change in the association's current regular and special assessments and
29 fees which have been approved by the board, but have not become due and
30 payable as of the date disclosure is provided pursuant to this subdivision.

31 **Comment.** The introductory clause of Section 4525 restates the substance of former Section
32 1368(a) without change.

33 Subdivisions (a)-(h) continue paragraphs (1) to (8) of subdivision (a) of former Section 1368
34 without change, with the following exceptions: (1) Cross-references are updated to reflect the
35 new location of the referenced provisions. (2) The term "association's board of directors" has
36 been replaced with the defined term "board." See Section 4085 ("board" defined). (3) Subdivision
37 (a) is revised to make clear that all governing documents must be provided. See Section 4150
38 ("governing documents"). (4) The term "member" is used in place of "member of the
39 association." See Section 4160 ("member" defined).

40 Former Section 1368(g) has not been continued. It provided that a community association
41 manager is an agent for the purposes of general agency law. That provision was superfluous and
42 included an erroneous cross-reference. There is no need to state the application of general agency
43 law to a common interest development.

44 **Staff Note.** The first paragraph of proposed Section 4525 restates the first paragraph of
45 Section 1368(a), to improve its clarity.

1 Subdivision (d) replaces the existing reference to “Section 1367 or 1367.1” with a reference to
2 “Article 5 (commencing with Section 5650) of Chapter 6.” That reference encompasses all of the
3 provisions of former Sections 1367 and 1367.1 under which assessment debt and related charges
4 “may be made a lien.”

5 The proposed law would not continue existing Section 1368(g). That provision is unnecessary.

6 **§ 4530 (UNCHANGED). Information to be provided by association**

7 4530. (a) Upon written request, an association shall, within 10 days of the
8 mailing or delivery of the request, provide the owner of a separate interest with a
9 copy of the requested items specified in Section 4525.

10 (b) The items required to be made available pursuant to this section may be
11 maintained in electronic form and requesting parties shall have the option of
12 receiving them by electronic transmission or machine readable storage media if
13 the association maintains these items in electronic form.

14 (c) The association may charge a reasonable fee for this service based upon the
15 association’s actual cost to procure, prepare, and reproduce the requested items.

16 **Comment.** Section 4530 continues former Section 1368(b) without change, except that
17 subdivisions are added and a cross-reference is updated to reflect the location of the referenced
18 provision.

19 **§ 4535 (UNCHANGED). Related requirements**

20 4535. In addition to the requirements of this article, an owner transferring title to
21 a separate interest shall comply with applicable requirements of Sections 1133 and
22 1134.

23 **Comment.** Section 4535 restates former Section 1368(f) without change, except that “section”
24 is replaced with “article” to reflect the fact that former Section 1368 is continued in this article.

25 **§ 4540 (UNCHANGED). Enforcement of article**

26 4540. Any person or entity who willfully violates this article is liable to the
27 purchaser of a separate interest that is subject to this section for actual damages
28 occasioned thereby and, in addition, shall pay a civil penalty in an amount not to
29 exceed five hundred dollars (\$500). In an action to enforce this liability, the
30 prevailing party shall be awarded reasonable attorney’s fees.

31 **Comment.** Section 4540 restates former Section 1368(d) without change, except that “section”
32 is replaced with “article.”

33 **§ 4545 (UNCHANGED). Validity of title unaffected**

34 4545. Nothing in this article affects the validity of title to real property
35 transferred in violation of this article.

36 **Comment.** Section 4545 restates former Section 1368(e) without change, except that “section”
37 is replaced with “article.”

1

Article 3. Transfer Fee

2 **§ 4575 (UNCHANGED). Transfer fee**

3 4575. Subject to the provisions of Section 4580, neither an association nor a
4 community service organization or similar entity may impose or collect any
5 assessment, penalty, or fee in connection with a transfer of title or any other
6 interest except for the following:

- 7 (a) An amount not to exceed the association's actual costs to change its records.
- 8 (b) An amount authorized by Section 4530.

9 **Comment.** Section 4575 continues former Section 1368(c)(1) without change, except that
10 cross-references are updated to reflect the location of the referenced provisions.

11 **§ 4580 (REVISED). Exemption from transfer fee limitations**

12 4580. Section 4575 does not apply to a community service organization or
13 similar entity of either of the following types:

- 14 (a) An entity that satisfies both of the following conditions:
 - 15 (1) It was established before February 20, 2003.
 - 16 (2) It exists and operates, in whole or in part, to fund or perform environmental
17 mitigation or to restore or maintain wetlands or native habitat, as required by the
18 state or local government as an express written condition of development.
- 19 (b) An entity that satisfies all of the following conditions:
 - 20 (1) It is not an entity described by subdivision (a).
 - 21 (2) It was established and received a transfer fee before January 1, 2004.
 - 22 (3) On and after January 1, 2006, it offers a purchaser the following payment
23 options for the fee or charge it collects at time of transfer:
 - 24 (A) Paying the fee or charge at the time of transfer.
 - 25 (B) Paying the fee or charge pursuant to an installment payment plan for a
26 period of not less than seven years. If the purchaser elects to pay the fee or charge
27 in installment payments, the community service organization or similar entity may
28 also collect additional amounts that do not exceed the actual costs for billing and
29 financing on the amount owed. If the purchaser sells the separate interest before
30 the end of the installment payment plan period, the purchaser shall pay the
31 remaining balance before the transfer.

32 **Comment.** Section 4580 restates former Section 1368(c)(2) without substantive change.

33 **Staff Note.** Proposed Section 4580 would restate Section 1368(c)(2) to make it more
34 understandable.

35

Article 4. Restrictions on Transfers

36 **§ 4600 (REVISED). Grant of exclusive use**

37 4600. (a) Unless the governing documents specify a different percentage, the
38 affirmative vote of members owning at least 67 percent of the separate interests in

1 the common interest development shall be required before the board may grant
2 exclusive use of any portion of the common area to a member.

3 (b) Subdivision (a) does not apply to the following actions:

4 (1) A reconveyance of all or any portion of that common area to the subdivider
5 to enable the continuation of development that is in substantial conformance with
6 a detailed plan of phased development submitted to the Real Estate Commissioner
7 with the application for a public report.

8 (2) Any grant of exclusive use that is in substantial conformance with a detailed
9 plan of phased development submitted to the Real Estate Commissioner with the
10 application for a public report or in accordance with the governing documents
11 approved by the Real Estate Commissioner.

12 (3) Any grant of exclusive use that is for any of the following reasons:

13 (A) To eliminate or correct engineering errors in documents recorded with the
14 county recorder or on file with a public agency or utility company.

15 (B) To eliminate or correct encroachments due to errors in construction of any
16 improvements.

17 (C) To permit changes in the plan of development submitted to the Real Estate
18 Commissioner in circumstances where the changes are the result of topography,
19 obstruction, hardship, aesthetic considerations, or environmental conditions.

20 (D) To fulfill the requirement of a public agency.

21 (E) To transfer the burden of management and maintenance of any common area
22 that is generally inaccessible and not of general use to the membership at large of
23 the association.

24 (c) Any measure placed before the members requesting that the board grant
25 exclusive use of any portion of the common area shall specify whether the
26 association will receive any monetary consideration for the grant and whether the
27 association or the transferee will be responsible for providing any insurance
28 coverage for exclusive use of the common area.

29 **Comment.** Section 4600 restates former Section 1363.07 without change, with the following
30 exceptions: (1) The section is no longer limited in its application to a common area that the
31 association owns or in which the association has an easement right. It now also applies to
32 common area that is owned by the members as tenants in common. (2) An introductory clause is
33 added in subdivision (b), to introduce the list of exceptions. (3) The substance of former
34 subdivision (a)(3)(F) is continued in Section 4025. (4) The term “board of directors” has been
35 replaced throughout with the defined term “board.” See Section 4085 (“board” defined).

36 **Staff Note.** Proposed Section 4600 is revised to expand its scope, improve its organization,
37 and to relocate an exemption for nonresidential CIDs (to proposed Section 4025).

38 **§ 4605 (REVISED). Civil action to enforce Section 4600**

39 4605. (a) A member of an association may bring a civil action for declaratory or
40 equitable relief for a violation of Section 4600 by the association, including, but
41 not limited to, injunctive relief, restitution, or a combination thereof, within one
42 year of the date the cause of action accrues.

1 (b) A member who prevails in a civil action to enforce the member’s rights
2 pursuant to Section 4600 shall be entitled to reasonable attorney’s fees and court
3 costs, and the court may impose a civil penalty of up to five hundred dollars
4 (\$500) for each violation, except that each identical violation shall be subject to
5 only one penalty if the violation affects each member equally. A prevailing
6 association shall not recover any costs, unless the court finds the action to be
7 frivolous, unreasonable, or without foundation.

8 **Comment.** Section 4605 restates former Section 1363.09(a)-(b) without change, with the
9 following exceptions: (1) The phrase “an association of which he or she is a member” has been
10 replaced with “the association.” (2) “This article” has been replaced with “Section 4600.” (3) The
11 phrase “his or her” has been replaced with “the member’s.” (4) The second sentence of former
12 Section 1363.09(a) has not been continued because it is irrelevant to judicial enforcement of this
13 article. (5) The term “member” is used in place of “member of the association.” See Section 4160
14 (“member” defined).

15 **Staff Note.** Proposed Section 4605 would generally continue the judicial enforcement
16 provisions of existing Section 1363.09 as they apply to existing Section 1363.07, but it would not
17 continue provisions specific to member elections (the second sentence of Section 1363.09(a), and
18 all of subdivision (c)).

19 **§ 4610 (REVISED). Partition of condominium project**

20 4610. (a) Except as provided in this section, the common area in a condominium
21 project shall remain undivided, and there shall be no judicial partition thereof.
22 Nothing in this section shall be deemed to prohibit partition of a cotenancy in a
23 condominium.

24 (b) The owner of a separate interest in a condominium project may maintain a
25 partition action as to the entire project as if the owners of all of the separate
26 interests in the project were tenants in common in the entire project in the same
27 proportion as their interests in the common area. The court shall order partition
28 under this subdivision only by sale of the entire condominium project and only
29 upon a showing of one of the following:

30 (1) More than three years before the filing of the action, the condominium
31 project was damaged or destroyed, so that a material part was rendered unfit for its
32 prior use, and the condominium project has not been rebuilt or repaired
33 substantially to its state prior to the damage or destruction.

34 (2) Three-fourths or more of the project is destroyed or substantially damaged
35 and owners of separate interests holding in the aggregate more than a 50-percent
36 interest in the common area oppose repair or restoration of the project.

37 (3) The project has been in existence more than 50 years, is obsolete and
38 uneconomic, and owners of separate interests holding in the aggregate more than a
39 50-percent interest in the common area oppose repair or restoration of the project.

40 (4) Any conditions in the declaration for sale under the circumstances described
41 in this subdivision have been met.

42 **Comment.** Section 4610 continues former Section 1359 without change, except that references
43 to “common areas” are singularized and subdivision (b)(4) is rephrased to avoid use of “such.”

1 **Staff Note.** Proposed Section 4610(b)(4) would rephrase Section 1359(b)(4) to avoid use of
2 the word “such,” which is strongly disfavored in statutory drafting. The Commission invites
3 comment on whether the rephrasing would cause any substantive change in the meaning of the
4 provision.

5 **§ 4615 (UNCHANGED). Lien for work performed in condominium project**

6 4615. (a) In a condominium project, no labor performed or services or materials
7 furnished with the consent of, or at the request of, an owner in the condominium
8 project or the owners’ agent or contractor shall be the basis for the filing of a lien
9 against any other property of any other owner in the condominium project unless
10 that other owner has expressly consented to or requested the performance of the
11 labor or furnishing of the materials or services. However, express consent shall be
12 deemed to have been given by the owner of any condominium in the case of
13 emergency repairs thereto.

14 (b) Labor performed or services or materials furnished for the common area, if
15 duly authorized by the association, shall be deemed to be performed or furnished
16 with the express consent of each condominium owner.

17 (c) The owner of any condominium may remove that owner’s condominium
18 from a lien against two or more condominiums or any part thereof by payment to
19 the holder of the lien of the fraction of the total sum secured by the lien that is
20 attributable to the owner’s condominium.

21 **Comment.** Section 4615 continues former Section 1369 without change, except for the
22 following changes: (1) Subdivisions are added. (2) The phrase “his or her” is replaced with
23 references to the owner throughout. (3) A reference to “common areas” is singularized. (4) The
24 word “which” is replaced with “that” in subdivision (c).

25 **Article 5. Transfer of Separate Interest**

26 **§ 4625 (UNCHANGED). Community apartment project**

27 4625. In a community apartment project, any conveyance, judicial sale, or other
28 voluntary or involuntary transfer of the separate interest includes the undivided
29 interest in the community apartment project. Any conveyance, judicial sale, or
30 other voluntary or involuntary transfer of the owner’s entire estate also includes
31 the owner’s membership interest in the association.

32 **Comment.** Section 4625 continues former Section 1358(a) without change.

33 **§ 4630 (UNCHANGED). Condominium project**

34 4630. In a condominium project the common area is not subject to partition,
35 except as provided in Section 4610. Any conveyance, judicial sale, or other
36 voluntary or involuntary transfer of the separate interest includes the undivided
37 interest in the common area. Any conveyance, judicial sale, or other voluntary or
38 involuntary transfer of the owner’s entire estate also includes the owner’s
39 membership interest in the association.

1 **Comment.** Section 4630 continues former Section 1358(b) without change, except that the
2 cross-reference is updated to reflect the new location of the referenced provision and references to
3 “common areas” are singularized.

4 **§ 4635 (UNCHANGED). Planned development**

5 4635. In a planned development, any conveyance, judicial sale, or other
6 voluntary or involuntary transfer of the separate interest includes the undivided
7 interest in the common area, if any exists. Any conveyance, judicial sale, or other
8 voluntary or involuntary transfer of the owner’s entire estate also includes the
9 owner’s membership interest in the association.

10 **Comment.** Section 4635 continues former Section 1358(c) without change, except that a
11 reference to “common areas” is singularized.

12 **§ 4640 (UNCHANGED). Stock cooperative**

13 4640. In a stock cooperative, any conveyance, judicial sale, or other voluntary or
14 involuntary transfer of the separate interest includes the ownership interest in the
15 corporation, however evidenced. Any conveyance, judicial sale, or other voluntary
16 or involuntary transfer of the owner’s entire estate also includes the owner’s
17 membership interest in the association.

18 **Comment.** Section 4640 continues former Section 1358(d) without change.

19 **§ 4645 (UNCHANGED). Transfer of exclusive use common area**

20 4645. Nothing in this article prohibits the transfer of exclusive use areas,
21 independent of any other interest in a common interest subdivision, if
22 authorization to separately transfer exclusive use areas is expressly stated in the
23 declaration and the transfer occurs in accordance with the terms of the declaration.

24 **Comment.** Section 4645 continues the next to last paragraph of former Section 1358 without
25 change, except that “section” is replaced with “article.”

26 **§ 4650 (UNCHANGED). Severability of interests**

27 4650. Any restrictions upon the severability of the component interests in real
28 property which are contained in the declaration shall not be deemed conditions
29 repugnant to the interest created within the meaning of Section 711. However,
30 these restrictions shall not extend beyond the period in which the right to partition
31 a project is suspended under Section 4610.

32 **Comment.** Section 4650 continues the last paragraph of former Section 1358 without change,
33 with the following exceptions: (1) A superfluous reference to the “Civil Code” is omitted. (2) The
34 cross-reference is updated to reflect the new location of the referenced provision.

1 CHAPTER 4. PROPERTY USE AND MAINTENANCE

2 Article 1. Use of Separate Interest

3 § 4700 (NEW). Application of article

4 4700. This article includes provisions that limit the authority of an association to
5 regulate the use of a member’s separate interest. Nothing in this article is intended
6 to affect the application of any other provision that limits the authority of an
7 association to regulate the use of a member’s separate interest, including, but not
8 limited to, the following provisions:

9 (a) Sections 712 and 713, relating to the display of signs.

10 (b) Sections 714 and 714.1, relating to solar energy systems.

11 (c) Section 714.5, relating to structures that are constructed offsite and moved to
12 the property in sections or modules.

13 (d) Sections 782, 782.5, and 6150 of this code and Section 12956.1 of the
14 Government Code, relating to racial restrictions.

15 (e) Section 12927 of the Government Code, relating to the modification of
16 property to accommodate a disability.

17 (f) Section 1597.40 of the Health and Safety Code, relating to the operation of a
18 family day care home.

19 **Comment.** Section 4700 is new. It provides a non-exclusive list of provisions outside of this
20 part that limit the authority of an association to regulate separate interest property use.

21 **Staff Note.** Proposed Section 4700 is new. It introduces the article and lists other provisions
22 that protect separate interest use rights.

23 § 4705 (UNCHANGED). Display of U.S. flag

24 4705. (a) Except as required for the protection of the public health or safety, no
25 declaration or other governing document shall limit or prohibit, or be construed to
26 limit or prohibit, the display of the flag of the United States by a member on or in
27 the member’s separate interest or within the member’s exclusive use common
28 area.

29 (b) For purposes of this section, “display of the flag of the United States” means
30 a flag of the United States made of fabric, cloth, or paper displayed from a staff or
31 pole or in a window, and does not mean a depiction or emblem of the flag of the
32 United States made of lights, paint, roofing, siding, paving materials, flora, or
33 balloons, or any other similar building, landscaping, or decorative component.

34 (c) In any action to enforce this section, the prevailing party shall be awarded
35 reasonable attorney’s fees and costs.

36 **Comment.** Section 4705 continues former Section 1353.5 without change, except that a
37 superfluous cross-reference to governing definitions is omitted and the defined term “member” is
38 used in place of “owner.” See Section 4160 (“member” defined).

1 **§ 4710 (UNCHANGED). Noncommercial sign**

2 4710. (a) The governing documents may not prohibit posting or displaying of
3 noncommercial signs, posters, flags, or banners on or in a member’s separate
4 interest, except as required for the protection of public health or safety or if the
5 posting or display would violate a local, state, or federal law.

6 (b) For purposes of this section, a noncommercial sign, poster, flag, or banner
7 may be made of paper, cardboard, cloth, plastic, or fabric, and may be posted or
8 displayed from the yard, window, door, balcony, or outside wall of the separate
9 interest, but may not be made of lights, roofing, siding, paving materials, flora, or
10 balloons, or any other similar building, landscaping, or decorative component, or
11 include the painting of architectural surfaces.

12 (c) An association may prohibit noncommercial signs and posters that are more
13 than 9 square feet in size and noncommercial flags or banners that are more than
14 15 square feet in size.

15 **Comment.** Section 4710 continues former Section 1353.6 without change, except that the
16 redundant phrase “including the operating rules” is not continued and the defined term “member”
17 is used in place of “owner.” See Section 4160 (“member” defined).

18 **§ 4715 (UNCHANGED). Pets**

19 4715. (a) No governing documents shall prohibit the owner of a separate interest
20 within a common interest development from keeping at least one pet within the
21 common interest development, subject to reasonable rules and regulations of the
22 association. This section may not be construed to affect any other rights provided
23 by law to an owner of a separate interest to keep a pet within the development.

24 (b) For purposes of this section, “pet” means any domesticated bird, cat, dog,
25 aquatic animal kept within an aquarium, or other animal as agreed to between the
26 association and the homeowner.

27 (c) If the association implements a rule or regulation restricting the number of
28 pets an owner may keep, the new rule or regulation shall not apply to prohibit an
29 owner from continuing to keep any pet that the owner currently keeps in the
30 owner’s separate interest if the pet otherwise conforms with the previous rules or
31 regulations relating to pets.

32 (d) For the purposes of this section, “governing documents” shall include, but
33 are not limited to, the conditions, covenants, and restrictions of the common
34 interest development, and the bylaws, rules, and regulations of the association.

35 (e) This section shall become operative on January 1, 2001, and shall only apply
36 to governing documents entered into, amended, or otherwise modified on or after
37 that date.

38 **Comment.** Section 4715 continues former Section 1360.5 without change, except that “his or
39 her” has been replaced with “the owner’s” in subdivision (c).

1 **§ 4720 (UNCHANGED). Roofing materials**

2 4720. (a) No common interest development may require a homeowner to install
3 or repair a roof in a manner that is in violation of Section 13132.7 of the Health
4 and Safety Code.

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

13 **Comment.** Section 4720 continues former Section 1353.7 without change. See also Section
14 4765(a)(3) (“Notwithstanding a contrary provision of the governing documents, a decision on a
15 proposed change may not violate any governing provision of law, including, but not limited to,
16 the Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3
17 of Title 2 of the Government Code), or a building code or other applicable law governing land use
18 or public safety.”).

19 **§ 4725 (UNCHANGED). Television antenna or satellite dish**

20 4725. (a) Any covenant, condition, or restriction contained in any deed, contract,
21 security instrument, or other instrument affecting the transfer or sale of, or any
22 interest in, a common interest development that effectively prohibits or restricts
23 the installation or use of a video or television antenna, including a satellite dish, or
24 that effectively prohibits or restricts the attachment of that antenna to a structure
25 within that development where the antenna is not visible from any street or
26 common area, except as otherwise prohibited or restricted by law, is void and
27 unenforceable as to its application to the installation or use of a video or television
28 antenna that has a diameter or diagonal measurement of 36 inches or less.

29 (b) This section shall not apply to any covenant, condition, or restriction, as
30 described in subdivision (a), that imposes reasonable restrictions on the
31 installation or use of a video or television antenna, including a satellite dish, that
32 has a diameter or diagonal measurement of 36 inches or less. For purposes of this
33 section, “reasonable restrictions” means those restrictions that do not significantly
34 increase the cost of the video or television antenna system, including all related
35 equipment, or significantly decrease its efficiency or performance and include all
36 of the following:

37 (1) Requirements for application and notice to the association prior to the
38 installation.

39 (2) Requirement of a member to obtain the approval of the association for the
40 installation of a video or television antenna that has a diameter or diagonal
41 measurement of 36 inches or less on a separate interest owned by another.

42 (3) Provision for the maintenance, repair, or replacement of roofs or other
43 building components.

1 (4) Requirements for installers of a video or television antenna to indemnify or
2 reimburse the association or its members for loss or damage caused by the
3 installation, maintenance, or use of a video or television antenna that has a
4 diameter or diagonal measurement of 36 inches or less.

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

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

13 **Comment.** Section 4725 restates former Section 1376 without change, except that the defined
14 term "member" is used in place of "owner." See Section 4160 ("member" defined). See also 47
15 C.F.R. § 1.4000.

16 **Staff Note:** In prior comments, it has been suggested that existing Section 1376 is largely
17 preempted by the FCC regulation cited in the Comment above and should not be continued. See
18 Memorandum 2008-43, p. 43. The staff requests public comment on the merits of that suggestion.

19 **§ 4730 (REVISED). Marketing restriction**

20 4730. (a) Any governing document of an association that arbitrarily or
21 unreasonably restricts an owner's ability to market the owner's interest in a
22 common interest development is void.

23 (b) No association may adopt, enforce, or otherwise impose any governing
24 document that does either of the following:

25 (1) Imposes an assessment or fee in connection with the marketing of an
26 owner's interest in an amount that exceeds the association's actual or direct costs.
27 That assessment or fee shall be deemed to violate the limitation set forth in
28 subdivision (b) of Section 5600.

29 (2) Establishes an exclusive relationship with a real estate broker through which
30 the sale or marketing of interests in the development is required to occur. The
31 limitation set forth in this paragraph does not apply to the sale or marketing of
32 separate interests owned by the association or to the sale or marketing of common
33 area by the association.

34 (c) For purposes of this section, "market" and "marketing" mean listing,
35 advertising, or obtaining or providing access to show the owner's interest in the
36 development.

37 (d) This section does not apply to rules or regulations made pursuant to Section
38 712 or 713 regarding real estate signs.

39 **Comment.** Section 4730 continues former Section 1368.1 without change, with the following
40 exceptions: (1) The phrase "rule or regulation" is replaced with "governing document." This
41 broadens the application of the section so that it governs any provision in the governing
42 documents and not just an operating rule. (2) The phrase "his or her" is replaced with "the
43 owner's" in subdivision (a). (3) A reference to "common areas" is singularized.

1 **Staff Note.** Proposed Section 4730 would be broadened to apply to any governing document,
2 and not just to a “rule or regulation” (which is unclear and may only encompass an operating
3 rule).

4 **§ 4755 (UNCHANGED). Low water-using plants**

5 4755. (a) Notwithstanding any other law, a provision of the governing
6 documents shall be void and unenforceable if it does any of the following:

7 (1) Prohibits, or includes conditions that have the effect of prohibiting, the use
8 of low water-using plants as a group.

9 (2) Has the effect of prohibiting or restricting compliance with either of the
10 following:

11 (A) A water-efficient landscape ordinance adopted or in effect pursuant to
12 subdivision (c) of Section 65595 of the Government Code.

13 (B) Any regulation or restriction on the use of water adopted pursuant to Section
14 353 or 375 of the Water Code.

15 (b) This section shall not prohibit an association from applying landscaping
16 rules established in the governing documents, to the extent the rules fully conform
17 with the requirements of subdivision (a).

18 **Comment.** Section 4755 continues former Section 1353.8 without change, except that surplus
19 language is not continued (i.e., the phrases “of any,” “of a common interest development,” and
20 “and regulations”). The term “governing documents” includes all governing documents of a
21 common interest development. See Section 4150 (“governing documents” defined).

22 **Article 2. Modification of Separate Interest**

23 **§ 4760 (REVISED). Improvements to separate interest**

24 4760. (a) Subject to the governing documents and applicable law, a member
25 may do the following:

26 (1) Make any improvement or alteration within the boundaries of the member’s
27 separate interest that does not impair the structural integrity or mechanical systems
28 or lessen the support of any portions of the common interest development.

29 (2) Modify the member’s separate interest, at the member’s expense, to facilitate
30 access for persons who are blind, visually handicapped, deaf, or physically
31 disabled, or to alter conditions which could be hazardous to these persons. These
32 modifications may also include modifications of the route from the public way to
33 the door of the separate interest for the purposes of this paragraph if the separate
34 interest is on the ground floor or already accessible by an existing ramp or
35 elevator. The right granted by this paragraph is subject to the following conditions:

36 (A) The modifications shall be consistent with applicable building code
37 requirements.

38 (B) The modifications shall be consistent with the intent of otherwise applicable
39 provisions of the governing documents pertaining to safety or aesthetics.

40 (C) Modifications external to the dwelling shall not prevent reasonable passage
41 by other occupants, and shall be removed by the member when the separate

1 interest is no longer occupied by persons requiring those modifications who are
2 blind, visually handicapped, deaf, or physically disabled.

3 (D) Any member who intends to modify a separate interest pursuant to this
4 paragraph shall submit plans and specifications to the association for review to
5 determine whether the modifications will comply with the provisions of this
6 paragraph. The association shall not deny approval of the proposed modifications
7 under this paragraph without good cause.

8 (b) Any change in the exterior appearance of a separate interest shall be in
9 accordance with the governing documents and applicable provisions of law.

10 **Comment.** Section 4760 continues former Section 1360 without change, with the following
11 exceptions: (1) The scope of the provision is broadened to apply to any separate interest, and not
12 just a unit in a condominium project. (2) The phrase “his or her” is not continued in subdivision
13 (a)(2)(D). (3) The defined term “member” is used in place of “owner” throughout. See Section
14 4160 (“member” defined). (4) The defined term “occupant” is used in place of “resident.” See
15 Section 4163 (“occupant” defined).

16 See also Section 4765 (association decision on modification of separate interest must comply
17 with Fair Employment and Housing Act); Gov’t Code § 12927 (accommodation of disability
18 under Fair Employment and Housing Act).

19 **Staff Note.** Proposed Section 4760 broadens the scope of Section 1360 to include all CIDs,
20 and not just condominiums. References to “units” are replaced with references to “separate
21 interests.” References to condominium associations are changed to refer to associations generally.

22 **§ 4765 (UNCHANGED). Architectural review and decision making**

23 4765. (a) This section applies if the governing documents require association
24 approval before a member may make a physical change to the member’s separate
25 interest or to the common area. In reviewing and approving or disapproving a
26 proposed change, the association shall satisfy the following requirements:

27 (1) The association shall provide a fair, reasonable, and expeditious procedure
28 for making its decision. The procedure shall be included in the association’s
29 governing documents. The procedure shall provide for prompt deadlines. The
30 procedure shall state the maximum time for response to an application or a request
31 for reconsideration by the board.

32 (2) A decision on a proposed change shall be made in good faith and may not be
33 unreasonable, arbitrary, or capricious.

34 (3) Notwithstanding a contrary provision of the governing documents, a decision
35 on a proposed change may not violate any governing provision of law, including,
36 but not limited to, the Fair Employment and Housing Act (Part 2.8 (commencing
37 with Section 12900) of Division 3 of Title 2 of the Government Code), or a
38 building code or other applicable law governing land use or public safety.

39 (4) A decision on a proposed change shall be in writing. If a proposed change is
40 disapproved, the written decision shall include both an explanation of why the
41 proposed change is disapproved and a description of the procedure for
42 reconsideration of the decision by the board.

1 (5) If a proposed change is disapproved, the applicant is entitled to
2 reconsideration by the board that made the decision, at an open meeting of the
3 board. This paragraph does not require reconsideration of a decision that is made
4 by the board or a body that has the same membership as the board, at a meeting
5 that satisfies the requirements of Article 2 (commencing with Section 4900) of
6 Chapter 5. Reconsideration by the board does not constitute dispute resolution
7 within the meaning of Section 5905.

8 (b) Nothing in this section authorizes a physical change to the common area in a
9 manner that is inconsistent with an association's governing documents, unless the
10 change is required by law.

11 (c) An association shall annually provide its members with notice of any
12 requirements for association approval of physical changes to property. The notice
13 shall describe the types of changes that require association approval and shall
14 include a copy of the procedure used to review and approve or disapprove a
15 proposed change.

16 **Comment.** Section 4765 continues former Section 1378 without change, with the following
17 exceptions: (1) The terms "board of directors" and "board of directors of the association" have
18 been replaced with the defined term "board." See Sections 4085 ("board" defined). (2) A
19 reference to the "association's" governing documents has not been continued. See Section 4150
20 ("governing documents" defined). (3) The defined term "member" is used in place of "owner."
21 See Section 4160 ("member" defined).

22 Article 3. Maintenance

23 § 4775 (UNCHANGED). Maintenance responsibility generally

24 4775. (a) Unless otherwise provided in the declaration of a common interest
25 development, the association is responsible for repairing, replacing, or maintaining
26 the common area, other than exclusive use common area, and the owner of each
27 separate interest is responsible for maintaining that separate interest and any
28 exclusive use common area appurtenant to the separate interest.

29 (b) The costs of temporary relocation during the repair and maintenance of the
30 areas within the responsibility of the association shall be borne by the owner of the
31 separate interest affected.

32 **Comment.** Subdivision (a) of Section 4775 continues former Section 1364(a) without change,
33 except that references to "common areas" are singularized.

34 Subdivision (b) continues former Section 1364(c) without change.

35 § 4780 (REVISED). Wood-destroying pests or organisms

36 4780. (a) In a community apartment project, condominium project, or stock
37 cooperative, unless otherwise provided in the declaration, the association is
38 responsible for the repair and maintenance of the common area occasioned by the
39 presence of wood-destroying pests or organisms.

40 (b) In a planned development, unless a different maintenance scheme is
41 provided in the declaration, each owner of a separate interest is responsible for the

1 repair and maintenance of that separate interest as may be occasioned by the
2 presence of wood-destroying pests or organisms. Upon approval of the majority of
3 all members of the association (Section 4065), that responsibility may be
4 delegated to the association, which shall be entitled to recover the cost thereof as a
5 special assessment.

6 **Comment.** Subdivision (a) of Section 4780 continues former Section 1364(b)(1) without
7 change, except that a superfluous cross-reference to governing definitions has not been continued.

8 Subdivision (b) continues former Section 1364(b)(2) without change, with the following
9 exceptions: (1) A superfluous cross-reference to a governing definition has not been continued.
10 (2) A cross-reference to Section 4065 is added. (3) The last sentence is revised to avoid use of the
11 word “such.”

12  **Staff Note.** The last sentence of Section 1364(b)(2) has been restated, in proposed Section
13 4780(b), to avoid use of the word “such.” Standard legislative drafting practice is to avoid the use
14 of “such” as a shorthand reference for a previously described thing.

15 **§ 4785 (REVISED). Temporary removal of occupant to perform treatment of wood-**
16 **destroying pests**

17 4785. (a) The association may cause the temporary, summary removal of any
18 occupant of a common interest development for such periods and at such times as
19 may be necessary for prompt, effective treatment of wood-destroying pests or
20 organisms.

21 (b) The association shall give notice of the need to temporarily vacate a separate
22 interest to the occupants and to the owners, not less than 15 days nor more than 30
23 days prior to the date of the temporary relocation. The notice shall state the reason
24 for the temporary relocation, the date and time of the beginning of treatment, the
25 anticipated date and time of termination of treatment, and that the occupants will
26 be responsible for their own accommodations during the temporary relocation.

27 (c) Notice by the association shall be deemed complete upon either:

28 (1) Personal delivery of a copy of the notice to the occupants, and if an occupant
29 is not the owner, individual delivery (Section 4040) of a copy of the notice to the
30 owner.

31 (2) Individual delivery (Section 4040) to the occupant at the address of the
32 separate interest, and if the occupant is not the owner, individual delivery (Section
33 4040) of a copy of the notice to the owner.

34 **Comment.** Section 4785 continues former Section 1364(d) without change, except that
35 subdivision (c) is revised to improve its clarity and to incorporate the “individual delivery” notice
36 procedure.

37  **Staff Note.** Proposed Section 4785(c) is revised to improve its clarity and to incorporate the
38 “individual delivery” notice procedure.

39 **§ 4790 (REVISED). Exclusive use communication wiring**

40 4790. (a) Notwithstanding the provisions of the declaration, a member is entitled
41 to reasonable access to the common area for the purpose of maintaining the
42 internal and external communication wiring made part of the exclusive use

1 common area of the member’s separate interest pursuant to subdivision (c) of
2 Section 4145. The access shall be subject to the consent of the association, whose
3 approval shall not be unreasonably withheld, and which may include the
4 association’s approval of telephone wiring upon the exterior of the common area,
5 and other conditions as the association determines reasonable.

6 (b) For the purposes of this section, “wiring” includes, without limitation,
7 nonmetallic transmission lines.

8 **Comment.** Subdivision (a) of Section 4790 continues former Section 1364(f) without change,
9 with the following exceptions: (1) The reference to “telephone wiring” has been generalized to
10 accommodate non-telephonic communication wiring. (2) A cross-reference is updated to reflect
11 the new location of the referenced provision. (3) The defined term “member” is used in place of
12 “owner.” See Section 4160 (“member” defined). (4) References to “common areas” are
13 singularized.

14 Subdivision (b) is new.

15 **Staff Note.** Proposed Section 4790 would expand the scope of Section 1364(f) slightly, to
16 include non-telephonic communication wiring (e.g., Ethernet) and non-metallic lines (e.g., fiber-
17 optic).

18 CHAPTER 5. ASSOCIATION GOVERNANCE

19 Article 1. Association Existence and Powers

20 § 4800 (UNCHANGED). Association

21 4800. A common interest development shall be managed by an association that
22 may be incorporated or unincorporated. The association may be referred to as a
23 community association.

24 **Comment.** Section 4800 continues former Section 1363(a) without change.

25 § 4805 (UNCHANGED). Association powers

26 4805. (a) Unless the governing documents provide otherwise, and regardless of
27 whether the association is incorporated or unincorporated, the association may
28 exercise the powers granted to a nonprofit mutual benefit corporation, as
29 enumerated in Section 7140 of the Corporations Code, except that an
30 unincorporated association may not adopt or use a corporate seal or issue
31 membership certificates in accordance with Section 7313 of the Corporations
32 Code.

33 (b) The association, whether incorporated or unincorporated, may exercise the
34 powers granted to an association in this part.

35 **Comment.** Section 4805 restates former Section 1363(c) without change, except that
36 subdivisions are added and “title” is replaced with “part.”

37 § 4810 (UNCHANGED). Standing

38 4810. An association established to manage a common interest development has
39 standing to institute, defend, settle, or intervene in litigation, arbitration,

1 mediation, or administrative proceedings in its own name as the real party in
2 interest and without joining with it the members, in matters pertaining to the
3 following:

4 (a) Enforcement of the governing documents.

5 (b) Damage to the common area.

6 (c) Damage to a separate interest that the association is obligated to maintain or
7 repair.

8 (d) Damage to a separate interest that arises out of, or is integrally related to,
9 damage to the common area or a separate interest that the association is obligated
10 to maintain or repair.

11 **Comment.** Section 4810 continues former Section 1368.3 without change, except that the
12 defined term “member” is used in place of “owner.” See Section 4160 (“member” defined).

13 **§ 4815 (UNCHANGED). Comparative fault**

14 4815. (a) In an action maintained by an association pursuant to subdivision (b),
15 (c), or (d) of Section 4810, the amount of damages recovered by the association
16 shall be reduced by the amount of damages allocated to the association or its
17 managing agents in direct proportion to their percentage of fault based upon
18 principles of comparative fault. The comparative fault of the association or its
19 managing agents may be raised by way of defense, but shall not be the basis for a
20 cross-action or separate action against the association or its managing agents for
21 contribution or implied indemnity, where the only damage was sustained by the
22 association or its members. It is the intent of the Legislature in enacting this
23 subdivision to require that comparative fault be pleaded as an affirmative defense,
24 rather than a separate cause of action, where the only damage was sustained by the
25 association or its members.

26 (b) In an action involving damages described in subdivision (b), (c), or (d) of
27 Section 4810, the defendant or cross-defendant may allege and prove the
28 comparative fault of the association or its managing agents as a setoff to the
29 liability of the defendant or cross-defendant even if the association is not a party to
30 the litigation or is no longer a party whether by reason of settlement, dismissal, or
31 otherwise.

32 (c) Subdivisions (a) and (b) apply to actions commenced on or after January 1,
33 1993.

34 (d) Nothing in this section affects a person’s liability under Section 1431, or the
35 liability of the association or its managing agent for an act or omission that causes
36 damages to another.

37 **Comment.** Section 4815 continues former Section 1368.4 without change.

38 **§ 4820 (UNCHANGED). Joint neighborhood association**

39 4820. Whenever two or more associations have consolidated any of their
40 functions under a joint neighborhood association or similar organization, members
41 of each participating association shall be (1) entitled to attend all meetings of the

1 joint association other than executive sessions, (2) given reasonable opportunity
2 for participation in those meetings, and (3) entitled to the same access to the joint
3 association’s records as they are to the participating association’s records.

4 **Comment.** Section 4820 continues former Section 1363(i) without change.

5 **Article 2. Board Meeting**

6 **§ 4900 (UNCHANGED). Short title**

7 4900. This article shall be known and may be cited as the Common Interest
8 Development Open Meeting Act.

9 **Comment.** Section 4900 continues former Section 1363.05(a) without change, except that
10 “section” is changed to “article.”

11 **§ 4920 (REVISED). Notice of board meeting**

12 4920. (a) Unless the time and place of meeting is fixed by the governing
13 documents, or unless the governing documents provide for a longer period of
14 notice, members shall be given notice of the time and place of a board meeting,
15 except for an emergency meeting held pursuant to Section 4923, at least four days
16 prior to the meeting. Notice shall be given by general delivery (Section 4045). The
17 notice shall contain the agenda for the meeting.

18 (b) If the association is organized as a nonprofit mutual benefit corporation,
19 notice of a board meeting is also governed by Section 7211 of the Corporations
20 Code.

21 **Comment.** Subdivision (a) of Section 4920 continues former Section 1363.05(f) without
22 change, with the following exceptions: (1) References to the definition of “meeting” have been
23 replaced with the defined term “board meeting.” (2) References to “bylaws” have been replaced
24 with references to “governing documents,” to broaden the scope of the provision. (3) Specific
25 rules on delivery of notice are replaced with a functionally equivalent requirement that notice be
26 given by “general delivery,” pursuant to Section 4045. (4) A reference has been added to Section
27 4923, which continues the emergency meeting provisions of former Section 1363.05(g).

28 Subdivision (b) is new.

29 **Staff Note.** Proposed Section 4920 would make three minor changes to the rules governing
30 notice of a board meeting: (1) The operation of existing Section 1363.05(f) is conditioned on
31 whether the board meeting schedule is fixed in the association’s bylaws. Proposed Section 4920
32 would expand the scope of that condition, to include any governing document that fixes the
33 board’s meeting schedule. That should better reflect the fact that documents other than the bylaws
34 can be used to address such matters. (2) Existing Section 1363.05(f) specifies detailed procedures
35 for delivery of notice. Those procedures are functionally equivalent to the requirements specified
36 for general delivery of notices in proposed Section 4045. The specific details are replaced with a
37 reference to the requirements of that section. (3) A cross-reference is added to alert readers that
38 an incorporated association will also need to consider applicable provisions of the Corporations
39 Code when giving notice of a board meeting.

40 **§ 4923 (REVISED). Emergency board meeting**

41 4923. An emergency meeting of the board may be called by the president of the
42 association, or by any two directors other than the president, if there are

1 circumstances that could not have been reasonably foreseen which require
2 immediate attention and possible action by the board, and which of necessity make
3 it impracticable to provide notice as required by Section 4920.

4 **Comment.** Section 4923 restates former Section 1363.05(g) without substantive change except
5 that the defined term “director” is used in place of “board member.” See Section 4140 (“director”
6 defined).

7 **Staff Note.** Proposed Section 4923 would set the emergency meeting provision out as a
8 separate section, to make it easier to find. That change requires adjustment of the cross-reference
9 to the notice requirements of Section 1363.05 (in proposed Section 4920).

10 **§ 4925 (REVISED). Board meeting open**

11 4925. (a) Any member may attend board meetings, except when the board
12 adjourns to executive session.

13 (b) The board shall permit any member to speak at any meeting of the
14 association or the board, except for meetings of the board held in executive
15 session. A reasonable time limit for all members of the association to speak to the
16 board or before a meeting of the association shall be established by the board.

17 **Comment.** Subdivision (a) of Section 4925 continues part of the first sentence of former
18 Section 1363.05(b), without substantive change, except for the following changes: (1) The term
19 “meetings of the board of directors of the association” has been replaced with the defined term
20 “board meetings” See Section 4090 (“board meeting” defined). (2) Subdivision (a) does not
21 continue language specifying when a board may meet in executive session. The substance of that
22 language is continued in Section 4935. (3) The term “member” is used in place of “member of the
23 association.” See Section 4160 (“member” defined).

24 Subdivision (b) continues former Section 1363.05(h) without change, except that the terms
25 “board of directors” and “board of directors of the association” have been replaced with the
26 defined term “board.” See Section 4085 (“board” defined).

27 **Staff Note.** (1) Proposed Sections 4925(a) would continue only part of the substance of the
28 first sentence of existing Section 1363.05(b). The remaining substance, relating to closed
29 sessions, would be continued in proposed Section 4935.

30 (2) Specific notice posting requirements would be replaced with a reference to the provision
31 governing general notice delivery. That accomplishes the same objective, with greater flexibility.

32 **§ 4930 (REVISED). Limitation on meeting content**

33 4930. (a) Except as described in paragraphs (b) to (e), inclusive, the board may
34 not discuss or take action on any item at a nonemergency meeting unless the item
35 was placed on the agenda included in the notice that was distributed pursuant to
36 subdivision (a) of Section 4920. This subdivision does not prohibit a member or
37 occupant who is not a director from speaking on issues not on the agenda.

38 (b) Notwithstanding subdivision (a), a director, a managing agent or other agent
39 of the board, or a member of the staff of the board, may do any of the following:

40 (1) Briefly respond to statements made or questions posed by a person speaking
41 at a meeting as described in subdivision (b) of Section 4925.

1 (2) Ask a question for clarification, make a brief announcement, or make a brief
2 report on the person's own activities, whether in response to questions posed by a
3 member or based upon the person's own initiative.

4 (c) Notwithstanding subdivision (a), the board or a director, subject to rules or
5 procedures of the board, may do any of the following:

6 (1) Provide a reference to, or provide other resources for factual information to,
7 its managing agent or other agents or staff.

8 (2) Request its managing agent or other agents or staff to report back to the
9 board at a subsequent meeting concerning any matter, or take action to direct its
10 managing agent or other agents or staff to place a matter of business on a future
11 agenda.

12 (3) Direct its managing agent or other agents or staff to perform administrative
13 tasks that are necessary to carry out this section.

14 (d) Notwithstanding subdivision (a), the board may take action on any item of
15 business not appearing on the agenda distributed pursuant to subdivision (a) of
16 Section 4920 under any of the following conditions:

17 (1) Upon a determination made by a majority of the board present at the meeting
18 that an emergency situation exists. An emergency situation exists if there are
19 circumstances that could not have been reasonably foreseen by the board, that
20 require immediate attention and possible action by the board, and that, of
21 necessity, make it impracticable to provide notice.

22 (2) Upon a determination made by the board by a vote of two-thirds of the
23 directors present at the meeting, or, if less than two-thirds of total membership of
24 the board is present at the meeting, by a unanimous vote of the directors present,
25 that there is a need to take immediate action and that the need for action came to
26 the attention of the board after the agenda was distributed pursuant to subdivision
27 (a) of Section 4920.

28 (3) The item appeared on an agenda that was distributed pursuant to subdivision
29 (a) of Section 4920 for a prior meeting of the board that occurred not more than 30
30 calendar days before the date that action is taken on the item and, at the prior
31 meeting, action on the item was continued to the meeting at which the action is
32 taken.

33 (e) Before discussing any item pursuant to subdivision (d), the board shall
34 openly identify the item to the members in attendance at the meeting.

35 **Comment.** Section 4930 continues former Section 1363.05(i) without change, with the
36 following exceptions: (1) References to "posting" of notice has been omitted throughout. Section
37 4920 does not require that notice be "posted." (2) The numbering of the paragraphs of the former
38 provision has been simplified. (3) Statutory references have been updated to reflect the new
39 location of the referenced provision. (4) The phrase "his or her" has been replaced in subdivision
40 (b)(2) with "the person's." (5) Subdivision (d)(2) has been revised to make clear that the
41 "members" referenced in that paragraph are members of the board. (6) The term "board of
42 directors" has been replaced throughout with the defined term "board." See Section 4085
43 ("board" defined). (7) The defined term "director" is used in place of "board member"
44 throughout. See Section 4140 ("director" defined). (8) The defined term "occupant" is used in
45 place of "resident" in subdivision (a). See Section 4163 ("occupant" defined). (9) The term

1 “member” is added to the second sentence of subdivision (a) to make clear that the section applies
2 to nonresident members.

3 **Staff Notes.** (1) Existing Section 1363.05 requires that meeting notice be “posted.” Proposed
4 Section 4920 would provide greater flexibility, replacing the “posting” requirement with a
5 requirement that a meeting notice be distributed pursuant to the rules governing a general notice.
6 Consistent with that minor change, proposed Section 4930(a) does not continue references to
7 “posting” of the meeting notice.

8 (2) Subdivision (d)(2) is revised to make clear that the “members” referenced in that paragraph
9 are directors. The Commission invites comment on whether that change would cause any
10 problems.

11 (3) The term “member” is added to the second sentence of subdivision (a) to make clear that
12 the section applies to nonresident members.

13 **§ 4935 (REVISED). Executive session**

14 4935. (a) The board may adjourn to executive session to consider litigation,
15 matters relating to the formation of contracts with third parties, member discipline,
16 personnel matters, or to meet with a member, upon the member’s request,
17 regarding the member’s payment of assessments, as specified in Section 5665.

18 (b) The board shall meet in executive session, if requested by a member who
19 may be subject to a fine, penalty, or other form of discipline, and the member shall
20 be entitled to attend the executive session.

21 (c) The board shall meet in executive session to discuss a payment plan pursuant
22 to Section 5665.

23 (d) The board shall meet in executive session to decide whether to foreclose on a
24 lien pursuant to subdivision (b) of Section 5705.

25 (e) Any matter discussed in executive session shall be generally noted in the
26 minutes of the immediately following meeting that is open to the entire
27 membership.

28 **Comment.** Subdivision (a) of Section 4935 continues part of the first sentence of former
29 Section 1363.05(b), without substantive change. The remainder of the former sentence is
30 continued without substantive change in Section 4925(a).

31 Subdivision (b) continues the second sentence of former Section 1363.05(b) without change,
32 except that the term “board of directors of the association” has been replaced with the defined
33 term “board.” See Section 4085 (“board” defined).

34 Subdivision (c) is new. It provides a cross-reference to a provision requiring that the board
35 meet in executive session when discussing a proposed payment plan.

36 Subdivision (d) is new. It provides a cross-reference to a provision requiring that the board
37 meet in executive session when deciding whether to foreclose on a lien for overdue assessments.

38 Subdivision (e) continues former Section 1363.05(c) without change.

39 **Staff Note.** Subdivisions (c) and (d) of proposed Section 4935 are added to highlight two
40 circumstances in which an executive session is mandatory.

41 **§ 4950 (REVISED). Minutes**

42 4950. (a) The minutes, minutes proposed for adoption that are marked to
43 indicate draft status, or a summary of the minutes, of any meeting of the board,
44 other than an executive session, shall be available to members within 30 days of

1 the meeting. The minutes, proposed minutes, or summary minutes shall be
2 distributed to any member upon request and upon reimbursement of the
3 association's costs for making that distribution.

4 (b) The annual policy statement, prepared pursuant to Section 5310, shall inform
5 the members of their right to obtain copies of board meeting minutes and of how
6 and where to do so.

7 **Comment.** Subdivision (a) of Section 4950 continues former Section 1363.05(d) without
8 change, except that (1) the term "board of directors of the association" has been replaced with the
9 defined term "board" and (2) the term "member" is used in place of "member of the association."
10 See Sections 4085 ("board" defined), 4160 ("member" defined).

11 Subdivision (b) is consistent with the substance of former Section 1363.05(e), but recasts it to
12 be consistent with the annual distribution of the policy statement pursuant to Section 5310.

13  **Staff Note.** Subdivision (b) has been adjusted to conform to proposed Section 5310. See the
14 Staff Note following that section.

15 **§ 4955 (REVISED). Civil action to enforce article**

16 4955. (a) A member of an association may bring a civil action for declaratory or
17 equitable relief for a violation of this article by the association, including, but not
18 limited to, injunctive relief, restitution, or a combination thereof, within one year
19 of the date the cause of action accrues.

20 (b) A member who prevails in a civil action to enforce the member's rights
21 pursuant to this article shall be entitled to reasonable attorney's fees and court
22 costs, and the court may impose a civil penalty of up to five hundred dollars
23 (\$500) for each violation, except that each identical violation shall be subject to
24 only one penalty if the violation affects each member equally. A prevailing
25 association shall not recover any costs, unless the court finds the action to be
26 frivolous, unreasonable, or without foundation.

27 **Comment.** Section 4955 restates former Section 1363.09(a)-(b) without change, with the
28 following exceptions: (1) The phrase "an association of which he or she is a member" has been
29 replaced with "the association." (2) The second sentence of former Section 1363.09(a) has not
30 been continued because it is irrelevant to judicial enforcement of this article. (3) The phrase "his
31 or her" has been replaced in subdivision (b) with "the member's." (3) The term "member" is used
32 in place of "member of the association." See Section 4160 ("member" defined).

33  **Staff Note.** Proposed Section 4955 would generally continue the judicial enforcement
34 provisions of existing Section 1363.09 as they apply to the open meeting requirements, but it
35 would not continue provisions specific to member elections (the second sentence of Section
36 1363.09(a), and all of subdivision (c)).

37 **Article 3. Member Meeting**

38 **§ 5000 (REVISED). Member meeting**

39 5000. (a) Meetings of the membership of the association shall be conducted in
40 accordance with a recognized system of parliamentary procedure or any
41 parliamentary procedures the association may adopt.

1 (b) Notwithstanding any other provision of law, notice of meetings of the
2 members shall specify those matters the board intends to present for action by the
3 members, but, except as otherwise provided by law, any proper matter may be
4 presented at the meeting for action.

5 (c) If an association is organized as a nonprofit mutual benefit corporation, a
6 member meeting is also governed by Sections 7510 through 7527 of the
7 Corporations Code, inclusive.

8 **Comment.** Subdivision (a) of Section 5000 continues former Section 1363(d) without change.

9 Subdivision (b) continues former Section 1363(e) without change.

10 Subdivision (c) is new.

11  **Staff Note.** Proposed Section 5000(c) is added to alert readers that an incorporated
12 association will also need to consider applicable provisions of the Corporations Code when
13 conducting a member meeting.

14 Article 4. Member Election

15 § 5100 (REVISED). Application of article

16 5100. (a) Notwithstanding any other law or provision of the governing
17 documents, elections regarding assessments legally requiring a vote, election and
18 removal of directors, amendments to the governing documents, or the grant of
19 exclusive use of common area property pursuant to Section 4600 shall be held by
20 secret ballot in accordance with the procedures set forth in this article.

21 (b) This article also governs an election on any topic that is expressly identified
22 in the operating rules as being governed by this article.

23 (c) The provisions of this article apply to both incorporated and unincorporated
24 associations, notwithstanding any contrary provision of the governing documents.

25 (d) The procedures set forth in this article shall apply to votes cast directly by
26 the membership, but do not apply to votes cast by delegates or other elected
27 representatives.

28 (e) In the event of a conflict between this article and the provisions of the
29 Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section
30 7110) of Division 2 of Title 1 of the Corporations Code) relating to elections, the
31 provisions of this article shall prevail.

32 **Comment.** Subdivision (a) of Section 5100 continues the first sentence of former Section
33 1363.03(b) without change, with the following exceptions: (1) “Section” is replaced with
34 “article.” (2) A cross-reference is updated to reflect the new location of the referenced provision.
35 (3) “Association board of directors” is replaced with the defined term “board.” See Section 4085
36 (“board” defined). (4) The defined term “director” is used in place of “board member.” See
37 Section 4140 (“director” defined).

38 Subdivision (b) is new. It permits an association to adopt an operating rule applying the
39 requirements of this article to an election that would not otherwise be governed by this article.

40 Subdivisions (c)-(e) continue former Section 1363.03(l)-(n), respectively, without change,
41 except that “section” is replaced with “article” throughout.

42 Former Section 1363.03(o), stating the operative date of the former section, is obsolete and is
43 not continued.

1 **Staff Note.** Proposed Section 5100(b) is new. It would permit an association to adopt an
2 operating rule applying the requirements of this article to an election that would not otherwise be
3 governed by this article. This gives the association, acting through its operating rules, the
4 discretion to expand (but not narrow) the application of this article.

5 **§ 5105 (UNCHANGED). Election rules**

6 5105. (a) An association shall adopt rules, in accordance with the procedures
7 prescribed by Article 5 (commencing with Section 4350) of Chapter 2, that do all
8 of the following:

9 (1) Ensure that if any candidate or member advocating a point of view is
10 provided access to association media, newsletters, or Internet Web sites during a
11 campaign, for purposes that are reasonably related to that election, equal access
12 shall be provided to all candidates and members advocating a point of view,
13 including those not endorsed by the board, for purposes that are reasonably related
14 to the election. The association shall not edit or redact any content from these
15 communications, but may include a statement specifying that the candidate or
16 member, and not the association, is responsible for that content.

17 (2) Ensure access to the common area meeting space, if any exists, during a
18 campaign, at no cost, to all candidates, including those who are not incumbents,
19 and to all members advocating a point of view, including those not endorsed by
20 the board, for purposes reasonably related to the election.

21 (3) Specify the qualifications for candidates for the board and any other elected
22 position, and procedures for the nomination of candidates, consistent with the
23 governing documents. A nomination or election procedure shall not be deemed
24 reasonable if it disallows any member from nominating himself or herself for
25 election to the board.

26 (4) Specify the qualifications for voting, the voting power of each membership,
27 the authenticity, validity, and effect of proxies, and the voting period for elections,
28 including the times at which polls will open and close, consistent with the
29 governing documents.

30 (5) Specify a method of selecting one or three independent third parties as
31 inspector, or inspectors, of election utilizing one of the following methods:

32 (A) Appointment of the inspector or inspectors by the board.

33 (B) Election of the inspector or inspectors by the members of the association.

34 (C) Any other method for selecting the inspector or inspectors.

35 (6) Allow the inspector, or inspectors, to appoint and oversee additional persons
36 to verify signatures and to count and tabulate votes as the inspector or inspectors
37 deem appropriate, provided that the persons are independent third parties.

38 (b) Notwithstanding any other provision of law, the rules adopted pursuant to
39 this section may provide for the nomination of candidates from the floor of
40 membership meetings or nomination by any other manner. Those rules may permit
41 write-in candidates for ballots.

42 **Comment.** Subdivision (a) of Section 5105 continues former Section 1363.03(a) without
43 change, except that (1) the term “board” is used in place of “board of directors” and (2) the term

1 “member” is used in place of “member of the association.” See Sections 4085 (“board” defined),
2 4160 (“member” defined).

3 Subdivision (b) continues former Section 1363.03(j) without change.

4 **§ 5110 (REVISED). Election inspector**

5 5110. (a) The association shall select an independent third party or parties as an
6 inspector of election. The number of inspectors of election shall be one or three.

7 (b) For the purposes of this section, an independent third party includes, but is
8 not limited to, a volunteer poll worker with the county registrar of voters, a
9 licensee of the California Board of Accountancy, or a notary public. An
10 independent third party may be a member, but may not be a director or a candidate
11 for director or be related to a director or to a candidate for director. An
12 independent third party may not be a person, business entity, or subdivision of a
13 business entity who is currently employed or under contract to the association for
14 any compensable services unless expressly authorized by rules of the association
15 adopted pursuant to paragraph (5) of subdivision (a) of Section 5105.

16 (c) The inspector or inspectors of election shall do all of the following:

17 (1) Determine the number of memberships entitled to vote and the voting power
18 of each.

19 (2) Determine the authenticity, validity, and effect of proxies, if any.

20 (3) Receive ballots.

21 (4) Hear and determine all challenges and questions in any way arising out of or
22 in connection with the right to vote.

23 (5) Count and tabulate all votes.

24 (6) Determine when the polls shall close, consistent with the governing
25 documents.

26 (7) Determine the tabulated results of the election.

27 (8) Perform any acts as may be proper to conduct the election with fairness to all
28 members in accordance with this article, the Corporations Code, and all applicable
29 rules of the association regarding the conduct of the election that are not in conflict
30 with this article.

31 (d) An inspector of election shall perform all duties impartially, in good faith, to
32 the best of the inspector of election’s ability, and as expeditiously as is practical. If
33 there are three inspectors of election, the decision or act of a majority shall be
34 effective in all respects as the decision or act of all. Any report made by the
35 inspector or inspectors of election is prima facie evidence of the facts stated in the
36 report.

37 **Comment.** Section 5110 continues former Section 1363.03(c) without change, with the
38 following exceptions: (1) “Section” is replaced with “article” throughout. (2) A cross-reference is
39 updated to reflect the new location of the referenced provision. (3) The phrase “his or her” has
40 been replaced in subdivision (d). (4) The second sentence of subdivision (b) is reworded to clarify
41 its meaning. (5) The term “board of directors” has been replaced with the defined term “board.”
42 See Section 4085 (“board” defined). (6) The defined term “director” is used in place of “board
43 member.” See Section 4140 (“director” defined). (7) The term “member” is used in place of
44 “member of the association.” See Section 4160 (“member” defined).

1 **Staff Note.** The second sentence of proposed Section 5110(b) is revised as follows:

2 An independent third party may be a member of the association, but may not be a member of
3 the board of directors or a candidate for the board of directors or be related to a member of the
4 board of directors or to a candidate for the board of directors.

5 The Commission invites comment on whether that change would cause any problems.

6 **§ 5115 (REVISED). Voting procedure**

7 5115. (a) Ballots and two preaddressed envelopes with instructions on how to
8 return ballots shall be mailed by first-class mail or delivered by the association to
9 every member not less than 30 days prior to the deadline for voting. In order to
10 preserve confidentiality, a voter may not be identified by name, address, or lot,
11 parcel, or unit number on the ballot. The association shall use as a model those
12 procedures used by California counties for ensuring confidentiality of vote by mail
13 ballots, including all of the following:

14 (1) The ballot itself is not signed by the voter, but is inserted into an envelope
15 that is sealed. This envelope is inserted into a second envelope that is sealed. In
16 the upper left hand corner of the second envelope, the voter shall sign the voter's
17 name, indicate the voter's name, and indicate the address or separate interest
18 identifier that entitles the voter to vote.

19 (2) The second envelope is addressed to the inspector or inspectors of election,
20 who will be tallying the votes. The envelope may be mailed or delivered by hand
21 to a location specified by the inspector or inspectors of election. The member may
22 request a receipt for delivery.

23 (b) A quorum shall be required only if so stated in the governing documents or
24 other provisions of law. If a quorum is required by the governing documents, each
25 ballot received by the inspector of elections shall be treated as a member present at
26 a meeting for purposes of establishing a quorum.

27 (c) An association shall allow for cumulative voting using the secret ballot
28 procedures provided in this section, if cumulative voting is provided for in the
29 governing documents.

30 (d) Except for the meeting to count the votes required in subdivision (a) of
31 Section 5120, an election may be conducted entirely by mail unless otherwise
32 specified in the governing documents.

33 (e) In an election to approve an amendment of the governing documents, the text
34 of the proposed amendment shall be delivered to the members with the ballot.

35 **Comment.** Subdivision (a) of Section 5115 continues former Section 1363.03(e) without
36 change, except that the phrase "his or her" has been replaced throughout.

37 Subdivision (b) continues the second and third sentences of former Section 1363.03(b) without
38 change, except that the phrase "of the association" is not continued.

39 Subdivision (c) continues the fourth sentence of former Section 1363.03(b) without change.

40 Subdivision (d) continues former Section 1363.03(k) without change, except that a cross-
41 reference is updated to reflect the new location of the referenced provision.

42 Subdivision (e) is new. It generalizes former Section 1355(b)(1), which required distribution of
43 the text of a proposed amendment when amending the declaration.

1 **§ 5120 (REVISED). Counting ballots**

2 5120. (a) All votes shall be counted and tabulated by the inspector of election, or
3 the inspector of election’s designee, in public at a properly noticed open meeting
4 of the board or members. Any candidate or other member of the association may
5 witness the counting and tabulation of the votes. No person, including a member
6 of the association or an employee of the management company, shall open or
7 otherwise review any ballot prior to the time and place at which the ballots are
8 counted and tabulated. The inspector of election, or the inspector of election’s
9 designee, may verify the member’s information and signature on the outer
10 envelope prior to the meeting at which ballots are tabulated. Once a secret ballot is
11 received by the inspector of elections, it shall be irrevocable.

12 (b) The tabulated results of the election shall be promptly reported to the board
13 and shall be recorded in the minutes of the next meeting of the board and shall be
14 available for review by members of the association. Within 15 days of the
15 election, the board shall give general notice (Section 4045) of the tabulated results
16 of the election.

17 **Comment.** Section 5120 restates former Section 1363.03(f)-(g) without change, with the
18 following exceptions: (1) The phrase “his or her designee” has been replaced with “the inspector
19 of election’s designee” throughout. (2) The last sentence replaces ambiguous language requiring
20 that election results be “publicized” with a reference to the requirements for giving general notice
21 (Section 4045). (3) The terms “board of directors” and “board of directors of the association”
22 have been replaced with the defined term “board.” See Section 4085 (“board” defined).

23  **Staff Note.** The last sentence of proposed Section 5120(b) would replace ambiguous
24 language requiring that election results be “publicized” with a more precise requirement that
25 general notice be given (Section 4045).

26 **§ 5125 (REVISED). Ballot custody and inspection**

27 5125. (a) The sealed ballots at all times shall be in the custody of the inspector
28 or inspectors of election or at a location designated by the inspector or inspectors
29 until after the tabulation of the vote, and until the time allowed by Section 5145
30 for challenging the election has expired, at which time custody shall be transferred
31 to the association. If there is a recount or other challenge to the election process,
32 the inspector or inspectors of election shall, upon written request, make the ballots
33 available for inspection and review by an association member or the member’s
34 authorized representative. Any recount shall be conducted in a manner that
35 preserves the confidentiality of the vote.

36 (b) After the transfer of the ballots to the association, the ballots shall be stored
37 by the association in a secure place for no less than one year after the date of the
38 election.

39 **Comment.** Section 5125 restates former Section 1363.03(h)-(i) without change, with the
40 following exceptions: (1) The reference to the time for filing an action under Corporations Code
41 Section 7527 is replaced with a reference to the time for filing an action under Section 5145. (2)
42 The phrase “his or her” has been replaced with “the members” in subdivision (a).

1 **Staff Note.** Existing Section 1363.03(h) requires that the election inspector maintain custody
2 of ballots “until the time allowed by Section 7527 of the Corporations Code for challenging the
3 election has expired...” That time is nine months after the election. By contrast, Section 1363.09
4 permits a CID election to be contested within one year after the election. If the purpose of Section
5 1363.03(h) is to require that the election inspector maintain custody of the ballots during the time
6 in which the election may be contested, then it is an error to reference the nine-month limitations
7 period in the Corporations Code. Proposed Section 5125 would correct that error, by referencing
8 the 12-month period used in the Davis-Stirling Act.

9 **§ 5130 (UNCHANGED). Proxies**

10 5130. (a) For purposes of this article, the following definitions shall apply:

11 (1) “Proxy” means a written authorization signed by a member or the authorized
12 representative of the member that gives another member or members the power to
13 vote on behalf of that member.

14 (2) “Signed” means the placing of the member’s name on the proxy (whether by
15 manual signature, typewriting, telegraphic transmission, or otherwise) by the
16 member or authorized representative of the member.

17 (b) Proxies shall not be construed or used in lieu of a ballot. An association may
18 use proxies if permitted or required by the bylaws of the association and if those
19 proxies meet the requirements of this article, other laws, and the governing
20 documents, but the association shall not be required to prepare or distribute
21 proxies pursuant to this article.

22 (c) Any instruction given in a proxy issued for an election that directs the
23 manner in which the proxyholder is to cast the vote shall be set forth on a separate
24 page of the proxy that can be detached and given to the proxyholder to retain. The
25 proxyholder shall cast the member’s vote by secret ballot. The proxy may be
26 revoked by the member prior to the receipt of the ballot by the inspector of
27 elections as described in Section 7613 of the Corporations Code.

28 **Comment.** Section 5130 continues former Section 1363.03(d) without change, except that
29 “section” has been replaced with “article” throughout, and a reference to the “association’s”
30 governing documents has not been continued.

31 **§ 5135 (REVISED). Campaign-related information**

32 5135. (a) Association funds shall not be used for campaign purposes in
33 connection with any association board election. Funds of the association shall not
34 be used for campaign purposes in connection with any other association election
35 except to the extent necessary to comply with duties of the association imposed by
36 law.

37 (b) For the purposes of this section, “campaign purposes” includes, but is not
38 limited to, the following:

39 (1) Expressly advocating the election or defeat of any candidate that is on the
40 association election ballot.

41 (2) Including the photograph or prominently featuring the name of any candidate
42 on a communication from the association or its board, excepting the ballot, ballot
43 materials, or a communication that is legally required, within 30 days of an

1 election. This is not a campaign purpose if the communication is one for which
2 subdivision (a) of Section 5105 requires that equal access be provided to another
3 candidate or advocate.

4 **Comment.** Section 5135 continues former Section 1363.04 without change, except that (1) a
5 cross-reference in former Section 1363.04(b)(2) is updated to reflect the new location of the
6 referenced provision, and (2) an exception is added to the definition of “campaign purposes” for
7 the inclusion of a candidate’s name or photograph in a communication that is legally required.
8 For example, preparation of meeting minutes would not be barred merely because the minutes
9 include the name of a candidate in a pending election. See Section 4950 (board meeting minutes).

10 **Staff Note.** Existing Section 1363.04 restricts the use of association funds for “campaign
11 purposes” in connection with a pending board election. “Campaign purposes” is defined to
12 include, with exceptions not relevant here, a communication that features the name or photograph
13 of a candidate. Read literally, that could preclude numerous communications that are required in
14 ordinary administration (e.g., delivery of a monthly assessment bill to a candidate). Fixing that
15 problem would require more redrafting than is consistent with the conservative approach being
16 taken in this revision of the proposed law. However, the problem can be partially fixed by
17 preserving a substantive improvement that was included in the original version of the proposed
18 law. Specifically, language has been added to proposed Section 5135(b)(2) to make clear that
19 legally required communications are not prohibited campaign communications. For example, an
20 association would not be barred from distributing board meeting minutes, merely because a
21 candidate’s name is in the minutes.

22 **§ 5140 (NEW). Voting rights**

23 5140. Unless the governing documents provide otherwise:

24 (a) A member who is entitled to vote may cast one vote for each separate
25 interest that the member owns.

26 (b) If a separate interest is owned by more than one person, each owner shall be
27 a member of the association, but their joint ownership has no effect on the number
28 of votes cast for that separate interest.

29 **Comment.** Section 5140 is drawn from 10 Cal. Code Regs. § 2792.18(a). It states default rules
30 that can be overridden by the governing documents. See also Corp. Code § 7312(d).

31 Subdivision (b) makes clear that joint owners of a separate interest share the voting rights that
32 are appurtenant to ownership of a separate interest. The law does not address how the joint
33 owners will decide how to cast their shared vote. That issue could be addressed in the
34 association’s election rules, pursuant to Section 5105.

35 **Staff Note.** Proposed Section 5140 is new. It is intended to provide useful guidance on two
36 common issues involving voting power. Because the rules are expressly subordinated to the
37 governing documents, they would serve as default rules only. An association would remain free
38 to adopt a different approach, if it chooses to do so.

39 **§ 5145 (UNCHANGED). Judicial enforcement**

40 5145. (a) A member of an association may bring a civil action for declaratory or
41 equitable relief for a violation of this article by the association, including, but not
42 limited to, injunctive relief, restitution, or a combination thereof, within one year
43 of the date the cause of action accrues. Upon a finding that the election procedures
44 of this article, or the adoption of and adherence to rules provided by Article 5

1 (commencing with Section 4350) of Chapter 2, were not followed, a court may
2 void any results of the election.

3 (b) A member who prevails in a civil action to enforce the member’s rights
4 pursuant to this article shall be entitled to reasonable attorney’s fees and court
5 costs, and the court may impose a civil penalty of up to five hundred dollars
6 (\$500) for each violation, except that each identical violation shall be subject to
7 only one penalty if the violation affects each member of the association equally. A
8 prevailing association shall not recover any costs, unless the court finds the action
9 to be frivolous, unreasonable, or without foundation.

10 (c) A cause of action under Sections 5100 to 5130, inclusive, with respect to
11 access to association resources by a candidate or member advocating a point of
12 view, the receipt of a ballot by a member, or the counting, tabulation, or reporting
13 of, or access to, ballots for inspection and review after tabulation may be brought
14 in small claims court if the amount of the demand does not exceed the jurisdiction
15 of that court.

16 **Comment.** Subdivision (a) of Section 5145 continues former Section 1363.09(a) without
17 change, with the following exceptions: (1) A cross-reference is updated to reflect the new
18 location of the referenced provision. (2) The phrase “an association of which he or she is a
19 member” has been replaced with “the association.”

20 Subdivision (b) continues former Section 1363.09(b) without change, except that the phrase
21 “his or her” has been replaced with “the member’s.”

22 Subdivision (c) continues former Section 1363.09(c) without change, except that a cross-
23 reference is updated to reflect the new location of the referenced provision.

24 Article 5. Record Inspection

25 § 5200 (REVISED). Definitions

26 5200. For the purposes of this article, the following definitions shall apply:

27 (a) “Association records” means all of the following:

28 (1) Any financial document required to be provided to a member in Article 7
29 (commencing with Section 5300) or in Sections 5565 and 5810.

30 (2) Any financial document or statement required to be provided in Article 2
31 (commencing with Section 4525) of Chapter 3.

32 (3) Interim financial statements, periodic or as compiled, containing any of the
33 following:

34 (A) Balance sheet.

35 (B) Income and expense statement.

36 (C) Budget comparison.

37 (D) General ledger. A “general ledger” is a report that shows all transactions that
38 occurred in an association account over a specified period of time.

39 The records described in this paragraph shall be prepared in accordance with an
40 accrual or modified accrual basis of accounting.

41 (4) Executed contracts not otherwise privileged under law.

42 (5) Written board approval of vendor or contractor proposals or invoices.

- 1 (6) State and federal tax returns.
- 2 (7) Reserve account balances and records of payments made from reserve
- 3 accounts.
- 4 (8) Agendas and minutes of meetings of the members, the board and any
- 5 committees appointed by the board pursuant to Section 7212 of the Corporations
- 6 Code; excluding, however, agendas, minutes, and other information from
- 7 executive sessions of the board as described in Article 2 (commencing with
- 8 Section 4900).
- 9 (9) Membership lists, including name, property address, and mailing address.
- 10 (10) Check registers.
- 11 (11) The governing documents.
- 12 (12) An “enhanced association record” as defined in subdivision (b).

13 (b) “Enhanced association records” means invoices, receipts and canceled
14 checks for payments made by the association, purchase orders approved by the
15 association, credit card statements for credit cards issued in the name of the
16 association, statements for services rendered, and reimbursement requests
17 submitted to the association.

18 **Comment.** Subdivision (a) of Section 5200 continues former Section 1365.2(a)(1) without
19 change, with the following exceptions: (1) “Section” is replaced with “article” in the introductory
20 clause. (2) Cross-references are updated to reflect the new location of the referenced provision.
21 (3) Paragraphs (a)(11) and (a)(12) are new. (4) Substantive limitations on access to the
22 membership are not appropriate for inclusion in a definition and have been relocated, without
23 substantive change, to Section 5225. (5) The term “board of directors” has been replaced
24 throughout with the defined term “board.” See Section 4085 (“board” defined).

25 Subdivision (b) continues former Section 1365.2(a)(2) without change, except that a
26 substantive rule providing that a person submitting a reimbursement request is “solely responsible
27 for removing all personal identification information from the request” is not appropriate for
28 inclusion in a definition and has been relocated, without substantive change, to Section 5205(g).

29 **Staff Note.** Proposed Section 5200 would continue Section 1365.2(a), with two substantive
30 changes and a number of nonsubstantive changes. The nonsubstantive changes are described in
31 the Comment above. The substantive changes would be as follows:

32 (1) Proposed Section 5200(a)(11) would expand the definition of “association records” to include
33 all governing documents of the association.

34 (2) Proposed Section 5200(a)(12) would make clear that the general term “association records”
35 includes the set of records defined as “enhanced association records” in proposed Section
36 5200(b). This change is necessary to avoid the implication that provisions that reference
37 “association records” without also referencing “enhanced association records” do not apply to
38 enhanced association records. See, e.g., Civ. Code § 1365.2(b)(2), (c)(1)-(4), (e)-(f), (i). That
39 problematic implication is reinforced by Civil Code Section 1365.2(b)(1), which expressly
40 references *both* “association records” and “enhanced association records.”

41 The Commission also invites input on whether proposed Section 5300(a)(3)(D) should be revised
42 to include a reference to the association’s “journal.”

43 **§ 5205 (REVISED). Inspection and copying of association records**

44 5205. (a) The association shall make available association records for the time
45 periods and within the timeframes provided in Section 5210 for inspection and

1 copying by a member of the association, or the member's designated
2 representative. The association may bill the requesting member for the direct and
3 actual cost of copying requested documents. The association shall inform the
4 member of the amount of the copying costs before copying the requested
5 documents.

6 (b) A member of the association may designate another person to inspect and
7 copy the specified association records on the member's behalf. The member shall
8 make this designation in writing.

9 (c) The association shall make the specified association records available for
10 inspection and copying in the association's business office within the common
11 interest development.

12 (d) If the association does not have a business office within the development, the
13 association shall make the specified association records available for inspection
14 and copying at a place agreed to by the requesting member and the association.

15 (e) If the association and the requesting member cannot agree upon a place for
16 inspection and copying pursuant to subdivision (d) or if the requesting member
17 submits a written request directly to the association for copies of specifically
18 identified records, the association may satisfy the requirement to make the
19 association records available for inspection and copying by delivering copies of
20 the specifically identified records to the member by individual delivery (Section
21 4040) within the timeframes set forth in subdivision (b) of Section 5210.

22 (f) The association may bill the requesting member for the direct and actual cost
23 of copying and mailing requested documents. The association shall inform the
24 member of the amount of the copying and mailing costs, and the member shall
25 agree to pay those costs, before copying and sending the requested documents.

26 (g) In addition to the direct and actual costs of copying and mailing, the
27 association may bill the requesting member an amount not in excess of ten dollars
28 (\$10) per hour, and not to exceed two hundred dollars (\$200) total per written
29 request, for the time actually and reasonably involved in redacting the enhanced
30 association record. If the enhanced association records includes a reimbursement
31 request, the person submitting the reimbursement request shall be solely
32 responsible for removing all personal identification information from the request.
33 The association shall inform the member of the estimated costs, and the member
34 shall agree to pay those costs, before retrieving the requested documents.

35 (h) Requesting parties shall have the option of receiving specifically identified
36 records by electronic transmission or machine-readable storage media as long as
37 those records can be transmitted in a redacted format that does not allow the
38 records to be altered. The cost of duplication shall be limited to the direct cost of
39 producing the copy of a record in that electronic format. The association may
40 deliver specifically identified records by electronic transmission or machine-
41 readable storage media as long as those records can be transmitted in a redacted
42 format that prevents the records from being altered.

1 **Comment.** Subdivisions (a) through (g) of Section 5205, inclusive, continue former Section
2 1365.2(b)-(c) without change with the following exceptions: (1) Cross-references are updated to
3 reflect the new location of the referenced provisions. (2) A superfluous reference to “enhanced
4 association records” is not continued in subdivision (a). See Section 5200(a)(12) (“association
5 records” includes “enhanced association records”). (3) Subdivision (d) is rephrased to avoid
6 ending the sentence with a preposition. (4) Subdivision (e) is revised to provide for “individual
7 delivery” of records, rather than mailing. See Section 4040. (5) The second sentence of
8 subdivision (g) is added to restate the last clause of former Section 1365.2(a)(2) without
9 substantive change.

10 Subdivision (h) continues former Section 1365.2(h) without change.

11 **Staff Note.** (1) The second sentence of proposed Section 5205(g) is drawn from existing
12 Section 1365.2(a)(2). It states a substantive rule regarding redaction responsibility, and is better
13 located in proposed Section 5206, with other redaction rules, rather than being buried in a
14 definition as it is in existing law.

15 (2) Existing Section 1365.2(c)(5) permits the association to bill for redaction of “enhanced
16 association records as provided in paragraph (2) of subdivision (a)...” The last clause appears to
17 be a superfluous reference to the definition of the term “enhanced association records.” It is not
18 necessary to reference a definition that is generally applicable. The reference is not continued.

19 **§ 5210 (REVISED). Time periods**

20 5210. (a) Association records are subject to member inspection for the following
21 time periods:

22 (1) For the current fiscal year and for each of the previous two fiscal years.

23 (2) Notwithstanding paragraph (1), minutes of member and board meetings are
24 subject to inspection permanently. If a committee has decision making authority,
25 minutes of the meetings of that committee shall be made available commencing
26 January 1, 2007, and shall thereafter be permanently subject to inspection.

27 (b) When a member properly requests access to association records, access to
28 the requested records shall be granted within the following time periods:

29 (1) Association records prepared during the current fiscal year, within 10
30 business days following the association’s receipt of the request.

31 (2) Association records prepared during the previous two fiscal years, within 30
32 calendar days following the association’s receipt of the request.

33 (3) Any record or statement available pursuant to Article 2 (commencing with
34 Section 4525) of Chapter 3, Article 7 (commencing with Section 5300), Section
35 5565, or Section 5810, within the timeframe specified therein.

36 (4) Minutes of member and board meetings, within the timeframe specified in
37 subdivision (a) of Section 4950.

38 (5) Minutes of meetings of committees with decision making authority for
39 meetings commencing on or after January 1, 2007, within 15 calendar days
40 following approval.

41 (6) Membership list, within the timeframe specified in Section 8330 of the
42 Corporations Code.

43 (c) There shall be no liability pursuant to this article for an association that fails
44 to retain records for the periods specified in subdivision (a) that were created prior
45 to January 1, 2006.

1 **Comment.** Subdivisions (a) and (b) of Section 5210 restate former Section 1365.2(i)-(j)
2 without substantive change.

3 Subdivision (c) continues former Section 1365.2(k) without change, with the following
4 exceptions: (1) “Section” is changed to “article.” (2) A cross-reference is updated to reflect the
5 new location of the referenced provision.

6 **Staff Note.** Proposed Section 5210 would restate Section 1365.2(i)-(j) without making any
7 change in its substance. The restatement is necessary because existing law is potentially
8 confusing. It does not draw a clear enough distinction between the time during which records are
9 subject to inspection, and the time, after receipt of a proper inspection request, when access to the
10 requested records must be granted. The existing provision uses similar wording in framing both
11 issues (*compare* subdivision (i) (“The time periods for which specified records shall be provided
12 is as follows:”), *with* subdivision (j) (“The timeframes in which access to specified records shall
13 be provided to a requesting member is as follows:”).

14 Proposed Section 5210 would draw the distinction more clearly.

15 **§ 5215 (UNCHANGED). Withholding and redaction**

16 5215. (a) Except as provided in subdivision (b), the association may withhold or
17 redact information from the association records if any of the following are true:

18 (1) The release of the information is reasonably likely to lead to identity theft.
19 For the purposes of this section, “identity theft” means the unauthorized use of
20 another person’s personal identifying information to obtain credit, goods, services,
21 money, or property. Examples of information that may be withheld or redacted
22 pursuant to this paragraph include bank account numbers of members or vendors,
23 social security or tax identification numbers, and check, stock, and credit card
24 numbers.

25 (2) The release of the information is reasonably likely to lead to fraud in
26 connection with the association.

27 (3) The information is privileged under law. Examples include documents
28 subject to attorney-client privilege or relating to litigation in which the association
29 is or may become involved, and confidential settlement agreements.

30 (4) The release of the information is reasonably likely to compromise the
31 privacy of an individual member of the association.

32 (5) The information contains any of the following:

33 (A) Records of a-la-carte goods or services provided to individual members of
34 the association for which the association received monetary consideration other
35 than assessments.

36 (B) Records of disciplinary actions, collection activities, or payment plans of
37 members other than the member requesting the records.

38 (C) Any person’s personal identification information, including, without
39 limitation, social security number, tax identification number, driver’s license
40 number, credit card account numbers, bank account number, and bank routing
41 number.

42 (D) Agendas, minutes, and other information from executive sessions of the
43 board as described in Article 2 (commencing with Section 4900), except for

1 executed contracts not otherwise privileged. Privileged contracts shall not include
2 contracts for maintenance, management, or legal services.

3 (E) Personnel records other than the payroll records required to be provided
4 under subdivision (b).

5 (F) Interior architectural plans, including security features, for individual homes.

6 (b) Except as provided by the attorney-client privilege, the association may not
7 withhold or redact information concerning the compensation paid to employees,
8 vendors, or contractors. Compensation information for individual employees shall
9 be set forth by job classification or title, not by the employee's name, social
10 security number, or other personal information.

11 (c) No association, officer, director, employee, agent, or volunteer of an
12 association shall be liable for damages to a member of the association or any third
13 party as the result of identity theft or other breach of privacy because of the failure
14 to withhold or redact that member's information under this section unless the
15 failure to withhold or redact the information was intentional, willful, or negligent.

16 (d) If requested by the requesting member, an association that denies or redacts
17 records shall provide a written explanation specifying the legal basis for
18 withholding or redacting the requested records.

19 **Comment.** Section 5215 continues former Section 1365.2(d) without change, except that a
20 cross-reference is updated to reflect the new location of the referenced provision and the term
21 "board of directors" has been replaced with the defined term "board." See Section 4085 ("board"
22 defined).

23 **§ 5220 (UNCHANGED). Membership list opt out**

24 5220. A member of the association may opt out of the sharing of that member's
25 name, property address, and mailing address by notifying the association in
26 writing that the member prefers to be contacted via the alternative process
27 described in subdivision (c) of Section 8330 of the Corporations Code. This opt-
28 out shall remain in effect until changed by the member.

29 **Comment.** Section 5220 continues former Section 1365.2(a)(1)(I)(iii) without change, except
30 that "his or her" has been replaced with references to the "member" throughout.

31 **§ 5225 (UNCHANGED). Membership list request**

32 5225. A member requesting the membership list shall state the purpose for
33 which the list is requested which purpose shall be reasonably related to the
34 requester's interest as a member. If the association reasonably believes that the
35 information in the list will be used for another purpose, it may deny the member
36 access to the list. If the request is denied, in any subsequent action brought by the
37 member under Section 5235, the association shall have the burden to prove that
38 the member would have allowed use of the information for purposes unrelated to
39 the member's interest as a member.

40 **Comment.** Section 5225 continues former Section 1365.2(a)(1)(I)(ii) without change, with the
41 following exceptions: (1) "The member requesting the list" has been replaced with "A member

1 requesting the membership list,” to improve clarity. (2) A cross-reference is updated to reflect the
2 new location of the referenced provision. (3) “His or her” is replaced with “the member’s.”

3 **§ 5230 (UNCHANGED). Restriction on use of records**

4 5230. (a) The association records, and any information from them, may not be
5 sold, used for a commercial purpose, or used for any other purpose not reasonably
6 related to a member’s interest as a member. An association may bring an action
7 against any person who violates this article for injunctive relief and for actual
8 damages to the association caused by the violation.

9 (b) This article may not be construed to limit the right of an association to
10 damages for misuse of information obtained from the association records pursuant
11 to this article or to limit the right of an association to injunctive relief to stop the
12 misuse of this information.

13 (c) An association shall be entitled to recover reasonable costs and expenses,
14 including reasonable attorney’s fees, in a successful action to enforce its rights
15 under this article.

16 **Comment.** Section 5230 continues former Section 1365.2(e) without change, with the
17 following exceptions: (1) “The member requesting the list” has been replaced with “A member
18 requesting the membership list,” to improve clarity. (2) A cross-reference is updated to reflect the
19 new location of the referenced provision. (3) “His or her” is replaced with “the member’s.” (4)
20 “This section” has been replaced with “this article” throughout.

21 **§ 5235 (UNCHANGED). Enforcement**

22 5235. (a) A member of an association may bring an action to enforce that
23 member’s right to inspect and copy the association records. If a court finds that the
24 association unreasonably withheld access to the association records, the court shall
25 award the member reasonable costs and expenses, including reasonable attorney’s
26 fees, and may assess a civil penalty of up to five hundred dollars (\$500) for the
27 denial of each separate written request.

28 (b) A cause of action under this section may be brought in small claims court if
29 the amount of the demand does not exceed the jurisdiction of that court.

30 (c) A prevailing association may recover any costs if the court finds the action to
31 be frivolous, unreasonable, or without foundation.

32 **Comment.** Section 5235 continues former Section 1365.2(f) without change, except that the
33 provision has been divided into subdivisions for ease of reference.

34 **§ 5240 (REVISED). Application of article**

35 5240. (a) As applied to an association and its members, the provisions of this
36 article are intended to supersede the provisions of Sections 8330 and 8333 of the
37 Corporations Code to the extent those sections are inconsistent.

38 (b) Except as provided in subdivision (a), members of the association shall have
39 access to association records, including accounting books and records and
40 membership lists, in accordance with Article 3 (commencing with Section 8330)
41 of Chapter 13 of Part 3 of Division 2 of Title 1 of the Corporations Code.

1 (c) The provisions of this article apply to any community service organization or
2 similar entity that is related to the association, and this article shall operate to give
3 a member of the community service organization or similar entity a right to
4 inspect and copy the records of that organization or entity equivalent to that
5 granted to association members by this article.

6 (d) The provisions of this article shall not apply to any common interest
7 development in which separate interests are being offered for sale by a subdivider
8 under the authority of a public report issued by the Department of Real Estate so
9 long as the subdivider or all subdividers offering those separate interests for sale,
10 or any employees of those subdividers or any other person who receives direct or
11 indirect compensation from any of those subdividers, comprise a majority of the
12 directors. Notwithstanding the foregoing, this article shall apply to that common
13 interest development no later than 10 years after the close of escrow for the first
14 sale of a separate interest to a member of the general public pursuant to the public
15 report issued for the first phase of the development.

16 **Comment.** Subdivision (a) of Section 5240 continues former Section 1365.2(l) without
17 change, except that “section” has been changed to “article.”

18 Subdivision (b) continues the first sentence of former Section 1363(f) without change, except
19 that the introductory clause has been added to clarify the relationship between this provision and
20 subdivision (a). The second sentence of former Section 1363(f) is not continued. That provision is
21 unnecessary because its substance is subsumed within Section 5200(a)(11), which guarantees
22 access to all governing documents, and not just the operating rules.

23 Subdivision (c) continues former Section 1365.2(g) without change, with the following
24 exceptions: (1) “Section” has been replaced with “article” throughout. (2) A superfluous
25 reference to the definition of “community service organization” has not been continued. See
26 Section 4110 (“community service organization”).

27 Subdivision (d) continues former Section 1365.2(m) without change, with the following
28 exceptions: (1) “Section” has been replaced with “article” throughout. (2) The term “board of
29 directors of the association” has been replaced with the defined term “board.” See Section 4085
30 (“board” defined). (3) The defined term “director” is used in place of “board member.” See
31 Section 4140 (“director” defined).

32 **Staff Note.** (1) The first sentence of Section 1363(f) provides that association members have
33 the same access to records that is granted to members of a nonprofit mutual benefit corporation
34 under the Corporations Code. Section 1365.2(l) expressly subordinates the Corporations Code
35 record provisions to the rules provided in that section, to the extent of any inconsistency. Those
36 provisions would be continued in proposed Section 5240(a) and (b). An introductory clause
37 would be added in subdivision (b), to provide better guidance on the intended relationship
38 between the two provisions.

39 (2) The second sentence of Section 1363(f) provides for member access to an association’s
40 operating rules. That rule is subsumed in proposed Section 5200(a)(11), which would provide for
41 access to *all* of an association’s governing documents, including the operating rules. See
42 proposed Section 4150 (“governing documents” defined).

Article 6. Record Keeping

§ 5250 (NEW). Duty to maintain records

5250. (a) An association shall maintain at least one copy of the following association records, for the periods specified in Section 5255:

(1) The original governing documents and any amendment of or addition to the governing documents.

(2) The membership list, including the name, address, and membership class of each member.

(3) The notice, agenda, and minutes of a member meeting, board meeting, or meeting of a committee that exercises a power of the board.

(4) A report prepared pursuant to Article 7 (commencing with Section 5300).

(5) Books and records of account.

(6) A tax return or other tax-related record.

(7) A deed or other record that relates to title of real property within the common interest development.

(8) A record that relates to the design, construction, or physical condition of the common interest development.

(9) A record that relates to a proposed modification of a member's separate interest.

(10) A record that relates to litigation involving the association or legal services provided to the association.

(11) An employment or payroll record.

(12) An insurance policy or record relating to insurance coverage or claims.

(13) A contract to which the association is a party.

(14) A loan document.

(15) A ballot, proxy, or other record that relates to an election.

(16) A reserve funding study.

(17) A record that relates to enforcement of a restriction.

(b) The association may keep a record in paper form or in any other form that can be converted to a paper copy, provided that the paper copy accurately portrays the content of the record. A paper copy produced from a non-paper record is admissible in evidence and is accepted for all other purposes, to the same extent as an original paper record of the same information.

Comment. Section 5250 is new.

 **Staff Note.** Proposed Section 5250 is new. It is intended to provide guidance on an issue that is not adequately addressed by existing law. The Commission invites input on whether there are other types of records that should be added to Section 5250.

§ 5255 (NEW). Record retention periods

5255. (a) Unless a longer period is required by law or by the governing documents, an association shall retain a record listed in Section 5250 for at least four years after its date of creation, except that a record with continuing legal or

1 operational effect shall be retained during the period of its effect and for at least
2 four years after the termination of its effect.

3 (b) The association shall retain the following records permanently:

4 (1) The original governing documents and each amendment of or addition to the
5 governing documents.

6 (2) The minutes of a member meeting, board meeting, or meeting of a
7 committee that exercises a power of the board.

8 (3) A deed or other record that relates to title of real property within the
9 common interest development.

10 (4) A record that relates to the design, construction, or physical condition of the
11 common interest development.

12 (c) A ballot cast in a member election shall be retained for the period provided
13 in Section 5125.

14 (d) This section does not apply to a record that is discarded or destroyed before
15 January 1, 2010.

16 **Comment.** Section 5255 is new. Subdivision (a) states a default retention period, but makes
17 clear that other law or an association's governing documents may impose a longer retention
18 period. A special rule is provided for records that have "continuing legal or operational effect."
19 Such records might include a lease or other contract with a fixed term. Associations should
20 determine whether administrative agencies, such as the Franchise Tax Board or Internal Revenue
21 Service, impose longer retention requirements for some records.

22 Subdivision (c) reflects the rule provided in Section 5125 (ballot custody).

23 Subdivision (d) provides that the requirements of this section only apply to a record held by an
24 association at the time that the section became operative. Note that other record retention
25 requirements may govern documents that were held by the association before that date. See, e.g.,
26 Section 5210 (period during which records must be made available for member inspection); 22
27 Cal. Code Regs. § 1085-2 (four-year period for retention of employment records); 26 C.F.R. §
28 1.6001-1 (retention of federal tax records while material to assessment or collection of tax); 29
29 C.F.R. § 516.5 (three-year period for retention of payroll records).

30 **Staff Note.** Proposed Section 5255 is new. It is intended to provide guidance on an issue that
31 is not adequately addressed by existing law. The Commission invites input on whether any of the
32 retention periods specified in Section 5255 should be changed or eliminated.

33 Article 7. Annual Reports

34 § 5300 (REVISED). Annual budget report

35 5300. (a) Notwithstanding a contrary provision in the governing documents, an
36 association shall prepare and distribute an annual budget report, 30 to 90 days
37 before the end of its fiscal year.

38 (b) Unless the governing documents impose more stringent standards, the annual
39 budget report shall include all of the following information:

40 (1) A pro forma operating budget, showing the estimated revenue and expenses
41 on an accrual basis.

42 (2) A summary of the association's reserves, prepared pursuant to Section 5565.

1 (3) A summary of the reserve funding plan adopted by the board, as specified in
2 paragraph (5) of subdivision (b) of Section 5550. The summary shall include
3 notice to members that the full reserve study plan is available upon request, and
4 the association shall provide the full reserve plan to any member upon request.

5 (4) A statement as to whether the board has determined to defer or not undertake
6 repairs or replacement of any major component with a remaining life of 30 years
7 or less, including a justification for the deferral or decision not to undertake the
8 repairs or replacement.

9 (5) A statement as to whether the board, consistent with the reserve funding plan
10 adopted pursuant to Section 5560 has determined or anticipates that the levy of
11 one or more special assessments will be required to repair, replace, or restore any
12 major component or to provide adequate reserves therefor. If so, the statement
13 shall also set out the estimated amount, commencement date, and duration of the
14 assessment.

15 (6) A statement as to the mechanism or mechanisms by which the board will
16 fund reserves to repair or replace major components, including assessments,
17 borrowing, use of other assets, deferral of selected replacements or repairs, or
18 alternative mechanisms.

19 (7) A general statement addressing the procedures used for the calculation and
20 establishment of those reserves to defray the future repair, replacement, or
21 additions to those major components that the association is obligated to maintain.
22 The report shall include, but need not be limited to, reserve calculations made
23 using the formula described in paragraph (4) of subdivision (b) of Section 5570,
24 and may not assume a rate of return on cash reserves in excess of 2 percent above
25 the discount rate published by the Federal Reserve Bank of San Francisco at the
26 time the calculation was made.

27 (8) A statement as to whether the association has any outstanding loans with an
28 original term of more than one year, including the payee, interest rate, amount
29 outstanding, annual payment, and when the loan is scheduled to be retired.

30 (9) A summary of the association's property, general liability, earthquake, flood,
31 and fidelity insurance policies. For each policy, the summary shall include the
32 name of the insurer, the type of insurance, the policy limit, and the amount of the
33 deductible, if any. To the extent that any of the required information is specified in
34 the insurance policy declaration page, the association may meet its obligation to
35 disclose that information by making copies of that page and distributing it with the
36 annual budget report. The summary distributed pursuant to this paragraph shall
37 contain, in at least 10-point boldface type, the following statement:

38 "This summary of the association's policies of insurance provides only certain
39 information, as required by Section 5300 of the Civil Code, and should not be
40 considered a substitute for the complete policy terms and conditions contained in
41 the actual policies of insurance. Any association member may, upon request and
42 provision of reasonable notice, review the association's insurance policies and,

1 upon request and payment of reasonable duplication charges, obtain copies of
2 those policies. Although the association maintains the policies of insurance
3 specified in this summary, the association’s policies of insurance may not cover
4 your property, including personal property or real property improvements to or
5 around your dwelling, or personal injuries or other losses that occur within or
6 around your dwelling. Even if a loss is covered, you may nevertheless be
7 responsible for paying all or a portion of any deductible that applies. Association
8 members should consult with their individual insurance broker or agent for
9 appropriate additional coverage.”

10 (c) The annual budget report shall be made available to the members pursuant to
11 Section 5320.

12 (d) The summary of the association’s reserves disclosed pursuant to paragraph
13 (2) of subdivision (b) shall not be admissible in evidence to show improper
14 financial management of an association, provided that other relevant and
15 competent evidence of the financial condition of the association is not made
16 inadmissible by this provision.

17 (e) The Assessment and Reserve Funding Disclosure Summary form, prepared
18 pursuant to Section 5570, shall accompany each annual budget report or summary
19 of the annual budget report that is delivered pursuant to this article.

20 **Comment.** Subdivision (a) of Section 5300 continues the last paragraph of former Section
21 1365(a) without substantive change.

22 Subdivision (b)(1) continues former Section 1365(a)(1) without substantive change.

23 Subdivision (b)(2) continues the introduction of former Section 1365(a)(2) without substantive
24 change. The remainder of former Section 1365(a)(2) is continued in Section 5565.

25 Subdivision (b)(3) continues former Section 1365(b) without change, except that (1) the
26 commencement date of that requirement (January 1, 2009) is not continued, (2) an erroneous
27 cross-reference to former Section 1365.5(e)(4) has been revised to refer to Section 5560(b)(5),
28 which continues former Section 1365.5(e)(5), and (3) the term “board of directors of the
29 association” has been replaced with the defined term “board.” See Section 4085 (“board”
30 defined).

31 Subdivision (b)(4) continues former Section 1365(a)(3)(A) without change, except that the
32 introductory clause has been added and the term “board of directors of the association” has been
33 replaced with the defined term “board.” See Section 4085 (“board” defined).

34 Subdivision (b)(5) continues former Section 1365(a)(3)(B) without change, except that the
35 introductory clause has been added and the term “board of directors of the association” has been
36 replaced with the defined term “board.” See Section 4085 (“board” defined).

37 Subdivision (b)(6) continues former Section 1365(a)(3)(C) without change, except that the
38 introductory clause has been added and the term “board of directors” has been replaced with the
39 defined term “board.” See Section 4085 (“board” defined).

40 Subdivision (b)(7) continues the first paragraph of former Section 1365(a)(4) without change,
41 except that a cross-reference is updated to reflect the new location of the referenced provision.

42 Subdivision (b)(8) continues former Section 1365(a)(3)(D) without change, except that the
43 introductory clause has been added.

44 Subdivision (b)(9) continues former Section 1365(f)(1), (3)-(4) without change, except that the
45 redundant word “any” is replaced with “the” and an extraneous comma is deleted from the
46 statutory notice text.

47 Subdivision (c) is consistent with former Section 1365(d).

1 Subdivision (d) continues the second paragraph of former Section 1365(a)(4) without change,
2 except that a cross-reference is updated to reflect the new location of the referenced provision.

3 Subdivision (e) restates former Section 1365.2.5(b)(3) without substantive change.

4 **☞ Staff Note.** The annual budget report would continue much of the substance of existing
5 Section 1365, but would make the following organizational changes, to simplify compliance:

6 (1) Non-budgetary information that is currently required to be distributed annually would not
7 be part of the annual budget report. Instead, it would be collected into an annual “policy
8 statement,” and distributed pursuant to proposed Section 5310. This would not result in any
9 change in the information provided to the membership, but it would organize it into two
10 documents rather than one. That would make it easier for members to request the information of
11 interest to them, and would create an opportunity for cost reduction.

12 (2) Provisions of Section 1365(a)(2) that describe the required *content* of the “summary of
13 association reserves” would be relocated to proposed Section 5565 (in proximity to the other
14 reserve study and planning provisions).

15 (3) The requirement that a review of the financial statement be distributed to the members,
16 pursuant to Section 1365(c), is relocated to proposed Section 5305. That provision requires
17 distribution of information *after* the end of the fiscal year, and so it cannot be included with the
18 annual budget report, which is distributed *before* the end of the fiscal year.

19 (4) In proposed Section 5300(b)(3), a cross-reference to former Section 1365.5(e)(4) appears to
20 be erroneous. It has been revised to refer to the substance of former Section 1365.5(e)(5)
21 (continued in proposed Section 5550(b)(5)). The Commission invites comment on whether that
22 change would cause any problems.

23 **§ 5305 (REVISED). Review of financial statement**

24 5305. A review of the financial statement of the association shall be prepared in
25 accordance with generally accepted accounting principles by a licensee of the
26 California Board of Accountancy for any fiscal year in which the gross income to
27 the association exceeds seventy-five thousand dollars (\$75,000). A copy of the
28 review of the financial statement shall be distributed within 120 days after the
29 close of each fiscal year, by individual delivery (Section 4040).

30 **Comment.** Section 5305 continues former Section 1365(c) without change, except that
31 language has been added to specify the method of delivery.

32 **☞ Staff Note.** Proposed Section 5305 would specify the method by which the review of the
33 association’s financial statement is to be delivered (by “individual notice”).

34 **§ 5310 (NEW). Policy statement**

35 5310. (a) Within 120 days after the end of the fiscal year, the board shall prepare
36 and distribute an annual policy statement that provides the members with
37 information about association policies. The annual policy statement shall include
38 all of the following information:

39 (1) The name and address of the person designated to receive official
40 communications to the association, pursuant to Section 4035.

41 (2) A statement explaining that a member may submit a request to have notices
42 sent to up to two different specified addresses, pursuant to subdivision (b) of
43 Section 4040 and subdivision (f) of Section 5675.

44 (3) The location, if any, designated for posting of a general notice, pursuant to
45 paragraph (3) of subdivision (a) of Section 4045.

1 (4) Notice of a member’s option to receive general notices by individual
2 delivery, pursuant to subdivision (b) of Section 4045.

3 (5) Notice of a member’s right to receive copies of meeting minutes, pursuant to
4 subdivision (b) of Section 4950.

5 (6) The statement of assessment collection policies required by Section 5730.

6 (7) A statement describing the association’s policies and practices in enforcing
7 lien rights or other legal remedies for default in the payment of assessments.

8 (8) A statement describing the association’s discipline policy, if any, including
9 any schedule of penalties for violations of the governing documents pursuant to
10 Section 5850.

11 (9) A summary of alternative dispute resolution procedures, pursuant to Sections
12 5920 and 5965.

13 (10) A summary of any requirements for association approval of a physical
14 change to property, pursuant to Section 4765.

15 (11) Any other information that is required by law or the governing documents
16 or that the board determines to be appropriate for inclusion.

17 (b) The board shall promptly deliver a copy of the most recent annual policy
18 statement to any new member, at no cost to the member.

19 (c) The annual policy statement shall be made available to the members pursuant
20 to Section 5320.

21 **Comment.** Section 5310 is new. It aggregates the annual non-budgetary disclosures that are
22 required under various provisions of this part.

23  **Staff Note.** (1) See the first Staff Note following proposed Section 5300.
24 (2) Proposed Section 5310(c) would extend the existing “summary” distribution option, which
25 currently applies to the annual budget report, so that it would *also* apply to distribution of the
26 annual policy statement. See proposed Section 5320.

27 **§ 5320 (REVISED). Notice of availability**

28 5320. (a) When a report is prepared pursuant to Section 5300 or 5310, the
29 association shall deliver one of the following documents to all members, by
30 individual delivery (Section 4040):

31 (1) The full report.

32 (2) A summary of the report. The summary shall include a general description of
33 the content of the report. Instructions on how to request a complete copy of the
34 report at no cost to the member shall be printed in boldface type on the first page
35 of the summary.

36 (b) Notwithstanding subdivision (a), if a member has requested to receive all
37 reports in full, the association shall deliver the full report to that member, rather
38 than a summary of the report.

39 **Comment.** Subdivision (a) of Section 5320 generalizes former Section 1365(d), so that the
40 former optional “summary” approach to distributing the annual pro forma budget is extended to
41 the annual policy statement. Nothing in this section would prevent an association from combining
42 multiple reports or summaries of reports in a single mailing.

43 Subdivision (b) is new.

1 **☞ Staff Note.** Proposed Section 5320 generalizes the existing rule that governs distribution of
2 the annual pro forma budget, so that it also applies to distribution of the annual policy statement.
3 This provides an *optional* alternative approach that could help some associations to reduce costs.
4 Proposed subdivision (b) would improve on the existing approach, by allowing a member who
5 wishes to receive all reports in full to make that request once (rather than requiring the member to
6 make the same request every year, as would seem to be required under Section 1365(d)).

7 Article 8. Conflict of Interest

8 **§ 5350 (REVISED). Interested director**

9 5350. (a) Notwithstanding any other law, and regardless of whether an
10 association is incorporated or unincorporated, the provisions of Sections 7223 and
11 7224 of the Corporations Code shall apply to any contract or other transaction
12 authorized, approved, or ratified by the board or a committee of the board.

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

15 (1) Discipline of the director or committee member.

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

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

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

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

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

25 (c) Nothing in this section limits any other provision of law or the governing
26 documents that governs a decision in which a director may have an interest.

27 **Comment.** Subdivision (a) of Section 5350 continues former Section 1365.6 without
28 substantive change, except that the reference to Corporations Code Section 310, which governs
29 for-profit corporations, has been replaced with a reference to Corporations Code Sections 7233
30 and 7234, which state equivalent rules for nonprofit mutual benefit corporations.

31 Subdivisions (b) and (c) are new.

32 **☞ Staff Note.** (1) Proposed Section 5350(a) would correct an apparently erroneous reference to
33 Corporations Code Section 310, which governs for-profit corporations. The reference would be
34 replaced with a reference to Corporations Code Sections 7233 and 7234, which state equivalent
35 rules for nonprofit mutual benefit corporations.

36 (2) Subdivision (b) is added to provide simplified guidance to homeowner association board
37 members on impermissible conflicts. Subdivision (c) makes clear that the section is not intended
38 as a complete codification of the law governing director conflicts of interest.

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Article 9. Managing Agent

§ 5375 (UNCHANGED). Prospective managing agent disclosure

5375. A prospective managing agent of a common interest development shall provide a written statement to the board as soon as practicable, but in no event more than 90 days, before entering into a management agreement which shall contain all of the following information concerning the managing agent:

(a) The names and business addresses of the owners or general partners of the managing agent. If the managing agent is a corporation, the written statement shall include the names and business addresses of the directors and officers and shareholders holding greater than 10 percent of the shares of the corporation.

(b) Whether or not any relevant licenses such as architectural design, construction, engineering, real estate, or accounting have been issued by this state and are currently held by the persons specified in subdivision (a). If a license is currently held by any of those persons, the statement shall contain the following information:

- (1) What license is held.
- (2) The dates the license is valid.
- (3) The name of the licensee appearing on that license.

(c) Whether or not any relevant professional certifications or designations such as architectural design, construction, engineering, real property management, or accounting are currently held by any of the persons specified in subdivision (a), including, but not limited to, a professional common interest development manager. If any certification or designation is held, the statement shall include the following information:

- (1) What the certification or designation is and what entity issued it.
- (2) The dates the certification or designation is valid.
- (3) The names in which the certification or designation is held.

Comment. Section 5375 continues former Section 1363.1(a) without change, except that the superfluous phrase “of a common interest development” is not continued and the term “board of directors of the association” has been replaced with the defined term “board.” See Section 4085 (“board” defined).

§ 5380 (UNCHANGED). Trust fund account

5380. (a) A managing agent of a common interest development who accepts or receives funds belonging to the association shall deposit those funds that are not placed into an escrow account with a bank, savings association, or credit union or into an account under the control of the association, into a trust fund account maintained by the managing agent in a bank, savings association, or credit union in this state. All funds deposited by the managing agent in the trust fund account shall be kept in this state in a financial institution, as defined in Section 31041 of the Financial Code, which is insured by the federal government, and shall be

1 maintained there until disbursed in accordance with written instructions from the
2 association entitled to the funds.

3 (b) At the written request of the board, the funds the managing agent accepts or
4 receives on behalf of the association shall be deposited into an interest-bearing
5 account in a bank, savings association, or credit union in this state, provided all of
6 the following requirements are met:

7 (1) The account is in the name of the managing agent as trustee for the
8 association or in the name of the association.

9 (2) All of the funds in the account are covered by insurance provided by an
10 agency of the federal government.

11 (3) The funds in the account are kept separate, distinct, and apart from the funds
12 belonging to the managing agent or to any other person or entity for whom the
13 managing agent holds funds in trust except that the funds of various associations
14 may be commingled as permitted pursuant to subdivision (d).

15 (4) The managing agent discloses to the board the nature of the account, how
16 interest will be calculated and paid, whether service charges will be paid to the
17 depository and by whom, and any notice requirements or penalties for withdrawal
18 of funds from the account.

19 (5) No interest earned on funds in the account shall inure directly or indirectly to
20 the benefit of the managing agent or the managing agent's employees.

21 (c) The managing agent shall maintain a separate record of the receipt and
22 disposition of all funds described in this section, including any interest earned on
23 the funds.

24 (d) The managing agent shall not commingle the funds of the association with
25 the managing agent's own money or with the money of others that the managing
26 agent receives or accepts, unless all of the following requirements are met:

27 (1) The managing agent commingled the funds of various associations on or
28 before February 26, 1990, and has obtained a written agreement with the board of
29 each association that the managing agent will maintain a fidelity and surety bond
30 in an amount that provides adequate protection to the associations as agreed upon
31 by the managing agent and the board of each association.

32 (2) The managing agent discloses in the written agreement whether the
33 managing agent is deriving benefits from the commingled account or the bank,
34 credit union, or savings institution where the moneys will be on deposit.

35 (3) The written agreement provided pursuant to this subdivision includes, but is
36 not limited to, the name and address of the bonding companies, the amount of the
37 bonds, and the expiration dates of the bonds.

38 (4) If there are any changes in the bond coverage or the companies providing the
39 coverage, the managing agent discloses that fact to the board of each affected
40 association as soon as practical, but in no event more than 10 days after the
41 change.

42 (5) The bonds assure the protection of the association and provide the
43 association at least 10 days' notice prior to cancellation.

1 (6) Completed payments on the behalf of the association are deposited within 24
2 hours or the next business day and do not remain commingled for more than 10
3 calendar days.

4 (e) The prevailing party in an action to enforce this section shall be entitled to
5 recover reasonable legal fees and court costs.

6 (f) As used in this section, “completed payment” means funds received that
7 clearly identify the account to which the funds are to be credited.

8 **Comment.** Subdivision (a) of Section 5380 continues former Section 1363.2(a) without
9 change, except that “all such” is replaced with “those” to conform to standard legislative drafting
10 practice.

11 Subdivisions (b) and (c) continue former Section 1363.2(b)-(c) without change, except that the
12 phrase “his or her” has been replaced with “the managing agent’s” and the term “board of
13 directors” has been replaced with the defined term “board.” See Section 4085 (“board” defined).

14 Subdivision (d) continues former Section 1363.2(d) without change, except that “he or she”
15 and “his or her” have been replaced with “the managing agent” or “the managing agent’s”
16 throughout and the term “board of directors” has been replaced with the defined term “board.”
17 See Section 4085 (“board” defined).

18 Subdivision (e) continues former Section 1363.2(e) without change.

19 Subdivision (f) continues former Section 1363.2(g) without change, except “which” is replaced
20 with “that.”

21 Article 10. Government Assistance

22 § 5400 (UNCHANGED). Director training course

23 5400. To the extent existing funds are available, the Department of Consumer
24 Affairs and the Department of Real Estate shall develop an on-line education
25 course for the board regarding the role, duties, laws, and responsibilities of
26 directors and prospective directors, and the nonjudicial foreclosure process.

27 **Comment.** Section 5400 continues former Section 1363.001 without substantive change,
28 except that the term “board of directors” has been replaced with the defined term “board” and the
29 defined term “director” is used in place of “board member.” See Sections 4085 (“board” defined),
30 4140 (“director” defined).

31 § 5405 (UNCHANGED). State registry

32 5405. (a) To assist with the identification of common interest developments,
33 each association, whether incorporated or unincorporated, shall submit to the
34 Secretary of State, on a form and for a fee not to exceed thirty dollars (\$30) that
35 the Secretary of State shall prescribe, the following information concerning the
36 association and the development that it manages:

37 (1) A statement that the association is formed to manage a common interest
38 development under the Davis-Stirling Common Interest Development Act.

39 (2) The name of the association.

40 (3) The street address of the association’s onsite office, or, if none, of the
41 responsible officer or managing agent of the association.

1 (4) The name, address, and either the daytime telephone number or e-mail
2 address of the president of the association, other than the address, telephone
3 number, or e-mail address of the association's onsite office or managing agent.

4 (5) The name, street address, and daytime telephone number of the association's
5 managing agent, if any.

6 (6) The county, and if in an incorporated area, the city in which the development
7 is physically located. If the boundaries of the development are physically located
8 in more than one county, each of the counties in which it is located.

9 (7) If the development is in an unincorporated area, the city closest in proximity
10 to the development.

11 (8) The nine-digit ZIP Code, front street, and nearest cross street of the physical
12 location of the development.

13 (9) The type of common interest development, as defined in Section 4100,
14 managed by the association.

15 (10) The number of separate interests, as defined in Section 4185, in the
16 development.

17 (b) The association shall submit the information required by this section as
18 follows:

19 (1) By incorporated associations, within 90 days after the filing of its original
20 articles of incorporation, and thereafter at the time the association files its biennial
21 statement of principal business activity with the Secretary of State pursuant to
22 Section 8210 of the Corporations Code.

23 (2) By unincorporated associations, in July of 2003, and in that same month
24 biennially thereafter. Upon changing its status to that of a corporation, the
25 association shall comply with the filing deadlines in paragraph (1).

26 (c) The association shall notify the Secretary of State of any change in the street
27 address of the association's onsite office or of the responsible officer or managing
28 agent of the association in the form and for a fee prescribed by the Secretary of
29 State, within 60 days of the change.

30 (d) The penalty for an incorporated association's noncompliance with the initial
31 or biennial filing requirements of this section shall be suspension of the
32 association's rights, privileges, and powers as a corporation and monetary
33 penalties, to the same extent and in the same manner as suspension and monetary
34 penalties imposed pursuant to Section 8810 of the Corporations Code.

35 (e) The Secretary of State shall make the information submitted pursuant to
36 paragraph (4) of subdivision (a) available only for governmental purposes and
37 only to Members of the Legislature and the Business, Transportation and Housing
38 Agency, upon written request. All other information submitted pursuant to this
39 section shall be subject to public inspection pursuant to the California Public
40 Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title
41 1 of the Government Code. The information submitted pursuant to this section
42 shall be made available for governmental or public inspection.

1 **§ 5515 (REVISED). Temporary transfer of reserve funds**

2 5515. (a) Notwithstanding Section 5510, the board may authorize the temporary
3 transfer of moneys from a reserve fund to the association’s general operating fund
4 to meet short-term cashflow requirements or other expenses, if the board has
5 provided notice of the intent to consider the transfer in a board meeting notice
6 provided pursuant to Section 4920.

7 (b) The notice shall include the reasons the transfer is needed, some of the
8 options for repayment, and whether a special assessment may be considered.

9 (c) If the board authorizes the transfer, the board shall issue a written finding,
10 recorded in the board’s minutes, explaining the reasons that the transfer is needed,
11 and describing when and how the moneys will be repaid to the reserve fund.

12 (d) The transferred funds shall be restored to the reserve fund within one year of
13 the date of the initial transfer, except that the board may, after giving the same
14 notice required for considering a transfer, and, upon making a finding supported
15 by documentation that a temporary delay would be in the best interests of the
16 common interest development, temporarily delay the restoration.

17 (e) The board shall exercise prudent fiscal management in maintaining the
18 integrity of the reserve account, and shall, if necessary, levy a special assessment
19 to recover the full amount of the expended funds within the time limits required by
20 this section. This special assessment is subject to the limitation imposed by
21 Section 5605. The board may, at its discretion, extend the date the payment on the
22 special assessment is due. Any extension shall not prevent the board from
23 pursuing any legal remedy to enforce the collection of an unpaid special
24 assessment.

25 **Comment.** Section 5515 continues former Section 1365.5(c)(2) without change, with the
26 following exceptions: (1) Subdivisions are added. (2) Cross-references are updated to reflect the
27 new location of the referenced provisions. (3) The introductory word “however” was replaced
28 with “Notwithstanding Section 5510.” (4) The last clause of subdivision (a) is rephrased for
29 clarity.

30 **§ 5520 (REVISED). Use of reserve funds for litigation**

31 5520. (a) When the decision is made to use reserve funds or to temporarily
32 transfer moneys from the reserve fund to pay for litigation, the association shall
33 provide general notice (Section 4045) of that decision, and of the availability of an
34 accounting of those expenses.

35 (b) Unless the governing documents impose more stringent standards, the
36 association shall make an accounting of expenses related to the litigation on at
37 least a quarterly basis. The accounting shall be made available for inspection by
38 members of the association at the association’s office.

39 **Comment.** Section 5520 continues former Section 1365.5(d) without change, with the
40 following exceptions: (1) Subdivisions are added. (2) A reference to notice pursuant to
41 Corporations Code Section 5016 has been replaced with a requirement of general notice pursuant
42 to Section 4045.

43 See also Sections 4080 (“association”), 4085 (“board”), 4160 (“member”).

1 **☞ Staff Note.** Section 1365.5(d) requires notice pursuant to Corporations Code Section 5016,
2 which requires notice in a “newsletter, magazine or other organ regularly sent to members...”
3 Not all associations distribute periodicals of those types. Proposed Section 5520 would replace
4 that requirement with a requirement of general notice under Section 4045.

5 Article 3. Reserve Planning

6 **§ 5550 (UNCHANGED). Visual inspection of major components and reserve study**

7 5550. (a) At least once every three years, the board shall cause to be conducted a
8 reasonably competent and diligent visual inspection of the accessible areas of the
9 major components that the association is obligated to repair, replace, restore, or
10 maintain as part of a study of the reserve account requirements of the common
11 interest development, if the current replacement value of the major components is
12 equal to or greater than one-half of the gross budget of the association, excluding
13 the association’s reserve account for that period. The board shall review this study,
14 or cause it to be reviewed, annually and shall consider and implement necessary
15 adjustments to the board’s analysis of the reserve account requirements as a result
16 of that review.

17 (b) The study required by this section shall at a minimum include:

18 (1) Identification of the major components that the association is obligated to
19 repair, replace, restore, or maintain that, as of the date of the study, have a
20 remaining useful life of less than 30 years.

21 (2) Identification of the probable remaining useful life of the components
22 identified in paragraph (1) as of the date of the study.

23 (3) An estimate of the cost of repair, replacement, restoration, or maintenance of
24 the components identified in paragraph (1).

25 (4) An estimate of the total annual contribution necessary to defray the cost to
26 repair, replace, restore, or maintain the components identified in paragraph (1)
27 during and at the end of their useful life, after subtracting total reserve funds as of
28 the date of the study.

29 (5) A reserve funding plan that indicates how the association plans to fund the
30 contribution identified in paragraph (4) to meet the association’s obligation for the
31 repair and replacement of all major components with an expected remaining life of
32 30 years or less, not including those components that the board has determined
33 will not be replaced or repaired.

34 **Comment.** Section 5550 continues former Section 1365.5(e)(1)-(4) and the first sentence of
35 (e)(5) without change, except that the term “board of directors” has been replaced with the
36 defined term “board.” See Section 4085 (“board” defined).

37 **§ 5560 (REVISED). Reserve funding plan**

38 5560. (a) The reserve funding plan required by Section 5550 shall include a
39 schedule of the date and amount of any change in regular or special assessments
40 that would be needed to sufficiently fund the reserve funding plan.

1 (b) The plan shall be adopted by the board at an open meeting before the
2 membership of the association as described in Article 2 (commencing with Section
3 4900) of Chapter 5.

4 (c) If the board determines that an assessment increase is necessary to fund the
5 reserve funding plan, any increase shall be approved in a separate action of the
6 board that is consistent with the procedure described in Section 5605.

7 **Comment.** Section 5560 continues the second, third, and fourth sentences of former Section
8 1365.5(e)(5) without change, with the following exceptions: (1) The introductory clause has been
9 restated, without substantive change. (2) Cross-references are updated to reflect the new location
10 of the referenced provisions. (3) The term “board of directors” has been replaced with the defined
11 term “board.” See Section 4085 (“board” defined).

12  **Staff Note.** The introductory clause of Section 1365.5(e)(5) has been restated without
13 substantive change in proposed Section 5560(a), to reflect the separation of this provision from
14 the first sentence of Section 1365.5(e)(5).

15 **§ 5565 (REVISED). Summary of association reserves**

16 5565. The summary of the association’s reserves required by paragraph (2) of
17 subdivision (b) of Section 5300 shall be based on the most recent review or study
18 conducted pursuant to Section 5550, shall be based only on assets held in cash or
19 cash equivalents, shall be printed in boldface type and shall include all of the
20 following:

21 (a) The current estimated replacement cost, estimated remaining life, and
22 estimated useful life of each major component.

23 (b) As of the end of the fiscal year for which the study is prepared:

24 (1) The current estimate of the amount of cash reserves necessary to repair,
25 replace, restore, or maintain the major components.

26 (2) The current amount of accumulated cash reserves actually set aside to repair,
27 replace, restore, or maintain major components.

28 (3) If applicable, the amount of funds received from either a compensatory
29 damage award or settlement to an association from any person or entity for
30 injuries to property, real or personal, arising out of any construction or design
31 defects, and the expenditure or disposition of funds, including the amounts
32 expended for the direct and indirect costs of repair of construction or design
33 defects. These amounts shall be reported at the end of the fiscal year for which the
34 study is prepared as separate line items under cash reserves pursuant to paragraph
35 (2). Instead of complying with the requirements set forth in this paragraph, an
36 association that is obligated to issue a review of their financial statement pursuant
37 to Section 5305 may include in the review a statement containing all of the
38 information required by this paragraph.

39 (c) The percentage that the amount determined for purposes of paragraph (2) of
40 subdivision (b) equals the amount determined for purposes of paragraph (1) of
41 subdivision (b).

42 (d) The current deficiency in reserve funding expressed on a per unit basis. The
43 figure shall be calculated by subtracting the amount determined for purposes of

1 paragraph (2) of subdivision (b) from the amount determined for purposes of
 2 paragraph (1) of subdivision (b) and then dividing the result by the number of
 3 separate interests within the association, except that if assessments vary by the size
 4 or type of ownership interest, then the association shall calculate the current
 5 deficiency in a manner that reflects the variation.

6 **Comment.** Section 5565 continues former Section 1365(a)(2) without change, with the
 7 following exceptions: (1) The introductory clause is revised to reflect the organization of this
 8 provision as a separate section and to make minor grammatical improvements. (2) Subdivision
 9 (b)(3) corrects an erroneous cross-reference (to the financial statement required under Section
 10 5305). (3) Cross-references are updated to reflect the new location of the referenced provisions.

11 **Staff Note.** Proposed Section 5565 would continue former Section 1365(a)(2), which
 12 describes the required content of the “summary of association reserves” that must be included in
 13 the annual budget distributed to the members. In addition to making minor changes to reflect the
 14 organization of the provision as a separate section and to update cross-references, the proposed
 15 section would correct an erroneous cross-reference.

16 Existing Section 1365(a)(2)(B)(iii) refers to the financial statement prepared “pursuant to
 17 subdivision (b).” That cross-reference used to be correct, but in 2006 a bill was enacted that
 18 inserted a new subdivision (b) and renumbered the financial statement provision as subdivision
 19 (c). See 2006 Cal. Stat. ch. 181, § 1. The cross-reference should have been corrected at that time,
 20 but was apparently overlooked. Proposed Section 5565 would correct that error.

21 **§ 5570 (UNCHANGED). Assessment and reserve funding disclosure summary**

22 5570. (a) The disclosures required by this article with regard to an association or
 23 a property shall be summarized on the following form:

24 ASSESSMENT AND RESERVE FUNDING DISCLOSURE SUMMARY FOR THE
 25 FISCAL YEAR ENDING _____

26 (1) The regular assessment per ownership interest is \$_____ per _____. Note: If
 27 assessments vary by the size or type of ownership interest, the assessment
 28 applicable to this ownership interest may be found on page _____ of the attached
 29 summary.

30 (2) Additional regular or special assessments that have already been scheduled
 31 to be imposed or charged, regardless of the purpose, if they have been approved by
 32 the board and/or members:
 33

Date assessment will be due:	Amount per ownership interest per month or year (If assessments are variable, see note immediate below):	Purpose of the assessment:
	Total:	

1
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Note: If assessments vary by the size or type of ownership interest, the assessment applicable to this ownership interest may be found on page ____ of the attached report.

(3) Based upon the most recent reserve study and other information available to the board, will currently projected reserve account balances be sufficient at the end of each year to meet the association’s obligation for repair and/or replacement of major components during the next 30 years?

Yes ____ No ____

(4) If the answer to (3) is no, what additional assessments or other contributions to reserves would be necessary to ensure that sufficient reserve funds will be available each year during the next 30 years that have not yet been approved by the board or the members?

Approximate date assessments will be due:	Amount per ownership interest per month or year:
	Total:

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(5) All major components are included in the reserve study and are included in its calculations.

(6) Based on the method of calculation in paragraph (4) of subdivision (b) of Section 5570, the estimated amount required in the reserve fund at the end of the current fiscal year is \$____, based in whole or in part on the last reserve study or update prepared by ____ as of ____ (month), ____ (year). The projected reserve fund cash balance at the end of the current fiscal year is \$____, resulting in reserves being ____ percent funded at this date.

If an alternate, but generally accepted, method of calculation is also used, the required reserve amount is \$____. (See attached explanation)

(7) Based on the method of calculation in paragraph (4) of subdivision (b) of Section 5570 of the Civil Code, the estimated amount required in the reserve fund at the end of each of the next five budget years is \$____, and the projected reserve fund cash balance in each of those years, taking into account only assessments already approved and other known revenues, is \$____, leaving the reserve at ____ percent funding. If the reserve funding plan approved by the association is implemented, the projected reserve fund cash balance in each of those years will be \$____, leaving the reserve at ____ percent funding.

1 Note: The financial representations set forth in this summary are based on the
2 best estimates of the preparer at that time. The estimates are subject to change. At
3 the time this summary was prepared, the assumed long-term before-tax interest
4 rate earned on reserve funds was ____ percent per year, and the assumed long-
5 term inflation rate to be applied to major component repair and replacement costs
6 was ____ percent per year.

7 (b) For the purposes of preparing a summary pursuant to this section:

8 (1) “Estimated remaining useful life” means the time reasonably calculated to
9 remain before a major component will require replacement.

10 (2) “Major component” has the meaning used in Section 5550. Components with
11 an estimated remaining useful life of more than 30 years may be included in a
12 study as a capital asset or disregarded from the reserve calculation, so long as the
13 decision is revealed in the reserve study report and reported in the Assessment and
14 Reserve Funding Disclosure Summary.

15 (3) The form set out in subdivision (a) shall accompany each annual budget
16 report or summary thereof that is delivered pursuant to Section 5300. The form
17 may be supplemented or modified to clarify the information delivered, so long as
18 the minimum information set out in subdivision (a) is provided.

19 (4) For the purpose of the report and summary, the amount of reserves needed
20 to be accumulated for a component at a given time shall be computed as the
21 current cost of replacement or repair multiplied by the number of years the
22 component has been in service divided by the useful life of the component. This
23 shall not be construed to require the board to fund reserves in accordance with this
24 calculation.

25 **Comment.** Section 5570 continues former Section 1365.2.5 without change, except that a
26 reference to distribution of the pro forma operating budget has been changed to refer to the annual
27 budget report distributed pursuant to Section 5300 and the term “board of directors” has been
28 replaced with the defined term “board.” See Section 4085 (“board” defined).

29 **§ 5580 (REVISED). Community service organization report**

30 5580. (a) Unless the governing documents impose more stringent standards, any
31 community service organization whose funding from the association or its
32 members exceeds 10 percent of the organization’s annual budget shall prepare and
33 distribute to the association a report that meets the requirements of Section 5012
34 of the Corporations Code, and that describes in detail administrative costs and
35 identifies the payees of those costs in a manner consistent with the provisions of
36 Article 5 (commencing with Section 5200).

37 (b) If the community service organization does not comply with the standards,
38 the report shall disclose the noncompliance in detail. If a community service
39 organization is responsible for the maintenance of major components for which an
40 association would otherwise be responsible, the community service organization
41 shall supply to the association the information regarding those components that the
42 association would use to complete disclosures and reserve reports required under

1 this article and Section 5300. An association may rely upon information received
2 from a community service organization, and shall provide access to the
3 information pursuant to the provisions of Article 5 (commencing with Section
4 5200).

5 **Comment.** Section 5580 restates former Section 1365.3 without change, with the following
6 exceptions: (1) Cross-references are updated to reflect the new location of the referenced
7 provisions. (2) The section is divided into subdivisions for ease of reference. (3) A superfluous
8 cross-reference to the definition of “community service organization” is not continued.

9  **Staff Note.** Proposed Section 5580 uses the exact language of Section 1365.3 (except as
10 indicated in the Comment above). That language includes some significant ambiguities that are
11 left unaddressed because the staff does not understand the intended meaning. The staff invites
12 public comment on the following questions:

13 (1) What is meant by the requirement that the payees of administrative costs be identified “in a
14 manner consistent with the provisions of Section 1365.2?”

15 (2) What is meant by “If the community service organization does not comply with the
16 standards, the report shall disclose the noncompliance in detail”? What standards are being
17 referenced here?

18 Article 4. Assessment Setting

19 § 5600 (UNCHANGED). Levy of assessment

20 5600. (a) Except as provided in Section 5605, the association shall levy regular
21 and special assessments sufficient to perform its obligations under the governing
22 documents and this title.

23 (b) An association shall not impose or collect an assessment or fee that exceeds
24 the amount necessary to defray the costs for which it is levied.

25 **Comment.** Subdivision (a) of Section 5600 continues the first sentence of former Section
26 1366(a) without substantive change, except that a cross-reference is updated to reflect the new
27 location of the referenced provision.

28 Subdivision (b) continues former Section 1366.1 without substantive change.

29 § 5605 (REVISED). Assessment approval requirements

30 5605. (a) Annual increases in regular assessments for any fiscal year shall not be
31 imposed unless the board has complied with Section 5300 with respect to that
32 fiscal year, or has obtained the approval of a majority of a quorum of members
33 (Section 4070) at a member meeting or election.

34 (b) Notwithstanding more restrictive limitations placed on the board by the
35 governing documents, the board may not impose a regular assessment that is more
36 than 20 percent greater than the regular assessment for the association’s preceding
37 fiscal year or impose special assessments which in the aggregate exceed 5 percent
38 of the budgeted gross expenses of the association for that fiscal year without the
39 approval of a majority of a quorum of members (Section 4070) at a member
40 meeting or election.

41 (c) For the purposes of this section, “quorum” means members representing
42 more than 50 percent of the voting power of the association.

1 **Comment.** Subdivision (a) of Section 5605 continues the second sentence of former Section
 2 1366(a) without change, with the following exceptions: (1) Language requiring approval of a
 3 majority of members casting a vote at a meeting at which a quorum is established has been
 4 replaced with a reference to the standard provision on approval by a majority of a quorum of
 5 members (Section 4070). (2) A reference to an assessment increase “as authorized by subdivision
 6 (b)” is superfluous and potentially confusing, and is not continued. (3) Language requiring that a
 7 meeting or election be conducted pursuant to the Corporations Code is inconsistent with former
 8 Section 1363.03 and is not continued. (4) A cross-reference to former Section 1366(a) has been
 9 replaced with a cross-reference to Section 5300, which continues former Section 1366(a)-(b), and
 10 (f).

11 Subdivision (b) continues the first sentence of former Section 1366(b) without change, with the
 12 following exceptions: (1) Language requiring approval of a majority of members casting a vote at
 13 a meeting at which a quorum is established has been replaced with a reference to the standard
 14 provision on approval by a majority of a quorum of members (Section 4070). (2) Language
 15 requiring that a meeting or election be conducted pursuant to the Corporations Code is
 16 inconsistent with former Section 1363.03 and is not continued. (3) The term “board of directors”
 17 has been replaced with the defined term “board.” See Section 4085 (“board” defined).

18 Subdivision (c) restates the last sentence of former Section 1366(a) and the second sentence of
 19 former Section 1366(b). The provision makes clear that a quorum is based on a majority of the
 20 voting power, and not on a majority of the owners. This avoids uncertainty about the calculation
 21 of a quorum when a single separate interest is owned by more than one person.

22 **Staff Notes:** (1) Section 1366(a) and (b) require that member approval of an assessment
 23 increase be obtained “at a meeting or election of the association conducted in accordance with
 24 Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations
 25 Code and Section 7613 of the Corporations Code.” That requirement is plainly contradicted by
 26 Section 1363.03, which expressly supersedes the Corporations Code election provisions. That
 27 error would be corrected in proposed Section 5605, which would not continue the references to
 28 the election or meeting requirements of the Corporations Code.

29 (2) Existing Section 1366(a) requires member approval of an assessment increase if the board
 30 has not complied with Section 1365(a) for the fiscal year. Section 1365(a) requires the
 31 distribution of the annual pro forma budget.

32 In proposed Section 5605, the reporting requirement is broadened slightly, to simplify its
 33 application. It would require member approval of an assessment increase if the board does not
 34 distribute the “annual budget report” pursuant to proposed Section 5300. That report includes all
 35 of the elements of the existing pro forma budget, plus two related items that are currently not
 36 within the scope of Section 1366(a): the reserve funding plan distributed pursuant to Section
 37 1366(b) and the insurance coverage notice distributed pursuant to Section 1366(f).

38 (3) The quorum rule provided in proposed Section 4230(d) is revised to make clear that a
 39 quorum is based on a majority of the *voting power* (excluding those who own more than two
 40 units), and not on a majority of the *owners*. This avoids uncertainty about the calculation of a
 41 quorum when a single separate interest is owned by more than one person.

42 **§ 5610 (UNCHANGED). Emergency exception to assessment approval requirements**

43 5610. Section 5605 does not limit assessment increases necessary for emergency
 44 situations. For purposes of this section, an emergency situation is any one of the
 45 following:

46 (a) An extraordinary expense required by an order of a court.

47 (b) An extraordinary expense necessary to repair or maintain the common
 48 interest development or any part of it for which the association is responsible
 49 where a threat to personal safety on the property is discovered.

1 (c) An extraordinary expense necessary to repair or maintain the common
2 interest development or any part of it for which the association is responsible that
3 could not have been reasonably foreseen by the board in preparing and distributing
4 the annual budget report under Section 5300. However, prior to the imposition or
5 collection of an assessment under this subdivision, the board shall pass a
6 resolution containing written findings as to the necessity of the extraordinary
7 expense involved and why the expense was not or could not have been reasonably
8 foreseen in the budgeting process, and the resolution shall be distributed to the
9 members with the notice of assessment.

10 **Comment.** Section 5610 continues the third and fourth sentences and paragraphs (1) to (3),
11 inclusive, of former Section 1366(b), without change, with the following exceptions: (1) A
12 reference to the “pro forma operating budget” has been replaced with a reference to the “annual
13 budget report.” (2) Cross-references are updated to reflect the new location of the referenced
14 provisions.

15 **§ 5615 (REVISED). Notice of assessment increase**

16 5615. The association shall provide individual notice (Section 4040) to the
17 members of any increase in the regular or special assessments of the association,
18 not less than 30 nor more than 60 days prior to the increased assessment becoming
19 due.

20 **Comment.** Proposed Section 5615 continues former Section 1366(d) without change, except
21 that a requirement of delivery by first class mail has been replaced with a requirement of
22 “individual notice” and the defined term “member” is used in place of “owner.” See Section 4160
23 (“member” defined).

24  **Staff Note.** Proposed Section 5615 would replace the existing first class mail delivery
25 requirement in Section 1366(d) with the more flexible rule for delivery of individual notice under
26 Section 4040.

27 **§ 5620 (REVISED). Exemption from execution**

28 5620. (a) Regular assessments imposed or collected to perform the obligations
29 of an association under the governing documents or this title shall be exempt from
30 execution by a judgment creditor of the association only to the extent necessary
31 for the association to perform essential services, such as paying for utilities and
32 insurance. In determining the appropriateness of an exemption, a court shall
33 ensure that only essential services are protected under this subdivision.

34 (b) This exemption shall not apply to any consensual pledges, liens, or
35 encumbrances that have been approved by a majority of a quorum of members
36 (Section 4070) at a member meeting or election, or to any state tax lien, or to any
37 lien for labor or materials supplied to the common area.

38 **Comment.** Section 5620 continues former Section 1366(c) without change, with the following
39 exceptions: (1) Subdivisions are added. (2) A reference to approval of a majority of members
40 casting a vote at a meeting at which a quorum is established has been replaced with a reference to
41 the standard provision on approval by a majority of a quorum of members (Section 4070). (3)
42 Quorum-related language from former Section 1366(b)-(c) is not continued.

1 See also Sections 4080 (“association”), 4095 (“common area”), 4150 (“governing
2 documents”), 4160 (“member”).

3 **☞ Staff Note.** Both Section 1366(a) and (b) contain the following sentence: “For the purposes
4 of this section, ‘quorum’ means more than 50 percent of the owners of an association.” Although
5 those provisions purport to apply to the “section” as a whole, the fact that the sentence is repeated
6 in subdivisions (a) and (b) suggests that the intention may have been to limit the application of
7 the sentence to just those subdivisions. If so, then the special quorum rule would not apply to the
8 reference in Section 1366(c) to “any consensual pledges, liens, or encumbrances that have been
9 approved by the owners of an association, *constituting a quorum*, casting a majority of the votes
10 at a meeting or election of the association...” (Emphasis added.) Proposed Section 5620 is
11 drafted on the basis of that interpretation, and does not include the special quorum rule.

12 **§ 5625 (UNCHANGED). Property tax value as basis for assessments**

13 5625. (a) Except as provided in subdivision (b), notwithstanding any provision
14 of this part or the governing documents to the contrary, an association shall not
15 levy assessments on separate interests within the common interest development
16 based on the taxable value of the separate interests unless the association, on or
17 before December 31, 2009, in accordance with its governing documents, levied
18 assessments on those separate interests based on their taxable value, as determined
19 by the tax assessor of the county in which the separate interests are located.

20 (b) An association that is responsible for paying taxes on the separate interests
21 within the common interest development may levy that portion of assessments on
22 separate interests that is related to the payment of taxes based on the taxable value
23 of the separate interest, as determined by the tax assessor.

24 **Comment.** Proposed Section 5625 continues former Section 1366.4) without change, except
25 that “title” is changed to “part.”

26 **Article 5. Assessment Payment and Delinquency**

27 **§ 5650 (UNCHANGED). Assessment debt and delinquency**

28 5650. (a) A regular or special assessment and any late charges, reasonable fees
29 and costs of collection, reasonable attorney’s fees, if any, and interest, if any, as
30 determined in accordance with subdivision (b), shall be a debt of the owner of the
31 separate interest at the time the assessment or other sums are levied.

32 (b) Regular and special assessments levied pursuant to the governing documents
33 are delinquent 15 days after they become due, unless the declaration provides a
34 longer time period, in which case the longer time period shall apply. If an
35 assessment is delinquent the association may recover all of the following:

36 (1) Reasonable costs incurred in collecting the delinquent assessment, including
37 reasonable attorney’s fees.

38 (2) A late charge not exceeding 10 percent of the delinquent assessment or ten
39 dollars (\$10), whichever is greater, unless the declaration specifies a late charge in
40 a smaller amount, in which case any late charge imposed shall not exceed the
41 amount specified in the declaration.

1 (3) Interest on all sums imposed in accordance with this section, including the
2 delinquent assessments, reasonable fees and costs of collection, and reasonable
3 attorney’s fees, at an annual interest rate not to exceed 12 percent, commencing 30
4 days after the assessment becomes due, unless the declaration specifies the
5 recovery of interest at a rate of a lesser amount, in which case the lesser rate of
6 interest shall apply.

7 (c) Associations are hereby exempted from interest-rate limitations imposed by
8 Article XV of the California Constitution, subject to the limitations of this section.

9 **Comment.** Subdivision (a) of Section 5650 continues the first sentence of former Section
10 1367.1(a) without change, except that a cross-reference is updated to reflect the new location of
11 the referenced provision.

12 Subdivision (b) continues former Section 1366(e) without change.

13 Subdivision (c) continues former Section 1366(f) without change.

14 **§ 5655 (REVISED). Payments**

15 5655. (a) Any payments made by the owner of a separate interest toward
16 assessments shall first be applied to the assessments owed, and, only after the
17 assessments owed are paid in full shall the payments be applied to the fees and
18 costs of collection, attorney’s fees, late charges, or interest.

19 (b) When an owner makes a payment, the owner may request a receipt and the
20 association shall provide it. The receipt shall indicate the date of payment and the
21 person who received it.

22 (c) The association shall provide a mailing address for overnight payment of
23 assessments.

24 **Comment.** Section 5655 continues former Section 1367.1(b) without substantive change, with
25 the following exceptions: (1) A reference to assessment debt “set forth, as required in subdivision
26 (a)” is not continued. (2) Subdivisions are added.

27 **Staff Note.** Existing Section 1367.1(b) refers to payments made toward “the debt set forth, as
28 required in subdivision (a)...” The purpose of that language is unclear and it is potentially
29 problematic. It could be understood as limiting the right established in Section 1367.1(b) to debts
30 that have been properly noticed, pursuant to Section 1367.1(a). In other words, if the association
31 makes a technical mistake in describing the debt, the member’s right to pay off the principal first
32 might not apply. The staff sees no policy reason for such a result. The limiting language would
33 not be continued in proposed Section 5655.

34 **§ 5658 (UNCHANGED). Payment under protest**

35 5658. (a) If a dispute exists between the owner of a separate interest and the
36 association regarding any disputed charge or sum levied by the association,
37 including, but not limited to, an assessment, fine, penalty, late fee, collection cost,
38 or monetary penalty imposed as a disciplinary measure, and the amount in dispute
39 does not exceed the jurisdictional limits stated in Sections 116.220 and 116.221 of
40 the Code of Civil Procedure, the owner of the separate interest may, in addition to
41 pursuing dispute resolution pursuant to Article 3 (commencing with Section 5925)
42 of Chapter 8, pay under protest the disputed amount and all other amounts levied,
43 including any fees and reasonable costs of collection, reasonable attorney’s fees,

1 late charges, and interest, if any, pursuant to subdivision (b) of Section 5650, and
2 commence an action in small claims court pursuant to Chapter 5.5 (commencing
3 with Section 116.110) of Title 1 of the Code of Civil Procedure.

4 (b) Nothing in this section shall impede an association's ability to collect
5 delinquent assessments as provided in this article or Article 6 (commencing with
6 Section 5700).

7 **Comment.** Section 5658 continues former Section 1367.6 without change, except that cross-
8 references are updated to reflect the new location of the referenced provisions.

9 **§ 5660 (REVISED). Pre-lien notice**

10 5660. At least 30 days prior to recording a lien upon the separate interest of the
11 owner of record to collect a debt that is past due under Section 5650, the
12 association shall notify the owner of record in writing by certified mail of the
13 following:

14 (a) A general description of the collection and lien enforcement procedures of
15 the association and the method of calculation of the amount, a statement that the
16 owner of the separate interest has the right to inspect the association records
17 pursuant to Section 5205, and the following statement in 14-point boldface type, if
18 printed, or in capital letters, if typed:

19 “IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS PLACED IN
20 FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR ASSESSMENTS,
21 IT MAY BE SOLD WITHOUT COURT ACTION.”

22 (b) An itemized statement of the charges owed by the owner, including items on
23 the statement which indicate the amount of any delinquent assessments, the fees
24 and reasonable costs of collection, reasonable attorney’s fees, any late charges,
25 and interest, if any.

26 (c) A statement that the owner shall not be liable to pay the charges, interest, and
27 costs of collection, if it is determined the assessment was paid on time to the
28 association.

29 (d) The right to request a meeting with the board as provided by Section 5665.

30 (e) The right to dispute the assessment debt by submitting a written request for
31 dispute resolution to the association pursuant to the association’s “meet and
32 confer” program required in Article 2 (commencing with Section 5900) of Chapter
33 8.

34 (f) The right to request alternative dispute resolution with a neutral third party
35 pursuant to Article 3 (commencing with Section 5925) of Chapter 8 before the
36 association may initiate foreclosure against the owner’s separate interest, except
37 that binding arbitration shall not be available if the association intends to initiate a
38 judicial foreclosure.

39 **Comment.** Section 5660 continues the second sentence of former Section 1367.1(a), and
40 paragraphs (1) to (6) of that provision, inclusive, without change, with the following exceptions:
41 (1) The reference to inspection of records under Corporations Code Section 8333 is replaced with
42 a reference to inspection of records under Section 5205. (2) Cross-references are updated to
43 reflect the new location of the referenced provisions.

1 **Staff Note.** The notice required under Section 1367.1(a) includes notice of the right to inspect
2 records under Corporations Code Section 8333. That right has been superseded by the broader
3 inspection rights conferred by Section 1365.2. Proposed Section 5660 would refer to the latter
4 provision, rather than the Corporations Code.

5 **§ 5665 (UNCHANGED). Payment plan**

6 5665. (a) An owner, other than an owner of any interest that is described in
7 Section 11212 of the Business and Professions Code that is not otherwise exempt
8 from this section pursuant to subdivision (a) of Section 11211.7 of the Business
9 and Professions Code, may submit a written request to meet with the board to
10 discuss a payment plan for the debt noticed pursuant to Section 5660. The
11 association shall provide the owners the standards for payment plans, if any exist.

12 (b) The board shall meet with the owner in executive session within 45 days of
13 the postmark of the request, if the request is mailed within 15 days of the date of
14 the postmark of the notice, unless there is no regularly scheduled board meeting
15 within that period, in which case the board may designate a committee of one or
16 more directors to meet with the owner.

17 (c) Payment plans may incorporate any assessments that accrue during the
18 payment plan period. Additional late fees shall not accrue during the payment plan
19 period if the owner is in compliance with the terms of the payment plan.

20 (d) Payment plans shall not impede an association's ability to record a lien on
21 the owner's separate interest to secure payment of delinquent assessments.

22 (e) In the event of a default on any payment plan, the association may resume its
23 efforts to collect the delinquent assessments from the time prior to entering into
24 the payment plan.

25 **Comment.** Section 5665 continues former Section 1367.1(c)(3) without change, with the
26 following exceptions: (1) Cross-references are updated to reflect the new location of the
27 referenced provisions. (2) Subdivisions are added. (3) The defined term "director" is used in place
28 of "board member." See Section 4140 ("director" defined). (4) In subdivision (a), the cross-
29 reference is revised to refer to the Business and Professions Code.

30 **§ 5670 (UNCHANGED). Pre-lien dispute resolution**

31 5670. Prior to recording a lien for delinquent assessments, an association shall
32 offer the owner and, if so requested by the owner, participate in dispute resolution
33 pursuant to the association's "meet and confer" program required in Article 2
34 (commencing with Section 5900) of Chapter 8.

35 **Comment.** Section 5670 continues former Section 1367.1(c)(1)(A) without change, except that
36 a cross-reference is updated to reflect the new location of the referenced provision.

37 **§ 5673 (UNCHANGED). Decision to lien**

38 5673. For liens recorded on or after January 1, 2006, the decision to record a lien
39 for delinquent assessments shall be made only by the board and may not be
40 delegated to an agent of the association. The board shall approve the decision by a

1 majority vote of the directors in an open meeting. The board shall record the vote
2 in the minutes of that meeting.

3 **Comment.** Section 5673 continues former Section 1367.1(c)(2) without change, except that the
4 term “board of directors of the association” has been replaced with the defined term “board” and
5 the defined term “director” is used in place of “board member.” See Sections 4085 (“board”
6 defined), 4140 (“director” defined).

7 **§ 5675 (UNCHANGED). Notice of delinquent assessment**

8 5675. (a) The amount of the assessment, plus any costs of collection, late
9 charges, and interest assessed in accordance with subdivision (b) of Section 5650,
10 shall be a lien on the owner’s separate interest in the common interest
11 development from and after the time the association causes to be recorded with the
12 county recorder of the county in which the separate interest is located, a notice of
13 delinquent assessment, which shall state the amount of the assessment and other
14 sums imposed in accordance with subdivision (b) of Section 5650, a legal
15 description of the owner’s separate interest in the common interest development
16 against which the assessment and other sums are levied, and the name of the
17 record owner of the separate interest in the common interest development against
18 which the lien is imposed.

19 (b) The itemized statement of the charges owed by the owner described in
20 subdivision (b) of Section 5660 shall be recorded together with the notice of
21 delinquent assessment.

22 (c) In order for the lien to be enforced by nonjudicial foreclosure as provided in
23 Sections 5700 through 5710, inclusive, the notice of delinquent assessment shall
24 state the name and address of the trustee authorized by the association to enforce
25 the lien by sale.

26 (d) The notice of delinquent assessment shall be signed by the person designated
27 in the declaration or by the association for that purpose, or if no one is designated,
28 by the president of the association.

29 (e) A copy of the recorded notice of delinquent assessment shall be mailed by
30 certified mail to every person whose name is shown as an owner of the separate
31 interest in the association’s records, and the notice shall be mailed no later than 10
32 calendar days after recordation.

33 (f) Upon receipt of a written request by an owner identifying a secondary
34 address for purposes of collection notices, the association shall send additional
35 copies of any notices required by this section to the secondary address provided.
36 The association shall notify owners of their right to submit secondary addresses to
37 the association, in the annual policy statement prepared pursuant to Section 5310.
38 The owner’s request shall be in writing and shall be mailed to the association in a
39 manner that shall indicate the association has received it. The owner may identify
40 or change a secondary address at any time, provided that, if a secondary address is
41 identified or changed during the collection process, the association shall only be

1 required to send notices to the indicated secondary address from the point the
2 association receives the request.

3 (g) An association that fails to comply with the procedures set forth in this
4 section shall, prior to recording a lien, recommence the required notice process.
5 Any costs associated with recommencing the notice process shall be borne by the
6 association and not by the owner of a separate interest.

7 **Comment.** Subdivisions (a)-(e) of Section 5675 continue the first five sentences of former
8 Section 1367.1(d) without change, except that cross-references are updated to reflect the new
9 location of the referenced provisions.

10 Subdivision (f) continues former Section 1367.1(k) without change, except that a reference to
11 the annual budget has been replaced with a reference to the annual policy statement distributed
12 pursuant to Section 5310.

13 Subdivision (g) continues former Section 1367.1(l) without change.

14 **§ 5680 (REVISED). Lien priority**

15 5680. A lien created pursuant to Section 5675 shall be prior to all other liens
16 recorded subsequent to the notice of delinquent assessment, except that the
17 declaration may provide for the subordination thereof to any other liens and
18 encumbrances.

19 **Comment.** Section 5680 continues former Section 1367.1(f) without change, with the
20 following exceptions: (1) The phrase “notice of assessment” is replaced with the more specific
21 “notice of delinquent assessment.” (2) A cross-reference is updated to reflect the new location of
22 the referenced provision.

23 **Staff Note.** Section 1367.1(f) refers to the “notice of assessment.” It appears that the intention
24 was to refer to the “notice of delinquent assessment” specified in Section 1367.1(d). In order to
25 avoid any ambiguity, proposed Section 5680 uses the more specific term.

26 **§ 5685 (REVISED). Lien release**

27 5685. (a) Within 21 days of the payment of the sums specified in the notice of
28 delinquent assessment, the association shall record or cause to be recorded in the
29 office of the county recorder in which the notice of delinquent assessment is
30 recorded a lien release or notice of rescission and provide the owner of the
31 separate interest a copy of the lien release or notice that the delinquent assessment
32 has been satisfied.

33 (b) If it is determined that a lien previously recorded against the separate interest
34 was recorded in error, the party who recorded the lien shall, within 21 calendar
35 days, record or cause to be recorded in the office of the county recorder in which
36 the notice of delinquent assessment is recorded a lien release or notice of
37 rescission and provide the owner of the separate interest with a declaration that the
38 lien filing or recording was in error and a copy of the lien release or notice of
39 rescission.

40 (c) If it is determined that an association has recorded a lien for a delinquent
41 assessment in error, the association shall promptly reverse all late charges, fees,
42 interest, attorney’s fees, costs of collection, costs imposed for the notice prescribed
43 in Section 5660, and costs of recordation and release of the lien authorized under

1 subdivision (b) of Section 5720, and pay all costs related to any related dispute
2 resolution or alternative dispute resolution.

3 **Comment.** Subdivision (a) of Section 5685 continues the sixth sentence of former Section
4 1367.1(d) without change.

5 Subdivision (b) continues former Section 1367.1(i) without change.

6 Subdivision (c) continues former Section 1367.5 without change, with the following
7 exceptions: (1) The requirement that the error be discovered as a result of alternative dispute
8 resolution is not continued. (2) Cross-references are updated to reflect the new location of the
9 referenced provisions.

10 **Staff Note.** Section 1367.5 provides for a reversal of costs if it is determined, through
11 specified forms of alternative dispute resolution, that a lien for delinquent assessments is recorded
12 in error. There is no obvious policy reason why reversal of costs should be limited to errors
13 discovered through ADR (thereby omitting errors discovered in any other context). Proposed
14 Section 5685(c) would not continue the ADR-discovery limitation.

15 Article 6. Assessment Collection

16 § 5700 (REVISED). Collection generally

17 5700. (a) Except as otherwise provided in this article, after the expiration of 30
18 days following the recording of a lien created pursuant to Section 5675, the lien
19 may be enforced in any manner permitted by law, including sale by the court, sale
20 by the trustee designated in the notice of delinquent assessment, or sale by a
21 trustee substituted pursuant to Section 2934a.

22 (b) Nothing in Article 5 (commencing with Section 5650) or in subdivision (a)
23 of Section 726 of the Code of Civil Procedure prohibits actions against the owner
24 of a separate interest to recover sums for which a lien is created pursuant to Article
25 5 (commencing with Section 5650) or prohibits an association from taking a deed
26 in lieu of foreclosure.

27 **Comment.** Subdivision (a) of Section 5700 continues the second sentence of former Section
28 1367.1(g), with the following exceptions: (1) The introductory clause has been broadened to
29 recognize the application of all restrictions on collection that are provided in this article. See, e.g.,
30 Sections 5720 (limitation on foreclosure), 5735 (limitation on assignment). (2) Cross-references
31 are updated to reflect the new location of the referenced provisions.

32 Subdivision (b) continues former Section 1367.1(h) without change, except that cross-
33 references are updated to reflect the new location of the referenced provisions.

34 **Staff Note.** The rule stated in the second sentence of Section 1367.1(g) is limited by an
35 express caveat, recognizing the “limitations of this subdivision” (i.e., of Section 1367.1(g)). That
36 caveat appears to be too narrow. It does not recognize the substantive limitations on foreclosure
37 imposed by Section 1367.4. For that reason, the introductory clause of proposed Section 5700(a)
38 is broadened to encompass any exceptions stated in “this article,” which would include the
39 exceptions provided in Section 1367.4.

40 § 5705 (UNCHANGED). Decision to foreclose

41 5705. (a) Notwithstanding any law or any provisions of the governing
42 documents to the contrary, this section shall apply to debts for assessments that
43 arise on and after January 1, 2006.

1 (b) Prior to initiating a foreclosure on an owner’s separate interest, the
2 association shall offer the owner and, if so requested by the owner, participate in
3 dispute resolution pursuant to the association’s “meet and confer” program
4 required in Article 2 (commencing with Section 5900) of Chapter 8 or alternative
5 dispute resolution as set forth in Article 3 (commencing with Section 5925) of
6 Chapter 8. The decision to pursue dispute resolution or a particular type of
7 alternative dispute resolution shall be the choice of the owner, except that binding
8 arbitration shall not be available if the association intends to initiate a judicial
9 foreclosure.

10 (c) The decision to initiate foreclosure of a lien for delinquent assessments that
11 has been validly recorded shall be made only by the board and may not be
12 delegated to an agent of the association. The board shall approve the decision by a
13 majority vote of the directors in an executive session. The board shall record the
14 vote in the minutes of the next meeting of the board open to all members. The
15 board shall maintain the confidentiality of the owner or owners of the separate
16 interest by identifying the matter in the minutes by the parcel number of the
17 property, rather than the name of the owner or owners. A board vote to approve
18 foreclosure of a lien shall take place at least 30 days prior to any public sale.

19 (d) The board shall provide notice by personal service in accordance with the
20 manner of service of summons in Article 3 (commencing with Section 415.10) of
21 Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure to an owner of a
22 separate interest who occupies the separate interest or to the owner’s legal
23 representative, if the board votes to foreclose upon the separate interest. The board
24 shall provide written notice to an owner of a separate interest who does not occupy
25 the separate interest by first-class mail, postage prepaid, at the most current
26 address shown on the books of the association. In the absence of written
27 notification by the owner to the association, the address of the owner’s separate
28 interest may be treated as the owner’s mailing address.

29 **Comment.** Subdivision (a) of Section 5705 continues former Section 1367.4(a), as it related to
30 the substance of this section, without change.

31 Subdivision (b) continues former Section 1367.4(c)(1) without change, except that cross-
32 references are updated to reflect the new location of the referenced provisions. Subdivision (b) is
33 also consistent with former Section 1367.1(c)(1)(B).

34 Subdivision (c) continues former Section 1367.4(c)(2) without change, except that the term
35 “board of directors of the association” has been replaced with the defined term “board” and the
36 defined term “director” is used in place of “board member.” See Sections 4085 (“board” defined),
37 4140 (“director” defined).

38 Subdivision (d) continues former Section 1367.4(c)(3) without change.

39 **§ 5710 (UNCHANGED). Foreclosure**

40 5710. (a) Any sale by the trustee shall be conducted in accordance with Sections
41 2924, 2924b, and 2924c applicable to the exercise of powers of sale in mortgages
42 and deeds of trust.

43 (b) In addition to the requirements of Section 2924, a notice of default shall be
44 served by the association on the owner’s legal representative in accordance with

1 the manner of service of summons in Article 3 (commencing with Section 415.10)
2 of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure. The owner’s legal
3 representative shall be the person whose name is shown as the owner of a separate
4 interest in the association’s records, unless another person has been previously
5 designated by the owner as his or her legal representative in writing and mailed to
6 the association in a manner that indicates that the association has received it.

7 (c) The fees of a trustee may not exceed the amounts prescribed in Sections
8 2924c and 2924d, plus the cost of service for either of the following:

9 (1) The notice of default pursuant to subdivision (b).

10 (2) The decision of the board to foreclose upon the separate interest of an owner
11 as described in subdivision (d) of Section 5705.

12 **Comment.** Subdivision (a) Section 5710 continues the third sentence of former Section
13 1367.1(g) without change.

14 Subdivision (b) continues former Section 1367.1(j) without change.

15 Subdivision (c) continues the fourth sentence, and paragraphs (1) and (2), of former Section
16 1367.1(g) without change, except that cross-references are updated to reflect the new location of
17 the referenced provisions.

18 **§ 5715 (UNCHANGED). Right of redemption after trustee sale**

19 5715. (a) Notwithstanding any law or any provisions of the governing
20 documents to the contrary, this section shall apply to debts for assessments that
21 arise on and after January 1, 2006.

22 (b) A nonjudicial foreclosure by an association to collect upon a debt for
23 delinquent assessments shall be subject to a right of redemption. The redemption
24 period within which the separate interest may be redeemed from a foreclosure sale
25 under this paragraph ends 90 days after the sale. In addition to the requirements of
26 Section 2924f, a notice of sale in connection with an association’s foreclosure of a
27 separate interest in a common interest development shall include a statement that
28 the property is being sold subject to the right of redemption created in this section.

29 **Comment.** Subdivision (a) of Section 5715 continues former Section 1367.4(a), as it related to
30 the substance of this section, without change.

31 Subdivision (b) continues former Section 1367.4(c)(4) without change, except that “this
32 paragraph” is replaced with “this section.”

33 **§ 5720 (REVISED). Limitation on foreclosure**

34 5720. (a) Notwithstanding any law or any provisions of the governing
35 documents to the contrary, this section shall apply to debts for assessments that
36 arise on and after January 1, 2006.

37 (b) An association that seeks to collect delinquent regular or special assessments
38 of an amount less than one thousand eight hundred dollars (\$1,800), not including
39 any accelerated assessments, late charges, fees and costs of collection, attorney’s
40 fees, or interest, may not collect that debt through judicial or nonjudicial
41 foreclosure, but may attempt to collect or secure that debt in any of the following
42 ways:

1 (1) By a civil action in small claims court, pursuant to Chapter 5.5 (commencing
2 with Section 116.110) of Title 1 of Part 1 of the Code of Civil Procedure. An
3 association that chooses to proceed by an action in small claims court, and
4 prevails, may enforce the judgment as permitted under Article 8 (commencing
5 with Section 116.810) of Chapter 5.5 of Title 1 of Part 1 of the Code of Civil
6 Procedure. The amount that may be recovered in small claims court to collect
7 upon a debt for delinquent assessments may not exceed the jurisdictional limits of
8 the small claims court and shall be the sum of the following:

9 (A) The amount owed as of the date of filing the complaint in the small claims
10 court proceeding.

11 (B) In the discretion of the court, an additional amount to that described in
12 subparagraph (A) equal to the amount owed for the period from the date the
13 complaint is filed until satisfaction of the judgment, which total amount may
14 include accruing unpaid assessments and any reasonable late charges, fees and
15 costs of collection, attorney's fees, and interest, up to the jurisdictional limits of
16 the small claims court.

17 (2) By recording a lien on the owner's separate interest upon which the
18 association may not foreclose until the amount of the delinquent assessments
19 secured by the lien, exclusive of any accelerated assessments, late charges, fees
20 and costs of collection, attorney's fees, or interest, equals or exceeds one thousand
21 eight hundred dollars (\$1,800) or the assessments secured by the lien are more
22 than 12 months delinquent. An association that chooses to record a lien under
23 these provisions, prior to recording the lien, shall offer the owner and, if so
24 requested by the owner, participate in dispute resolution as set forth in Article 2
25 (commencing with Section 5900) of Chapter 8.

26 (3) Any other manner provided by law, except for judicial or nonjudicial
27 foreclosure.

28 (c) The limitation on foreclosure of assessment liens for amounts under the
29 stated minimum in this section does not apply to any of the following:

30 (1) Assessments secured by a lien that are more than 12 months delinquent.

31 (2) Assessments owed by owners of separate interests in timeshare estates, as
32 defined in subdivision (x) of Section 11212 of the Business and Professions Code.

33 (3) Assessments owed by the declarant.

34 **Comment.** Subdivision (a) of Section 5720 continues former Section 1367.4(a), as it related to
35 the substance of this section, without change.

36 Subdivision (b) continues former Section 1367.4(b) without change, except that a cross-
37 reference is updated to reflect the new location of the referenced provision, and incomplete cross-
38 references in paragraph (1) are corrected.

39 Subdivision (c) continues former Section 1367.4(d) without change, with the following
40 exceptions: (1) The first paragraph is added to reflect the rule in former Section 1367.4(c). (2)
41 The second paragraph replaces an erroneous cross-reference to Business and Professions Code
42 Section 11112(x) with a cross-reference to Business and Professions Code Section 11212(x). (3)
43 The defined term "declarant" is used in place of "developer" in the third paragraph. See Section
44 4130 ("declarant" defined).

1 **Staff Note.** (1) Section 1367.4(b) prohibits foreclosure to collect assessments that total less
 2 than \$1,800. However, Section 1367.4(c) expressly authorizes foreclosure to collect assessments
 3 if the amount owed is \$1,800 or more *or if the assessments secured by the lien are more than 12*
 4 *months delinquent*. The latter provision was intended as an exception to the prohibition on
 5 foreclosure for amounts less than \$1,800 (i.e., an association can foreclose on any amount, so
 6 long as the assessments are more than 12 months overdue). See Assembly Floor Analysis of SB
 7 137 (Sept. 1, 2005), p. 4 (“foreclosure remains an option in all cases where a homeowner is more
 8 than 12 months delinquent in paying any assessment amount.”).

9 It is potentially confusing to have an unqualified prohibition on foreclosure for amounts less
 10 than \$1,800 in Section 1367.4(b), with the 12-month delinquency exception stated indirectly in
 11 Section 1367.4(c). In order to improve understanding of these rules, proposed Section 5720(c)(1)
 12 would state the 12-month delinquency rule directly, as an express exception to the prohibition on
 13 foreclosure for small amounts.

14 (2) The existing reference to Business and Professions Code Section 11112(x) is incorrect.
 15 Proposed Section 5720(c)(2) would correct the error.

16 (3) Read literally, Section 1367.4(d) would exempt assessments paid by any person who is a
 17 developer. It seems likely that the intent was to exempt only the developer of the CID seeking to
 18 collect the assessment. Proposed Section 5720(c)(3) would use the term “the declarant” to avoid
 19 any ambiguity on this point.

20 **§ 5725 (REVISED). Property damage and fines**

21 5725. (a) A monetary charge imposed by the association as a means of
 22 reimbursing the association for costs incurred by the association in the repair of
 23 damage to common area and facilities caused by a member, an occupant of the
 24 member’s separate interest, or the member’s guest, invitee, or tenant may become
 25 a lien against the member’s separate interest enforceable by the sale of the interest
 26 under Sections 2924, 2924b, and 2924c, provided the authority to impose a lien is
 27 set forth in the governing documents. It is the intent of the Legislature not to
 28 contravene Section 2792.26 of Title 10 of the California Code of Regulations, as
 29 that section appeared on January 1, 1996, for associations of subdivisions that are
 30 being sold under authority of a subdivision public report, pursuant to Part 2
 31 (commencing with Section 11000) of Division 4 of the Business and Professions
 32 Code.

33 (b) A monetary penalty imposed by the association as a disciplinary measure for
 34 failure of a member to comply with the governing documents, except for the late
 35 payments, may not be characterized nor treated in the governing documents as an
 36 assessment that may become a lien against the member’s separate interest
 37 enforceable by the sale of the interest under Sections 2924, 2924b, and 2924c.

38 **Comment.** Subdivision (a) of Section 5725 continues the seventh and eighth sentences of
 39 former Section 1367.1(d) without change, except that (1) the section makes clear that a member
 40 may be liable for damage caused by an occupant of the member’s separate interest or an invitee
 41 and (2) a reference to “common areas” is singularized.

42 On January 1, 1996, Section 2792.26 of Title 10 of the California Code of Regulations read as
 43 follows:

44 2792.26. (a) The Association cannot be empowered to cause a forfeiture or abridgement of
 45 an owner’s right to the full use and enjoyment of his individually-owned subdivision interest
 46 on account of the failure by the owner to comply with provisions of the governing

1 instruments or of duly-enacted rules of operation for common areas and facilities except by
2 judgment of a court or a decision arising out of an arbitration or on account of a foreclosure
3 or sale under a power of sale for failure of the owner to pay assessments duly levied by the
4 Association.

5 (b) The governing instruments shall include provisions which authorize the governing body
6 to impose monetary penalties, temporary suspensions of an owner's rights as a member of the
7 Association or other appropriate discipline for failure to comply with the governing
8 instruments provided that the procedures for notice and hearing, satisfying the minimum
9 requirements of subdivision (h) of Section 1363 of the Civil Code, are followed with respect
10 to the accused member before a decision to impose discipline is reached.

11 (c) A monetary penalty imposed by the Association as a disciplinary measure for failure of
12 a member to comply with the governing instruments or as a means of reimbursing the
13 Association for costs incurred by the Association in the repair of damage to common areas
14 and facilities for which the member was allegedly responsible or in bringing the member and
15 his subdivision interest into compliance with the governing instruments may not be
16 characterized nor treated in the governing instruments as an assessment which may become a
17 lien against the member's subdivision interest enforceable by a sale of the interest in
18 accordance with the provisions of Sections 2924, 2924(b) and 2924(c) of the Civil Code.

19 (d) The provisions of subdivision (c) do not apply to charges imposed against an owner
20 consisting of reasonable late payment penalties for delinquent assessments and/or charges to
21 reimburse the Association for the loss of interest and for costs reasonably incurred (including
22 attorney's fees) in its efforts to collect delinquent assessments.

23 Subdivision (b) continues former Section 1367.1(e) without change, with the following
24 exceptions: (1) The introductory clause "except as indicated in subdivision (d)" is not continued.
25 (2) The undefined term "governing instruments" is replaced with the defined term "governing
26 documents." (3) The undefined term "subdivision separate interest" is replaced with the defined
27 term "separate interest."

28 **Staff Note.** (1) Proposed Section 5725(a) would expand the scope of the existing rule
29 governing reimbursement of costs incurred for damage caused by an owner or the owner's guest
30 or tenant, to also include damage caused by an owner's invitee or a resident of the owner's
31 separate interest.

32 (2) Proposed Section 5725(b) would omit the introductory clause of Section 1367.1(e): "Except
33 as indicated in subdivision (d)..." The staff sees nothing in Section 1367.1(d) that would operate
34 as an exception to the rule stated in Section 1367.1(e).

35 (3) Proposed Section 5725(b) would substitute the defined term "governing documents" for the
36 undefined term "governing instruments."

37 (4) Proposed Section 5725(b) would substitute the defined term "separate interest" for the
38 undefined term "subdivision separate interest."

39 **§ 5730 (REVISED). Statement of collection procedure**

40 5730. (a) The annual policy statement, prepared pursuant to Section 5310, shall
41 include the following notice:

42 "NOTICE ASSESSMENTS AND FORECLOSURE

43 This notice outlines some of the rights and responsibilities of owners of property
44 in common interest developments and the associations that manage them. Please
45 refer to the sections of the Civil Code indicated for further information. A portion
46 of the information in this notice applies only to liens recorded on or after January
47 1, 2003. You may wish to consult a lawyer if you dispute an assessment.

1 ASSESSMENTS AND FORECLOSURE

2 Assessments become delinquent 15 days after they are due, unless the governing
3 documents provide for a longer time. The failure to pay association assessments
4 may result in the loss of an owner’s property through foreclosure. Foreclosure may
5 occur either as a result of a court action, known as judicial foreclosure or without
6 court action, often referred to as nonjudicial foreclosure. For liens recorded on and
7 after January 1, 2006, an association may not use judicial or nonjudicial
8 foreclosure to enforce that lien if the amount of the delinquent assessments or
9 dues, exclusive of any accelerated assessments, late charges, fees, attorney’s fees,
10 interest, and costs of collection, is less than one thousand eight hundred dollars
11 (\$1,800). For delinquent assessments or dues in excess of one thousand eight
12 hundred dollars (\$1,800) or more than 12 months delinquent, an association may
13 use judicial or nonjudicial foreclosure subject to the conditions set forth in Article
14 6 (commencing with Section 5700) of Chapter 6 of Part 5 of Division 4 of the
15 Civil Code. When using judicial or nonjudicial foreclosure, the association records
16 a lien on the owner’s property. The owner’s property may be sold to satisfy the
17 lien if the amounts secured by the lien are not paid. (Sections 5700 through 5720
18 of the Civil Code, inclusive)

19 In a judicial or nonjudicial foreclosure, the association may recover assessments,
20 reasonable costs of collection, reasonable attorney’s fees, late charges, and
21 interest. The association may not use nonjudicial foreclosure to collect fines or
22 penalties, except for costs to repair common area damaged by a member or a
23 member’s guests, if the governing documents provide for this. (Section 5725 of
24 the Civil Code)

25 The association must comply with the requirements of Article 5 (commencing
26 with Section 5650) of Chapter 6 of Part 5 of Division 4 of the Civil Code when
27 collecting delinquent assessments. If the association fails to follow these
28 requirements, it may not record a lien on the owner’s property until it has satisfied
29 those requirements. Any additional costs that result from satisfying the
30 requirements are the responsibility of the association. (Section 5675 of the Civil
31 Code)

32 At least 30 days prior to recording a lien on an owner’s separate interest, the
33 association must provide the owner of record with certain documents by certified
34 mail, including a description of its collection and lien enforcement procedures and
35 the method of calculating the amount. It must also provide an itemized statement
36 of the charges owed by the owner. An owner has a right to review the
37 association’s records to verify the debt. (Section 5660 of the Civil Code)

38 If a lien is recorded against an owner’s property in error, the person who
39 recorded the lien is required to record a lien release within 21 days, and to provide
40 an owner certain documents in this regard. (Section 5685 of the Civil Code)

1 The collection practices of the association may be governed by state and federal
2 laws regarding fair debt collection. Penalties can be imposed for debt collection
3 practices that violate these laws.

4 PAYMENTS

5 When an owner makes a payment, he or she may request a receipt, and the
6 association is required to provide it. On the receipt, the association must indicate
7 the date of payment and the person who received it. The association must inform
8 owners of a mailing address for overnight payments. (Section 5655 of the Civil
9 Code)

10 An owner may, but is not obligated to, pay under protest any disputed charge or
11 sum levied by the association, including, but not limited to, an assessment, fine,
12 penalty, late fee, collection cost, or monetary penalty imposed as a disciplinary
13 measure, and by so doing, specifically reserve the right to contest the disputed
14 charge or sum in court or otherwise.

15 An owner may dispute an assessment debt by submitting a written request for
16 dispute resolution to the association as set forth in Article 2 (commencing with
17 Section 5900) of Chapter 8 of Part 5 of Division 4 of the Civil Code. In addition,
18 an association may not initiate a foreclosure without participating in alternative
19 dispute resolution with a neutral third party as set forth in Article 3 (commencing
20 with Section 5925) of Chapter 8 of Part 5 of Division 4 of the Civil Code, if so
21 requested by the owner. Binding arbitration shall not be available if the association
22 intends to initiate a judicial foreclosure.

23 An owner is not liable for charges, interest, and costs of collection, if it is
24 established that the assessment was paid properly on time. (Section 5685 of the
25 Civil Code)

26 MEETINGS AND PAYMENT PLANS

27 An owner of a separate interest that is not a timeshare may request the
28 association to consider a payment plan to satisfy a delinquent assessment. The
29 association must inform owners of the standards for payment plans, if any exist.
30 (Section 5665 of the Civil Code)

31 The board must meet with an owner who makes a proper written request for a
32 meeting to discuss a payment plan when the owner has received a notice of a
33 delinquent assessment. These payment plans must conform with the payment plan
34 standards of the association, if they exist. (Section 5665 of the Civil Code)”

35 (b) An association distributing the notice required by this section to an owner of
36 an interest that is described in Section 11212 of the Business and Professions Code
37 that is not otherwise exempt from this section pursuant to subdivision (a) of
38 Section 11211.7 of the Business and Professions Code may delete from the notice
39 described in subdivision (b) the portion regarding meetings and payment plans.

Comment. Section 5730 continues former Section 1365.1 without change, with the following exceptions: (1) The introductory clause is revised to reflect distribution of this notice as part of the annual policy statement. (2) A limited exception for units in time shares is moved to subdivision (b), without any substantive change. (3) A reference to the application date of former Section 1367.1 (January 1, 2001) is obsolete and is not continued. (4) The substance of former Section 1365.1(c) is generalized in Section 4040(b). (5) Erroneous references to “Division 2 of the Civil Code” have been corrected. The references should have been to “Part 2 of Division 2 of the Civil Code.” (6) An erroneous reference to former Section 1368.810 has been corrected. It should have referred to former Section 1363.810. (7) An erroneous reference to former Section 1367.1 in the last paragraph under the heading “Payments” has been corrected. The reference should have been to former Section 1367.5. (8) Cross-references are adjusted throughout to reflect the new location of the referenced provisions. (9) The term “board of directors” has been replaced with the defined term “board.” See Section 4085 (“board” defined). (10) A reference to “common areas” is singularized.

Staff Note. Proposed Section 5730 would make minor changes to the language and organization of Section 1365.1, and correct a number of reference errors, as indicated in the Comment above.

§ 5735 (REVISED). Assignment or pledge

5735. (a) An association may not voluntarily assign or pledge the association’s right to collect payments or assessments, or to enforce or foreclose a lien to a third party, except when the assignment or pledge is made to a financial institution or lender chartered or licensed under federal or state law, when acting within the scope of that charter or license, as security for a loan obtained by the association.

(b) Nothing in subdivision (a) restricts the right or ability of an association to assign any unpaid obligations of a former member to a third party for purposes of collection.

Comment. Section 5735 continues the first sentence of former Section 1367.1(g) without change, with the following exceptions: (1) The provision is divided into subdivisions. (2) An introductory clause is added in subdivision (b) to make the relationship between the two provisions clearer.

Staff Note. Proposed Section 5735 would break the first sentence of Section 1367.1(g) into two subdivisions and add an introductory clause in the second provision, to better define their relationship. (In existing law the two provisions are joined by a semi-colon and the ambiguous conjunction “however.”).

§ 5740 (NEW). Application of article

5740. (a) Except as otherwise provided, this article applies to a lien created on or after January 1, 2003.

(b) A lien created before January 1, 2003, is governed by the law in existence at the time the lien was created.

Comment. Section 5740 is new. A lien created on or after January 1, 1986, and before January 1, 2003, is governed by former Section 1367.

Staff Note. Under existing law, Section 1367 governs liens recorded on or after January 1, 1986, but before January 1, 2003. Liens that are recorded on or after January 1, 2003, are governed by Section 1367.1 (except that inconsistent provisions of Section 1376.4 govern debts

1 for assessments that arise on or after January 1, 2006). The overlap between these rules is
2 complicated and confusing.

3 The proposed law would simplify the application scheme, as follows:

4 (1) Section 1367 would be omitted as largely obsolete (but still applicable to older liens,
5 pursuant to proposed Section 5740(b)).

6 (2) Section 1367.1 would be continued in the proposed law, subject to the limitations provided
7 in proposed Section 5740(a).

8 (3) The provisions continuing Section 1367.4 would be expressly limited to debts for
9 assessments that arise on or after January 1, 2006. See proposed Sections 5705, 5715 & 5720.

10 CHAPTER 7. INSURANCE AND LIABILITY

11 § 5800 (UNCHANGED). Limitation of director and officer liability

12 5800. (a) A volunteer officer or volunteer director of an association that
13 manages a common interest development that is exclusively residential, shall not
14 be personally liable in excess of the coverage of insurance specified in paragraph
15 (4) to any person who suffers injury, including, but not limited to, bodily injury,
16 emotional distress, wrongful death, or property damage or loss as a result of the
17 tortious act or omission of the volunteer officer or volunteer director if all of the
18 following criteria are met:

19 (1) The act or omission was performed within the scope of the officer's or
20 director's association duties.

21 (2) The act or omission was performed in good faith.

22 (3) The act or omission was not willful, wanton, or grossly negligent.

23 (4) The association maintained and had in effect at the time the act or omission
24 occurred and at the time a claim is made one or more policies of insurance that
25 shall include coverage for (A) general liability of the association and (B)
26 individual liability of officers and directors of the association for negligent acts or
27 omissions in that capacity; provided, that both types of coverage are in the
28 following minimum amount:

29 (A) At least five hundred thousand dollars (\$500,000) if the common interest
30 development consists of 100 or fewer separate interests.

31 (B) At least one million dollars (\$1,000,000) if the common interest
32 development consists of more than 100 separate interests.

33 (b) The payment of actual expenses incurred by a director or officer in the
34 execution of the duties of that position does not affect the director's or officer's
35 status as a volunteer within the meaning of this section.

36 (c) An officer or director who at the time of the act or omission was a declarant,
37 or who received either direct or indirect compensation as an employee from the
38 declarant, or from a financial institution that purchased a separate interest at a
39 judicial or nonjudicial foreclosure of a mortgage or deed of trust on real property,
40 is not a volunteer for the purposes of this section.

1 (d) Nothing in this section shall be construed to limit the liability of the
2 association for its negligent act or omission or for any negligent act or omission of
3 an officer or director of the association.

4 (e) This section shall only apply to a volunteer officer or director who is a tenant
5 of a separate interest in the common interest development or is an owner of no
6 more than two separate interests in the common interest development.

7 (f)(1) For purposes of paragraph (1) of subdivision (a), the scope of the officer's
8 or director's association duties shall include, but shall not be limited to, both of the
9 following decisions:

10 (A) Whether to conduct an investigation of the common interest development
11 for latent deficiencies prior to the expiration of the applicable statute of
12 limitations.

13 (B) Whether to commence a civil action against the builder for defects in design
14 or construction.

15 (2) It is the intent of the Legislature that this section clarify the scope of
16 association duties to which the protections against personal liability in this section
17 apply. It is not the intent of the Legislature that these clarifications be construed to
18 expand, or limit, the fiduciary duties owed by the directors or officers.

19 **Comment.** Section 5800 continues former Section 1365.7 without change, except that
20 superfluous cross-references to governing definitions are not continued and subdivision (a) is
21 revised in two places to change "which" to "that." See also Corp. Code § 7231 (standard of care
22 and liability of director of nonprofit mutual benefit corporation).

23 **§ 5805 (UNCHANGED). Limitation of member liability**

24 5805. (a) It is the intent of the Legislature to offer civil liability protection to
25 owners of the separate interests in a common interest development that have
26 common area owned in tenancy-in-common if the association carries a certain
27 level of prescribed insurance that covers a cause of action in tort.

28 (b) Any cause of action in tort against any owner of a separate interest arising
29 solely by reason of an ownership interest as a tenant in common in the common
30 area of a common interest development shall be brought only against the
31 association and not against the individual owners of the separate interests, if both
32 of the insurance requirements in paragraphs (1) and (2) are met:

33 (1) The association maintained and has in effect for this cause of action, one or
34 more policies of insurance that include coverage for general liability of the
35 association.

36 (2) The coverage described in paragraph (1) is in the following minimum
37 amounts:

38 (A) At least two million dollars (\$2,000,000) if the common interest
39 development consists of 100 or fewer separate interests.

40 (B) At least three million dollars (\$3,000,000) if the common interest
41 development consists of more than 100 separate interests.

1 **Comment.** Section 5805 continues former Section 1365.9 without change, except that a
2 superfluous cross-reference to a governing definition is not continued, a reference to “common
3 areas” is singularized, and subdivision (b)(1) is revised to replace “which” with “that.”

4 **§ 5810. Notice of change in coverage**

5 5810. The association shall, as soon as reasonably practicable, provide
6 individual notice (Section 4040) to all members if any of the policies described in
7 the annual budget report pursuant to Section 5300 have lapsed, been canceled, and
8 are not immediately renewed, restored, or replaced, or if there is a significant
9 change, such as a reduction in coverage or limits or an increase in the deductible,
10 as to any of those policies. If the association receives any notice of nonrenewal of
11 a policy described in the annual budget report pursuant to Section 5300, the
12 association shall immediately notify its members if replacement coverage will not
13 be in effect by the date the existing coverage will lapse.

14 **Comment.** Section 5810 continues former Section 1365(f)(2) without change, except that (1)
15 The reference to delivery by first-class mail has been replaced with a reference to individual
16 delivery pursuant to Section 4040. (2) Cross-references are updated to reflect the new location of
17 the referenced provisions.

18 **CHAPTER 8. DISPUTE RESOLUTION AND ENFORCEMENT**

19 **Article 1. Disciplinary Action**

20 **§ 5850 (REVISED). Schedule of monetary penalties**

21 5850. If an association adopts or has adopted a policy imposing any monetary
22 penalty, including any fee, on any association member for a violation of the
23 governing documents, the board shall adopt and distribute to each member, in the
24 annual policy statement prepared pursuant to Section 5310, a schedule of the
25 monetary penalties that may be assessed for those violations, which shall be in
26 accordance with authorization for member discipline contained in the governing
27 documents.

28 **Comment.** Section 5850 continues the first sentence of former Section 1363(g) without
29 change, with the following exceptions: (1) A reference to the “rules of the association” is
30 superfluous and is not continued. The term “governing documents” encompasses rules. See
31 Section 4150. (2) A reference to delivery by first class mail has been changed to refer to delivery
32 by inclusion in the annual policy statement prepared pursuant to Section 5310. (3) “Subdivision”
33 is changed to “section.” (4) A clause making clear that a violation of the governing documents
34 can include a violation by a member’s guest or invitee is not continued in this section. The
35 substance of that clause is continued in Section 5860. (4) The term “board of directors” has been
36 replaced with the defined term “board.” See Section 4085 (“board” defined).

37  **Staff Note.** (1) Proposed Section 5850 would incorporate any “schedule of monetary
38 penalties” into the annual policy statement prepared pursuant to proposed Section 5310. The
39 second sentence of Section 1363(g), providing that the schedule only be distributed once (unless
40 it is amended) is not continued. It would be best if the membership were provided with the
41 schedule annually, and the cost of incorporating it into the annual policy statement should be
42 minimal.

1 (2) Existing Section 1363(g) makes clear that a violation of the governing documents includes
2 a violation by a member's guest or invitee. That principle would be generalized, to include a
3 tenant or other resident of a member's separate interest, in proposed Section 5860.

4 **§ 5855 (REVISED). Disciplinary process**

5 5855. (a) When the board is to meet to consider or impose discipline upon a
6 member, or to assess costs for damage to the common area, the board shall notify
7 the member in writing, by either personal delivery or individual delivery (Section
8 4040), at least 10 days prior to the meeting.

9 (b) The notification shall contain, at a minimum, the date, time, and place of the
10 meeting, the nature of the alleged violation for which a member may be
11 disciplined or the nature of the damage to the common area for which the member
12 may be assessed, and a statement that the member has a right to attend and may
13 address the board at the meeting. The board shall meet in executive session if
14 requested by the member being disciplined or assessed costs.

15 (c) If the board imposes discipline on a member or assesses the member for
16 damage to the common area, the board shall provide the member a written
17 notification of the decision, by either personal delivery or individual delivery
18 (Section 4040), within 15 days following the action.

19 (d) A disciplinary action or assessment of costs for damage to the common area
20 shall not be effective against a member unless the board fulfills the requirements
21 of this section.

22 **Comment.** Section 5855 continues former Section 1363(h) without change, with the following
23 exceptions: (1) Subdivisions are added. (2) The scope of the provision is expanded to include an
24 action to assess a member for costs for damage to the common area. (3) "Subdivision" is changed
25 to "section." (4) The terms "board of directors" and "board of directors of the association" have
26 been replaced with the defined term "board." See Section 4085 ("board" defined). (5) "Individual
27 delivery" is substituted for first class mailing. See Section 4040.

28  **Staff Note.** Proposed Section 5855 would expand the scope of the existing disciplinary
29 process to also encompass board action to assess a member for damage to the common area. In
30 each case, the member should have an opportunity to address the board and rebut any charges
31 against the member.

32 **§ 5860 (NEW). Responsibility for guest, invitee, tenant, or resident**

33 5860. For the purposes of this article, a member may be held responsible for a
34 violation of the governing documents or damage to the common area caused by
35 the member's guest, invitee, or tenant, or occupant of the member's separate
36 interest.

37 **Comment.** Section 5860 is new. It generalizes a clause of former Section 1363(g), which
38 provided that a member may be liable for a violation of the governing documents by the
39 member's guest or invitee.

40  **Staff Note.** Proposed Section 5860 would fill a gap in existing law, which recognizes a
41 member's vicarious liability for conduct of a guest or invitee, but not for a tenant or other
42 occupant of the member's separate interest.

1 **§ 5865 (REVISED). No effect on authority of board**

2 5865. Nothing in Sections 5850 or 5855 shall be construed to create, expand, or
3 reduce the authority of the board to impose monetary penalties on an association
4 member for a violation of the governing documents.

5 **Comment.** Section 5865 continues former Section 1363(j) without substantive change, except
6 that the term “board of directors of the association” has been replaced with the defined term
7 “board” and the phrase “or rules of the association” has not been continued. See Section 4085
8 (“board” defined), 4150 (“governing documents” includes the operating rules of the association).

9  **Staff Note.** Existing Section 1363(j) refers to the entirety of Section 1363. Proposed Section
10 5865 would only refer to the provisions of Section 1363 that relate to member discipline.

11 **Article 2. Internal Dispute Resolution**

12 **§ 5900 (UNCHANGED). Application of article**

13 5900. (a) This article applies to a dispute between an association and a member
14 involving their rights, duties, or liabilities under this part, under the Nonprofit
15 Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of
16 Division 2 of Title 1 of the Corporations Code), or under the governing documents
17 of the common interest development or association.

18 (b) This article supplements, and does not replace, Article 3 (commencing with
19 Section 5925), relating to alternative dispute resolution as a prerequisite to an
20 enforcement action.

21 **Comment.** Section 5900 continues former Section 1363.810 without change, except that cross-
22 references are updated to reflect the new location of the referenced provision.

23 **§ 5905 (UNCHANGED). Fair, reasonable, and expeditious dispute resolution procedure**
24 **required**

25 5905. (a) An association shall provide a fair, reasonable, and expeditious
26 procedure for resolving a dispute within the scope of this article.

27 (b) In developing a procedure pursuant to this article, an association shall make
28 maximum, reasonable use of available local dispute resolution programs involving
29 a neutral third party, including low-cost mediation programs such as those listed
30 on the Internet Web sites of the Department of Consumer Affairs and the United
31 States Department of Housing and Urban Development.

32 (c) If an association does not provide a fair, reasonable, and expeditious
33 procedure for resolving a dispute within the scope of this article, the procedure
34 provided in Section 5915 applies and satisfies the requirement of subdivision (a).

35 **Comment.** Section 5905 continues former Section 1363.820 without change, except that a
36 cross-reference is updated to reflect the new location of the referenced provision.

37 **§ 5910 (UNCHANGED). Minimum requirements of association procedure**

38 5910. A fair, reasonable, and expeditious dispute resolution procedure shall at a
39 minimum satisfy all of the following requirements:

1 (a) The procedure may be invoked by either party to the dispute. A request
2 invoking the procedure shall be in writing.

3 (b) The procedure shall provide for prompt deadlines. The procedure shall state
4 the maximum time for the association to act on a request invoking the procedure.

5 (c) If the procedure is invoked by a member, the association shall participate in
6 the procedure.

7 (d) If the procedure is invoked by the association, the member may elect not to
8 participate in the procedure. If the member participates but the dispute is resolved
9 other than by agreement of the member, the member shall have a right of appeal to
10 the board.

11 (e) A resolution of a dispute pursuant to the procedure, which is not in conflict
12 with the law or the governing documents, binds the association and is judicially
13 enforceable. An agreement reached pursuant to the procedure, which is not in
14 conflict with the law or the governing documents, binds the parties and is
15 judicially enforceable.

16 (f) The procedure shall provide a means by which the member and the
17 association may explain their positions.

18 (g) A member of the association shall not be charged a fee to participate in the
19 process.

20 **Comment.** Section 5910 continues former Section 1363.830 without change, except that
21 subdivision (e) is revised to replace “that” with “which,” and the term “association’s board of
22 directors” has been replaced with the defined term “board.” See Section 4085 (“board” defined).

23 **§ 5915 (UNCHANGED). Default meet and confer procedure**

24 5915. (a) This section applies to an association that does not otherwise provide a
25 fair, reasonable, and expeditious dispute resolution procedure. The procedure
26 provided in this section is fair, reasonable, and expeditious, within the meaning of
27 this article.

28 (b) Either party to a dispute within the scope of this article may invoke the
29 following procedure:

30 (1) The party may request the other party to meet and confer in an effort to
31 resolve the dispute. The request shall be in writing.

32 (2) A member of an association may refuse a request to meet and confer. The
33 association may not refuse a request to meet and confer.

34 (3) The board shall designate a director to meet and confer.

35 (4) The parties shall meet promptly at a mutually convenient time and place,
36 explain their positions to each other, and confer in good faith in an effort to
37 resolve the dispute.

38 (5) A resolution of the dispute agreed to by the parties shall be memorialized in
39 writing and signed by the parties, including the board designee on behalf of the
40 association.

41 (c) An agreement reached under this section binds the parties and is judicially
42 enforceable if both of the following conditions are satisfied:

1 (1) The agreement is not in conflict with law or the governing documents of the
2 common interest development or association.

3 (2) The agreement is either consistent with the authority granted by the board to
4 its designee or the agreement is ratified by the board.

5 (d) A member may not be charged a fee to participate in the process.

6 **Comment.** Section 5915 continues former Section 1363.840 without change, except that (1)
7 the phrase “in an association” is changed to “to an association,” (2) the term “association’s board
8 of directors” has been replaced with the defined term “board,” (3) the superfluous phrases “of the
9 association” and “of the common interest development or association” are not continued, and (4)
10 the defined term “director” is used in place of “board member.” See Sections 4085 (“board”
11 defined), 4140 (“director” defined), 4150 (“governing documents” defined).

12 **§ 5920 (REVISED). Notice in policy statement**

13 5920. The annual policy statement prepared pursuant to Section 5310 shall
14 include a description of the internal dispute resolution process provided pursuant
15 to this article.

16 **Comment.** Section 5920 continues former Section 1363.850 without change, except that a
17 reference to a notice delivered pursuant to former Section 1369.590 has been changed to refer to
18 distribution as part of the annual policy statement prepared pursuant to Section 5310.

19 **Staff Note.** Proposed Section 5920 would provide for distribution of notice of the internal
20 dispute resolution process as part of the annual policy statement distributed pursuant to proposed
21 Section 5310.

22 **Article 3. Alternative Dispute Resolution**
23 **Prerequisite to Civil Action**

24 **§ 5925 (UNCHANGED). Definitions**

25 5925. As used in this article:

26 (a) “Alternative dispute resolution” means mediation, arbitration, conciliation,
27 or other nonjudicial procedure that involves a neutral party in the decision making
28 process. The form of alternative dispute resolution chosen pursuant to this article
29 may be binding or nonbinding, with the voluntary consent of the parties.

30 (b) “Enforcement action” means a civil action or proceeding, other than a cross-
31 complaint, for any of the following purposes:

32 (1) Enforcement of this title.

33 (2) Enforcement of the Nonprofit Mutual Benefit Corporation Law (Part 3
34 commencing with Section 7110) of Division 2 of Title 1 of the Corporations
35 Code).

36 (3) Enforcement of the governing documents.

37 **Comment.** Section 5925 continues former Section 1369.510 without change, except the phrase
38 “of a common interest development” is not continued in subdivision (b)(3).

1 **§ 5930 (UNCHANGED). ADR prerequisite to enforcement action**

2 5930. (a) An association or a member may not file an enforcement action in the
3 superior court unless the parties have endeavored to submit their dispute to
4 alternative dispute resolution pursuant to this article.

5 (b) This section applies only to an enforcement action that is solely for
6 declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim
7 for monetary damages not in excess of the jurisdictional limits stated in Sections
8 116.220 and 116.221 of the Code of Civil Procedure.

9 (c) This section does not apply to a small claims action.

10 (d) Except as otherwise provided by law, this section does not apply to an
11 assessment dispute.

12 **Comment.** Section 5930 continues former Section 1369.520 without change, except that the
13 superfluous phrase “of a common interest development” is not continued and the defined term
14 “member” is used in place of “owner.” See Section 4160 (“member” defined).

15 **§ 5935 (UNCHANGED). Request for resolution**

16 5935. (a) Any party to a dispute may initiate the process required by Section
17 5930 by serving on all other parties to the dispute a Request for Resolution. The
18 Request for Resolution shall include all of the following:

19 (1) A brief description of the dispute between the parties.

20 (2) A request for alternative dispute resolution.

21 (3) A notice that the party receiving the Request for Resolution is required to
22 respond within 30 days of receipt or the request will be deemed rejected.

23 (4) If the party on whom the request is served is the member, a copy of this
24 article.

25 (b) Service of the Request for Resolution shall be by personal delivery, first-
26 class mail, express mail, facsimile transmission, or other means reasonably
27 calculated to provide the party on whom the request is served actual notice of the
28 request.

29 (c) A party on whom a Request for Resolution is served has 30 days following
30 service to accept or reject the request. If a party does not accept the request within
31 that period, the request is deemed rejected by the party.

32 **Comment.** Section 5935 continues former Section 1369.530 without change, except that the
33 defined term “member” is used in place of “owner.” See Section 4160 (“member” defined).

34 **§ 5940 (UNCHANGED). ADR process**

35 5940. (a) If the party on whom a Request for Resolution is served accepts the
36 request, the parties shall complete the alternative dispute resolution within 90 days
37 after the party initiating the request receives the acceptance, unless this period is
38 extended by written stipulation signed by both parties.

39 (b) Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence
40 Code applies to any form of alternative dispute resolution initiated by a Request
41 for Resolution under this article, other than arbitration.

1 (c) The costs of the alternative dispute resolution shall be borne by the parties.

2 **Comment.** Section 5940 continues former Section 1369.540 without change.

3 **§ 5945 (UNCHANGED). Tolling of statute of limitations**

4 5945. If a Request for Resolution is served before the end of the applicable time
5 limitation for commencing an enforcement action, the time limitation is tolled
6 during the following periods:

7 (a) The period provided in Section 5935 for response to a Request for
8 Resolution.

9 (b) If the Request for Resolution is accepted, the period provided by Section
10 5940 for completion of alternative dispute resolution, including any extension of
11 time stipulated to by the parties pursuant to Section 5940.

12 **Comment.** Section 5945 continues former Section 1369.550 without change, except that cross-
13 references are updated to reflect the new location of the referenced provisions.

14 **§ 5950 (UNCHANGED). Certification of efforts to resolve dispute**

15 5950. (a) At the time of commencement of an enforcement action, the party
16 commencing the action shall file with the initial pleading a certificate stating that
17 one or more of the following conditions is satisfied:

18 (1) Alternative dispute resolution has been completed in compliance with this
19 article.

20 (2) One of the other parties to the dispute did not accept the terms offered for
21 alternative dispute resolution.

22 (3) Preliminary or temporary injunctive relief is necessary.

23 (b) Failure to file a certificate pursuant to subdivision (a) is grounds for a
24 demurrer or a motion to strike unless the court finds that dismissal of the action for
25 failure to comply with this article would result in substantial prejudice to one of
26 the parties.

27 **Comment.** Section 5950 continues former Section 1369.560 without change.

28 **§ 5955 (UNCHANGED). Stay of litigation for dispute resolution**

29 5955. (a) After an enforcement action is commenced, on written stipulation of
30 the parties, the matter may be referred to alternative dispute resolution. The
31 referred action is stayed. During the stay, the action is not subject to the rules
32 implementing subdivision (c) of Section 68603 of the Government Code.

33 (b) The costs of the alternative dispute resolution shall be borne by the parties.

34 **Comment.** Section 5955 continues former Section 1369.570 without change.

35 **§ 5960 (REVISED). Attorney's fees**

36 5960. In an enforcement action in which fees and costs may be awarded, the
37 court, in determining the amount of the award, may consider whether a party's
38 refusal to participate in alternative dispute resolution before commencement of the
39 action was reasonable.

1 **Comment.** Section 5960 generalizes former Section 1369.580 so that it applies to any
2 enforcement action in which fees and costs may be awarded and not just to an action to enforce
3 the governing documents.

4 **Staff Note.** Existing Section 1369.580 authorizes the court to consider refusal to participate
5 in ADR in determining the amount of a fee or cost award, but only in an action under existing
6 Section 1354(a) (enforcement of covenants and restrictions in declaration). Proposed Section
7 5960 would expand the court’s authority to consider ADR nonparticipation in setting a fee or cost
8 award, so that it would apply to any enforcement action in which fees or costs may be awarded.

9 **§ 5965 (REVISED). Notice in annual policy statement**

10 5965. (a) An association shall annually provide its members a summary of the
11 provisions of this article that specifically references this article. The summary
12 shall include the following language:

13 “Failure of a member of the association to comply with the alternative dispute
14 resolution requirements of Section 5930 of the Civil Code may result in the loss of
15 the member’s right to sue the association or another member of the association
16 regarding enforcement of the governing documents or the applicable law.”

17 (b) The summary shall be included in the annual policy statement prepared
18 pursuant to Section 5310.

19 **Comment.** Subdivision (a) of Section 5965 continues former Section 1369.590(a) without
20 change, except that a cross-reference is updated to reflect the new location of the referenced
21 provision, and the pronoun “your” is replaced with “the member’s” to improve the clarity of the
22 notice.

23 Subdivision (b) is similar to the first sentence of former Section 1369.590(b).

24 **Staff Note.** Proposed Section 5965 would supersede the first sentence of Section
25 1369.590(b), which provided: “The summary shall be provided either at the time the pro forma
26 budget required by Section 1365 is distributed or in the manner prescribed in Section 5016 of the
27 Corporations Code.” The substance of the second sentence of Section 1369.590(b) would be
28 continued in proposed Section 5920.

29 **Article 4. Civil Actions**

30 **§ 5975 (UNCHANGED). Enforcement of governing documents**

31 5975. (a) The covenants and restrictions in the declaration shall be enforceable
32 equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind
33 all owners of separate interests in the development. Unless the declaration states
34 otherwise, these servitudes may be enforced by any owner of a separate interest or
35 by the association, or by both.

36 (b) A governing document other than the declaration may be enforced by the
37 association against an owner of a separate interest or by an owner of a separate
38 interest against the association.

39 (c) In an action to enforce the governing documents, the prevailing party shall be
40 awarded reasonable attorney’s fees and costs.

41 **Comment.** Section 5975 continues former Section 1354 without change.

1 **§ 5980 (NEW). Enforcement of this part**

2 5980. In addition to any other remedy provided by law, a member may bring an
3 action in superior court to enforce a provision of this part.

4 **Comment.** Section 5980 is new. Relief under this section may include a writ of mandate, an
5 injunction, or other appropriate relief.

6 ☞ **Staff Note.** Proposed Section 5980 would make clear that a member may bring a civil action
7 to enforce any requirement of the Davis-Stirling Act.

8 CHAPTER 9. CONSTRUCTION DEFECT LITIGATION

9 **§ 6000 (UNCHANGED). Actions for damages**

10 6000. (a) Before an association files a complaint for damages against a builder,
11 developer, or general contractor (“respondent”) of a common interest development
12 based upon a claim for defects in the design or construction of the common
13 interest development, all of the requirements of this section shall be satisfied with
14 respect to the builder, developer, or general contractor.

15 (b) The association shall serve upon the respondent a “Notice of
16 Commencement of Legal Proceedings.” The notice shall be served by certified
17 mail to the registered agent of the respondent, or if there is no registered agent,
18 then to any officer of the respondent. If there are no current officers of the
19 respondent, service shall be upon the person or entity otherwise authorized by law
20 to receive service of process. Service upon the general contractor shall be
21 sufficient to initiate the process set forth in this section with regard to any builder
22 or developer, if the builder or developer is not amenable to service of process by
23 the foregoing methods. This notice shall toll all applicable statutes of limitation
24 and repose, whether contractual or statutory, by and against all potentially
25 responsible parties, regardless of whether they were named in the notice, including
26 claims for indemnity applicable to the claim for the period set forth in subdivision

27 (c). The notice shall include all of the following:

28 (1) The name and location of the project.

29 (2) An initial list of defects sufficient to apprise the respondent of the general
30 nature of the defects at issue.

31 (3) A description of the results of the defects, if known.

32 (4) A summary of the results of a survey or questionnaire distributed to
33 homeowners to determine the nature and extent of defects, if a survey has been
34 conducted or a questionnaire has been distributed.

35 (5) Either a summary of the results of testing conducted to determine the nature
36 and extent of defects or the actual test results, if that testing has been conducted.

37 (c) Service of the notice shall commence a period, not to exceed 180 days,
38 during which the association, the respondent, and all other participating parties
39 shall try to resolve the dispute through the processes set forth in this section. This
40 180-day period may be extended for one additional period, not to exceed 180 days,

1 only upon the mutual agreement of the association, the respondent, and any parties
2 not deemed peripheral pursuant to paragraph (3) of subdivision (e). Any
3 extensions beyond the first extension shall require the agreement of all
4 participating parties. Unless extended, the dispute resolution process prescribed by
5 this section shall be deemed completed. All extensions shall continue the tolling
6 period described in subdivision (b).

7 (d) Within 25 days of the date the association serves the Notice of
8 Commencement of Legal Proceedings, the respondent may request in writing to
9 meet and confer with the board. Unless the respondent and the association
10 otherwise agree, there shall be not more than one meeting, which shall take place
11 no later than 10 days from the date of the respondent's written request, at a
12 mutually agreeable time and place. The meeting shall be subject to subdivision (a)
13 of Section 4925 and subdivisions (a) and (b) of Section 4935. The discussions at
14 the meeting are privileged communications and are not admissible in evidence in
15 any civil action, unless the association and the respondent consent in writing to
16 their admission.

17 (e) Upon receipt of the notice, the respondent shall, within 60 days, comply with
18 the following:

19 (1) The respondent shall provide the association with access to, for inspection
20 and copying of, all plans and specifications, subcontracts, and other construction
21 files for the project that are reasonably calculated to lead to the discovery of
22 admissible evidence regarding the defects claimed. The association shall provide
23 the respondent with access to, for inspection and copying of, all files reasonably
24 calculated to lead to the discovery of admissible evidence regarding the defects
25 claimed, including all reserve studies, maintenance records and any survey
26 questionnaires, or results of testing to determine the nature and extent of defects.
27 To the extent any of the above documents are withheld based on privilege, a
28 privilege log shall be prepared and submitted to all other parties. All other
29 potentially responsible parties shall have the same rights as the respondent
30 regarding the production of documents upon receipt of written notice of the claim,
31 and shall produce all relevant documents within 60 days of receipt of the notice of
32 the claim.

33 (2) The respondent shall provide written notice by certified mail to all
34 subcontractors, design professionals, their insurers, and the insurers of any
35 additional insured whose identities are known to the respondent or readily
36 ascertainable by review of the project files or other similar sources and whose
37 potential responsibility appears on the face of the notice. This notice to
38 subcontractors, design professionals, and insurers shall include a copy of the
39 Notice of Commencement of Legal Proceedings, and shall specify the date and
40 manner by which the parties shall meet and confer to select a dispute resolution
41 facilitator pursuant to paragraph (1) of subdivision (f), advise the recipient of its
42 obligation to participate in the meet and confer or serve a written acknowledgment
43 of receipt regarding this notice, advise the recipient that it will waive any

1 challenge to selection of the dispute resolution facilitator if it elects not to
2 participate in the meet and confer, advise the recipient that it may be bound by any
3 settlement reached pursuant to subdivision (d) of Section 6050, advise the
4 recipient that it may be deemed to have waived rights to conduct inspection and
5 testing pursuant to subdivision (c) of Section 6050, advise the recipient that it may
6 seek the assistance of an attorney, and advise the recipient that it should contact its
7 insurer, if any. Any subcontractor or design professional, or insurer for that
8 subcontractor, design professional, or additional insured, who receives written
9 notice from the respondent regarding the meet and confer shall, prior to the meet
10 and confer, serve on the respondent a written acknowledgment of receipt. That
11 subcontractor or design professional shall, within 10 days of service of the written
12 acknowledgment of receipt, provide to the association and the respondent a
13 Statement of Insurance that includes both of the following:

14 (A) The names, addresses, and contact persons, if known, of all insurance
15 carriers, whether primary or excess and regardless of whether a deductible or self-
16 insured retention applies, whose policies were in effect from the commencement
17 of construction of the subject project to the present and which potentially cover the
18 subject claims.

19 (B) The applicable policy numbers for each policy of insurance provided.

20 (3) Any subcontractor or design professional, or insurer for that subcontractor,
21 design professional, or additional insured, who so chooses, may, at any time, make
22 a written request to the dispute resolution facilitator for designation as a peripheral
23 party. That request shall be served contemporaneously on the association and the
24 respondent. If no objection to that designation is received within 15 days, or upon
25 rejection of that objection, the dispute resolution facilitator shall designate that
26 subcontractor or design professional as a peripheral party, and shall thereafter seek
27 to limit the attendance of that subcontractor or design professional only to those
28 dispute resolution sessions deemed peripheral party sessions or to those sessions
29 during which the dispute resolution facilitator believes settlement as to peripheral
30 parties may be finalized. Nothing in this subdivision shall preclude a party who
31 has been designated a peripheral party from being reclassified as a nonperipheral
32 party, nor shall this subdivision preclude a party designated as a nonperipheral
33 party from being reclassified as a peripheral party after notice to all parties and an
34 opportunity to object. For purposes of this subdivision, a peripheral party is a party
35 having total claimed exposure of less than twenty-five thousand dollars (\$25,000).

36 (f)(1) Within 20 days of sending the notice set forth in paragraph (2) of
37 subdivision (e), the association, respondent, subcontractors, design professionals,
38 and their insurers who have been sent a notice as described in paragraph (2) of
39 subdivision (e) shall meet and confer in an effort to select a dispute resolution
40 facilitator to preside over the mandatory dispute resolution process prescribed by
41 this section. Any subcontractor or design professional who has been given timely
42 notice of this meeting but who does not participate, waives any challenge he or she
43 may have as to the selection of the dispute resolution facilitator. The role of the

1 dispute resolution facilitator is to attempt to resolve the conflict in a fair manner.
2 The dispute resolution facilitator shall be sufficiently knowledgeable in the subject
3 matter and be able to devote sufficient time to the case. The dispute resolution
4 facilitator shall not be required to reside in or have an office in the county in which
5 the project is located. The dispute resolution facilitator and the participating
6 parties shall agree to a date, time, and location to hold a case management meeting
7 of all parties and the dispute resolution facilitator, to discuss the claims being
8 asserted and the scheduling of events under this section. The case management
9 meeting with the dispute resolution facilitator shall be held within 100 days of
10 service of the Notice of Commencement of Legal Proceedings at a location in the
11 county where the project is located. Written notice of the case management
12 meeting with the dispute resolution facilitator shall be sent by the respondent to
13 the association, subcontractors and design professionals, and their insurers who are
14 known to the respondent to be on notice of the claim, no later than 10 days prior to
15 the case management meeting, and shall specify its date, time, and location. The
16 dispute resolution facilitator in consultation with the respondent shall maintain a
17 contact list of the participating parties.

18 (2) No later than 10 days prior to the case management meeting, the dispute
19 resolution facilitator shall disclose to the parties all matters that could cause a
20 person aware of the facts to reasonably entertain a doubt that the proposed dispute
21 resolution facilitator would be able to resolve the conflict in a fair manner. The
22 facilitator's disclosure shall include the existence of any ground specified in
23 Section 170.1 of the Code of Civil Procedure for disqualification of a judge, any
24 attorney-client relationship the facilitator has or had with any party or lawyer for a
25 party to the dispute resolution process, and any professional or significant personal
26 relationship the facilitator or his or her spouse or minor child living in the
27 household has or had with any party to the dispute resolution process. The
28 disclosure shall also be provided to any subsequently noticed subcontractor or
29 design professional within 10 days of the notice.

30 (3) A dispute resolution facilitator shall be disqualified by the court if he or she
31 fails to comply with this paragraph and any party to the dispute resolution process
32 serves a notice of disqualification prior to the case management meeting. If the
33 dispute resolution facilitator complies with this paragraph, he or she shall be
34 disqualified by the court on the basis of the disclosure if any party to the dispute
35 resolution process serves a notice of disqualification prior to the case management
36 meeting.

37 (4) If the parties cannot mutually agree to a dispute resolution facilitator, then
38 each party shall submit a list of three dispute resolution facilitators. Each party
39 may then strike one nominee from the other parties' list, and petition the court,
40 pursuant to the procedure described in subdivisions (n) and (o), for final selection
41 of the dispute resolution facilitator. The court may issue an order for final
42 selection of the dispute resolution facilitator pursuant to this paragraph.

1 (5) Any subcontractor or design professional who receives notice of the
2 association's claim without having previously received timely notice of the meet
3 and confer to select the dispute resolution facilitator shall be notified by the
4 respondent regarding the name, address, and telephone number of the dispute
5 resolution facilitator. Any such subcontractor or design professional may serve
6 upon the parties and the dispute resolution facilitator a written objection to the
7 dispute resolution facilitator within 15 days of receiving notice of the claim.
8 Within seven days after service of this objection, the subcontractor or design
9 professional may petition the superior court to replace the dispute resolution
10 facilitator. The court may replace the dispute resolution facilitator only upon a
11 showing of good cause, liberally construed. Failure to satisfy the deadlines set
12 forth in this subdivision shall constitute a waiver of the right to challenge the
13 dispute resolution facilitator.

14 (6) The costs of the dispute resolution facilitator shall be apportioned in the
15 following manner: one-third to be paid by the association; one-third to be paid by
16 the respondent; and one-third to be paid by the subcontractors and design
17 professionals, as allocated among them by the dispute resolution facilitator. The
18 costs of the dispute resolution facilitator shall be recoverable by the prevailing
19 party in any subsequent litigation pursuant to Section 1032 of the Code of Civil
20 Procedure, provided however that any nonsettling party may, prior to the filing of
21 the complaint, petition the facilitator to reallocate the costs of the dispute
22 resolution facilitator as they apply to any nonsettling party. The determination of
23 the dispute resolution facilitator with respect to the allocation of these costs shall
24 be binding in any subsequent litigation. The dispute resolution facilitator shall take
25 into account all relevant factors and equities between all parties in the dispute
26 resolution process when reallocating costs.

27 (7) In the event the dispute resolution facilitator is replaced at any time, the case
28 management statement created pursuant to subdivision (h) shall remain in full
29 force and effect.

30 (8) The dispute resolution facilitator shall be empowered to enforce all
31 provisions of this section.

32 (g) (1) No later than the case management meeting, the parties shall begin to
33 generate a data compilation showing the following information regarding the
34 alleged defects at issue:

35 (A) The scope of the work performed by each potentially responsible
36 subcontractor.

37 (B) The tract or phase number in which each subcontractor provided goods or
38 services, or both.

39 (C) The units, either by address, unit number, or lot number, at which each
40 subcontractor provided goods or services, or both.

41 (2) This data compilation shall be updated as needed to reflect additional
42 information. Each party attending the case management meeting, and any

1 subsequent meeting pursuant to this section, shall provide all information available
2 to that party relevant to this data compilation.

3 (h) At the case management meeting, the parties shall, with the assistance of the
4 dispute resolution facilitator, reach agreement on a case management statement,
5 which shall set forth all of the elements set forth in paragraphs (1) to (8), inclusive,
6 except that the parties may dispense with one or more of these elements if they
7 agree that it is appropriate to do so. The case management statement shall provide
8 that the following elements shall take place in the following order:

9 (1) Establishment of a document depository, located in the county where the
10 project is located, for deposit of documents, defect lists, demands, and other
11 information provided for under this section. All documents exchanged by the
12 parties and all documents created pursuant to this subdivision shall be deposited in
13 the document depository, which shall be available to all parties throughout the
14 prefiling dispute resolution process and in any subsequent litigation. When any
15 document is deposited in the document depository, the party depositing the
16 document shall provide written notice identifying the document to all other parties.
17 The costs of maintaining the document depository shall be apportioned among the
18 parties in the same manner as the costs of the dispute resolution facilitator.

19 (2) Provision of a more detailed list of defects by the association to the
20 respondent after the association completes a visual inspection of the project. This
21 list of defects shall provide sufficient detail for the respondent to ensure that all
22 potentially responsible subcontractors and design professionals are provided with
23 notice of the dispute resolution process. If not already completed prior to the case
24 management meeting, the Notice of Commencement of Legal Proceedings shall be
25 served by the respondent on all additional subcontractors and design professionals
26 whose potential responsibility appears on the face of the more detailed list of
27 defects within seven days of receipt of the more detailed list. The respondent shall
28 serve a copy of the case management statement, including the name, address, and
29 telephone number of the dispute resolution facilitator, to all the potentially
30 responsible subcontractors and design professionals at the same time.

31 (3) Nonintrusive visual inspection of the project by the respondent,
32 subcontractors, and design professionals.

33 (4) Invasive testing conducted by the association, if the association deems
34 appropriate. All parties may observe and photograph any testing conducted by the
35 association pursuant to this paragraph, but may not take samples or direct testing
36 unless, by mutual agreement, costs of testing are shared by the parties.

37 (5) Provision by the association of a comprehensive demand which provides
38 sufficient detail for the parties to engage in meaningful dispute resolution as
39 contemplated under this section.

40 (6) Invasive testing conducted by the respondent, subcontractors, and design
41 professionals, if they deem appropriate.

1 (7) Allowance for modification of the demand by the association if new issues
2 arise during the testing conducted by the respondent, subcontractor, or design
3 professionals.

4 (8) Facilitated dispute resolution of the claim, with all parties, including
5 peripheral parties, as appropriate, and insurers, if any, present and having
6 settlement authority. The dispute resolution facilitators shall endeavor to set
7 specific times for the attendance of specific parties at dispute resolution sessions.
8 If the dispute resolution facilitator does not set specific times for the attendance of
9 parties at dispute resolution sessions, the dispute resolution facilitator shall permit
10 those parties to participate in dispute resolution sessions by telephone.

11 (i) In addition to the foregoing elements of the case management statement
12 described in subdivision (h), upon mutual agreement of the parties, the dispute
13 resolution facilitator may include any or all of the following elements in a case
14 management statement: the exchange of consultant or expert photographs; expert
15 presentations; expert meetings; or any other mechanism deemed appropriate by the
16 parties in the interest of resolving the dispute.

17 (j) The dispute resolution facilitator, with the guidance of the parties, shall at the
18 time the case management statement is established, set deadlines for the
19 occurrence of each event set forth in the case management statement, taking into
20 account such factors as the size and complexity of the case, and the requirement of
21 this section that this dispute resolution process not exceed 180 days absent
22 agreement of the parties to an extension of time.

23 (k)(1)(A) At a time to be determined by the dispute resolution facilitator, the
24 respondent may submit to the association all of the following:

25 (i) A request to meet with the board to discuss a written settlement offer.

26 (ii) A written settlement offer, and a concise explanation of the reasons for the
27 terms of the offer.

28 (iii) A statement that the respondent has access to sufficient funds to satisfy the
29 conditions of the settlement offer.

30 (iv) A summary of the results of testing conducted for the purposes of
31 determining the nature and extent of defects, if this testing has been conducted,
32 unless the association provided the respondent with actual test results.

33 (B) If the respondent does not timely submit the items required by this
34 subdivision, the association shall be relieved of any further obligation to satisfy
35 the requirements of this subdivision only.

36 (C) No less than 10 days after the respondent submits the items required by this
37 paragraph, the respondent and the board shall meet and confer about the
38 respondent's settlement offer.

39 (D) If the board rejects a settlement offer presented at the meeting held pursuant
40 to this subdivision, the board shall hold a meeting open to each member of the
41 association. The meeting shall be held no less than 15 days before the association
42 commences an action for damages against the respondent.

1 (E) No less than 15 days before this meeting is held, a written notice shall be
2 sent to each member of the association specifying all of the following:

3 (i) That a meeting will take place to discuss problems that may lead to the filing
4 of a civil action, and the time and place of this meeting.

5 (ii) The options that are available to address the problems, including the filing of
6 a civil action and a statement of the various alternatives that are reasonably
7 foreseeable by the association to pay for those options and whether these payments
8 are expected to be made from the use of reserve account funds or the imposition of
9 regular or special assessments, or emergency assessment increases.

10 (iii) The complete text of any written settlement offer, and a concise explanation
11 of the specific reasons for the terms of the offer submitted to the board at the
12 meeting held pursuant to subdivision (d) that was received from the respondent.

13 (F) The respondent shall pay all expenses attributable to sending the settlement
14 offer to all members of the association. The respondent shall also pay the expense
15 of holding the meeting, not to exceed three dollars (\$3) per association member.

16 (G) The discussions at the meeting and the contents of the notice and the items
17 required to be specified in the notice pursuant to paragraph (E) are privileged
18 communications and are not admissible in evidence in any civil action, unless the
19 association consents to their admission.

20 (H) No more than one request to meet and discuss a written settlement offer may
21 be made by the respondent pursuant to this subdivision.

22 (I) Except for the purpose of in camera review as provided in subdivision (c) of
23 Section 6050, all defect lists and demands, communications, negotiations, and
24 settlement offers made in the course of the prelitigation dispute resolution process
25 provided by this section shall be inadmissible pursuant to Sections 1119 to 1124,
26 inclusive, of the Evidence Code and all applicable decisional law. This
27 inadmissibility shall not be extended to any other documents or communications
28 which would not otherwise be deemed inadmissible.

29 (m) Any subcontractor or design professional may, at any time, petition the
30 dispute resolution facilitator to release that party from the dispute resolution
31 process upon a showing that the subcontractor or design professional is not
32 potentially responsible for the defect claims at issue. The petition shall be served
33 contemporaneously on all other parties, who shall have 15 days from the date of
34 service to object. If a subcontractor or design professional is released, and it later
35 appears to the dispute resolution facilitator that it may be a responsible party in
36 light of the current defect list or demand, the respondent shall renote the party as
37 provided by paragraph (2) of subdivision (e), provide a copy of the current defect
38 list or demand, and direct the party to attend a dispute resolution session at a stated
39 time and location. A party who subsequently appears after having been released by
40 the dispute resolution facilitator shall not be prejudiced by its absence from the
41 dispute resolution process as the result of having been previously released by the
42 dispute resolution facilitator.

1 (n) Any party may, at any time, petition the superior court in the county where
2 the project is located, upon a showing of good cause, and the court may issue an
3 order, for any of the following, or for appointment of a referee to resolve a dispute
4 regarding any of the following:

5 (1) To take a deposition of any party to the process, or subpoena a third party for
6 deposition or production of documents, which is necessary to further prelitigation
7 resolution of the dispute.

8 (2) To resolve any disputes concerning inspection, testing, production of
9 documents, or exchange of information provided for under this section.

10 (3) To resolve any disagreements relative to the timing or contents of the case
11 management statement.

12 (4) To authorize internal extensions of timeframes set forth in the case
13 management statement.

14 (5) To seek a determination that a settlement is a good faith settlement pursuant
15 to Section 877.6 of the Code of Civil Procedure and all related authorities. The
16 page limitations and meet and confer requirements specified in this section shall
17 not apply to these motions, which may be made on shortened notice. Instead, these
18 motions shall be subject to other applicable state law, rules of court, and local
19 rules. A determination made by the court pursuant to this motion shall have the
20 same force and effect as the determination of a postfiling application or motion for
21 good faith settlement.

22 (6) To ensure compliance, on shortened notice, with the obligation to provide a
23 Statement of Insurance pursuant to paragraph (2) of subdivision (e).

24 (7) For any other relief appropriate to the enforcement of the provisions of this
25 section, including the ordering of parties, and insurers, if any, to the dispute
26 resolution process with settlement authority.

27 (o)(1) A petition filed pursuant to subdivision (n) shall be filed in the superior
28 court in the county in which the project is located. The court shall hear and decide
29 the petition within 10 days after filing. The petitioning party shall serve the
30 petition on all parties, including the date, time, and location of the hearing no later
31 than five business days prior to the hearing. Any responsive papers shall be filed
32 and served no later than three business days prior to the hearing. Any petition or
33 response filed under this section shall be no more than three pages in length.

34 (2) All parties shall meet with the dispute resolution facilitator, if one has been
35 appointed and confer in person or by the telephone prior to the filing of that
36 petition to attempt to resolve the matter without requiring court intervention.

37 (p) As used in this section:

38 (1) “Association” shall have the same meaning as defined in Section 4080.

39 (2) “Builder” means the declarant, as defined in Section 4130.

40 (3) “Common interest development” shall have the same meaning as in Section
41 4100, except that it shall not include developments or projects with less than 20
42 units.

1 (q) The alternative dispute resolution process and procedures described in this
2 section shall have no application or legal effect other than as described in this
3 section.

4 (r) This section shall become operative on July 1, 2002, however it shall not
5 apply to any pending suit or claim for which notice has previously been given.

6 (s) This section shall become inoperative on July 1, 2017, and, as of January 1,
7 2018, is repealed, unless a later enacted statute, that becomes operative on or
8 before January 1, 2018, deletes or extends the dates on which it becomes
9 inoperative and is repealed.

10 **Comment.** Section 6000 continues former Section 1375 without change, except that cross-
11 references are updated to reflect the new location of the referenced provisions and the terms
12 “board of directors” and “board of directors of the association” have been replaced throughout
13 with the defined term “board.” See Section 4085 (“board” defined).

14 **§ 6050 (UNCHANGED). Action following pre-filing dispute resolution**

15 6050. (a) Upon the completion of the mandatory pre-filing dispute resolution
16 process described in Section 6000, if the parties have not settled the matter, the
17 association or its assignee may file a complaint in the superior court in the county
18 in which the project is located. Those matters shall be given trial priority.

19 (b) In assigning trial priority, the court shall assign the earliest possible trial
20 date, taking into consideration the pretrial preparation completed pursuant to
21 Section 6000, and shall deem the complaint to have been filed on the date of
22 service of the Notice of Commencement of Legal Proceedings described under
23 Section 6000.

24 (c) Any respondent, subcontractor, or design professional who received timely
25 prior notice of the inspections and testing conducted under Section 6000 shall be
26 prohibited from engaging in additional inspection or testing, except if all of the
27 following specific conditions are met, upon motion to the court:

28 (1) There is an insurer for a subcontractor or design professional, that did not
29 have timely notice that legal proceedings were commenced under Section 6000 at
30 least 30 days prior to the commencement of inspections or testing pursuant to
31 paragraph (6) of subdivision (h) of Section 6000.

32 (2) The insurer’s insured did not participate in any inspections or testing
33 conducted under the provisions of paragraph (6) of subdivision (h) of Section
34 6000.

35 (3) The insurer has, after receiving notice of a complaint filed in superior court
36 under subdivision (a), retained separate counsel, who did not participate in the
37 Section 6000 dispute resolution process, to defend its insured as to the allegations
38 in the complaint.

39 (4) It is reasonably likely that the insured would suffer prejudice if additional
40 inspections or testing are not permitted.

41 (5) The information obtainable through the proposed additional inspections or
42 testing is not available through any reasonable alternative sources.

1 If the court permits additional inspections or testing upon finding that these
2 requirements are met, any additional inspections or testing shall be limited to the
3 extent reasonably necessary to avoid the likelihood of prejudice and shall be
4 coordinated among all similarly situated parties to ensure that they occur without
5 unnecessary duplication. For purposes of providing notice to an insurer prior to
6 inspections or testing under paragraph (6) of subdivision (h) of Section 6000, if
7 notice of the proceedings was not provided by the insurer's insured, notice may be
8 made via certified mail either by the subcontractor, design professional,
9 association, or respondent to the address specified in the Statement of Insurance
10 provided under paragraph (2) of subdivision (e) of Section 6000. Nothing herein
11 shall affect the rights of an intervenor who files a complaint in intervention. If the
12 association alleges defects that were not specified in the prefiling dispute
13 resolution process under Section 6000, the respondent, subcontractor, and design
14 professionals shall be permitted to engage in testing or inspection necessary to
15 respond to the additional claims. A party who seeks additional inspections or
16 testing based upon the amendment of claims shall apply to the court for leave to
17 conduct those inspections or that testing. If the court determines that it must
18 review the defect claims alleged by the association in the prefiling dispute
19 resolution process in order to determine whether the association alleges new or
20 additional defects, this review shall be conducted in camera. Upon objection of
21 any party, the court shall refer the matter to a judge other than the assigned trial
22 judge to determine if the claim has been amended in a way that requires additional
23 testing or inspection.

24 (d) Any subcontractor or design professional who had notice of the facilitated
25 dispute resolution conducted under Section 6000 but failed to attend, or attended
26 without settlement authority, shall be bound by the amount of any settlement
27 reached in the facilitated dispute resolution in any subsequent trial, although the
28 affected party may introduce evidence as to the allocation of the settlement. Any
29 party who failed to participate in the facilitated dispute resolution because the
30 party did not receive timely notice of the mediation shall be relieved of any
31 obligation to participate in the settlement. Notwithstanding any privilege
32 applicable to the prefiling dispute resolution process provided by Section 6000,
33 evidence may be introduced by any party to show whether a subcontractor or
34 design professional failed to attend or attended without settlement authority. The
35 binding effect of this subdivision shall in no way diminish or reduce a nonsettling
36 subcontractor or design professional's right to defend itself or assert all available
37 defenses relevant to its liability in any subsequent trial. For purposes of this
38 subdivision, a subcontractor or design professional shall not be deemed to have
39 attended without settlement authority because it asserted defenses to its potential
40 liability.

41 (e) Notice of the facilitated dispute resolution conducted under Section 6000
42 must be mailed by the respondent no later than 20 days prior to the date of the first
43 facilitated dispute resolution session to all parties. Notice shall also be mailed to

1 each of these parties' known insurance carriers. Mailing of this notice shall be by
2 certified mail. Any subsequent facilitated dispute resolution notices shall be served
3 by any means reasonably calculated to provide those parties actual notice.

4 (f) As to the complaint, the order of discovery shall, at the request of any
5 defendant, except upon a showing of good cause, permit the association's expert
6 witnesses to be deposed prior to any percipient party depositions. The depositions
7 shall, at the request of the association, be followed immediately by the defendant's
8 experts and then by the subcontractors' and design professionals' experts, except
9 on a showing of good cause. For purposes of this section, in determining what
10 constitutes "good cause," the court shall consider, among other things, the goal of
11 early disclosure of defects and whether the expert is prepared to render a final
12 opinion, except that the court may modify the scope of any expert's deposition to
13 address those concerns.

14 (g)(1) The only method of seeking judicial relief for the failure of the
15 association or the respondent to complete the dispute resolution process under
16 Section 6000 shall be the assertion, as provided for in this subdivision, of a
17 procedural deficiency to an action for damages by the association against the
18 respondent after that action has been filed. A verified application asserting a
19 procedural deficiency shall be filed with the court no later than 90 days after the
20 answer to the plaintiff's complaint has been served, unless the court finds that
21 extraordinary conditions exist.

22 (2) Upon the verified application of the association or the respondent alleging
23 substantial noncompliance with Section 6000, the court shall schedule a hearing
24 within 21 days of the application to determine whether the association or
25 respondent has substantially complied with this section. The issue may be
26 determined upon affidavits or upon oral testimony, in the discretion of the court.

27 (3)(A) If the court finds that the association or the respondent did not
28 substantially comply with this paragraph, the court shall stay the action for up to
29 90 days to allow the noncomplying party to establish substantial compliance. The
30 court shall set a hearing within 90 days to determine substantial compliance. At
31 any time, the court may, for good cause shown, extend the period of the stay upon
32 application of the noncomplying party.

33 (B) If, within the time set by the court pursuant to this paragraph, the association
34 or the respondent has not established that it has substantially complied with this
35 section, the court shall determine if, in the interest of justice, the action should be
36 dismissed without prejudice, or if another remedy should be fashioned. Under no
37 circumstances shall the court dismiss the action with prejudice as a result of the
38 association's failure to substantially comply with this section. In determining the
39 appropriate remedy, the court shall consider the extent to which the respondent has
40 complied with this section.

41 (h) This section is operative on July 1, 2002, but does not apply to any action or
42 proceeding pending on that date.

1 (i) This section shall become inoperative on July 1, 2010, and, as of January 1,
2 2011, is repealed, unless a later enacted statute that is enacted before January 1,
3 2011, deletes or extends the dates on which it becomes inoperative and is repealed.

4 **Comment.** Section 6050 continues former Section 1375.05 without change, except that cross-
5 references are updated to reflect the new location of the referenced provisions.

6 **§ 6100 (UNCHANGED). Notice of resolution**

7 6100. (a) As soon as is reasonably practicable after the association and the
8 builder have entered into a settlement agreement or the matter has otherwise been
9 resolved regarding alleged defects in the common areas, alleged defects in the
10 separate interests that the association is obligated to maintain or repair, or alleged
11 defects in the separate interests that arise out of, or are integrally related to, defects
12 in the common areas or separate interests that the association is obligated to
13 maintain or repair, where the defects giving rise to the dispute have not been
14 corrected, the association shall, in writing, inform only the members of the
15 association whose names appear on the records of the association that the matter
16 has been resolved, by settlement agreement or other means, and disclose all of the
17 following:

18 (1) A general description of the defects that the association reasonably believes,
19 as of the date of the disclosure, will be corrected or replaced.

20 (2) A good faith estimate, as of the date of the disclosure, of when the
21 association believes that the defects identified in paragraph (1) will be corrected or
22 replaced. The association may state that the estimate may be modified.

23 (3) The status of the claims for defects in the design or construction of the
24 common interest development that were not identified in paragraph (1) whether
25 expressed in a preliminary list of defects sent to each member of the association or
26 otherwise claimed and disclosed to the members of the association.

27 (b) Nothing in this section shall preclude an association from amending the
28 disclosures required pursuant to subdivision (a), and any amendments shall
29 supersede any prior conflicting information disclosed to the members of the
30 association and shall retain any privilege attached to the original disclosures.

31 (c) Disclosure of the information required pursuant to subdivision (a) or
32 authorized by subdivision (b) shall not waive any privilege attached to the
33 information.

34 (d) For the purposes of the disclosures required pursuant to this section, the term
35 “defects” shall be defined to include any damage resulting from defects.

36 **Comment.** Section 6100 continues former Section 1375.1 without change.

37 **§ 6150 (UNCHANGED). Notice of civil action**

38 6150. (a) Not later than 30 days prior to the filing of any civil action by the
39 association against the declarant or other developer of a common interest
40 development for alleged damage to the common areas, alleged damage to the
41 separate interests that the association is obligated to maintain or repair, or alleged

1 damage to the separate interests that arises out of, or is integrally related to,
2 damage to the common areas or separate interests that the association is obligated
3 to maintain or repair, the board shall provide a written notice to each member of
4 the association who appears on the records of the association when the notice is
5 provided. This notice shall specify all of the following:

6 (1) That a meeting will take place to discuss problems that may lead to the filing
7 of a civil action.

8 (2) The options, including civil actions, that are available to address the
9 problems.

10 (3) The time and place of this meeting.

11 (b) Notwithstanding subdivision (a), if the association has reason to believe that
12 the applicable statute of limitations will expire before the association files the civil
13 action, the association may give the notice, as described above, within 30 days
14 after the filing of the action.

15 **Comment.** Section 6150 continues former Section 1368.5 without change, except that the term
16 “board of directors of the association” has been replaced with the defined term “board.” See
17 Section 4085 (“board” defined).

18 **Uncodified (added). Operative date**

19 This act becomes operative on January 1, 2013.

DISPOSITION OF FORMER LAW

The table below shows the relationship between each provision of the existing Davis-Stirling Common Interest Development Act and the corresponding provision of the proposed law.

<i>Existing Provision</i>	<i>Proposed Provision(s)</i>	<i>Existing Provision</i>	<i>Proposed Provision(s)</i>
1350.....	4000	1357.140.....	4365
1350.5.....	4005	1357.150.....	4370
1350.7.....	omitted, but see 4040, 4045, 4050	1358(a).....	4625
1351 (intro.).....	4075	1358(b).....	4630
1351(a).....	4080	1358(c).....	4635
1351(b).....	4095	1358(d).....	4640
1351(c).....	4100	1358 (last ¶).....	4650
1351(d).....	4105	1358 (next to last ¶).....	4645
1351(e)(1)-(2).....	4120	1359.....	4610
1351(e)(3) (except last ¶).....	4290	1360.....	4760
1351(e)(3) (last ¶).....	4295	1360.5.....	4715
1351(f).....	4125	1361.....	4505
1351(g).....	4130	1361.5.....	4510
1351(h).....	4135	1362.....	4500
1351(i).....	4145	1363(a).....	4800
1351(j).....	4150	1363(b).....	omitted
1351(k).....	4175	1363(c).....	4805
1351(l).....	4185	1363(d).....	5000(a)
1351(m).....	4190	1363(e).....	5000(b)
1352.....	4030(a)	1363(f) (1st sent.).....	5240(b)
1352.5.....	4225(a)-(b), (d)	1363(f) (2d sent.).....	omitted
1353(a)(1) (1st & 2d sent.).....	4250(a)	1363(g) (1st sent.).....	5850
1353(a)(1)-(4) (except 1st & 2d sent.).....	4255	1363(g) (2d sent.).....	omitted
1353(b).....	4250(b)	1363(h).....	5855
1353.5.....	4705	1363(i).....	4820
1353.6.....	4710	1363(j).....	5865
1353.7.....	4720	1363.001.....	5400
1353.8.....	4755	1363.005.....	omitted
1354.....	5975	1363.03(a).....	5105(a)
1355(a).....	4270(a)	1363.03(b) (1st sent.).....	5100(a)
1355(b) (1st sent.).....	4260	1363.03(b) (2d & 3d sents.).....	5115(b)
1355(b)(1).....	5115(e)	1363.03(b) (4th sent.).....	5115(c)
1355(b)(2).....	4270(b)	1363.03(c).....	5110
1355(b)(3).....	4270(a)(3)	1363.03(d).....	5130
1355.5.....	4230	1363.03(e).....	5115(a)
1356.....	4275	1363.03(f).....	5120(a)
1357(a).....	4265(a)	1363.03(g).....	5120(b)
1357(b) (except part of 1st sent.).....	omitted	1363.03(h).....	5125(a)
1357(b) (part of 1st sent.).....	4265(b)	1363.03(i).....	5125(b)
1357(c).....	omitted	1363.03(j).....	5105(b)
1357(d).....	4265(c)	1363.03(k).....	5115(d)
1357.100(a).....	4165	1363.03(l).....	5100(c)
1357.100(b).....	4180	1363.03(m).....	5100(d)
1357.110.....	4350	1363.03(n).....	5100(e)
1357.120.....	4355	1363.03(o).....	omitted
1357.130.....	4360	1363.04.....	5135

<i>Existing Provision</i>	<i>Proposed Provision(s)</i>	<i>Existing Provision</i>	<i>Proposed Provision(s)</i>
1363.05(a).....	4900	1365.2(a)(2) (except last cl.)	5200(b)
1363.05(b) (1st part of 1st sent.)	4925(a)	1365.2(a)(2) (last cl.)	5205(g) (2d sent.)
1363.05(b) (2d part of 1st sent.)	4935(a)	1365.2(b)	5205(a)-(b)
1363.05(b) (2d sent.)	4935(b)	1365.2(c)(1)-(4)	5205(c)-(f)
1363.05(c)	4935(e)	1365.2(c)(5).....	5205(g) (1st & 3d sents.)
1363.05(d).....	4950(a)	1365.2(d)	5215
1363.05(e)	4950(b)	1365.2(e)	5230
1363.05(f)	4920(a)	1365.2(f)	5235
1363.05(g).....	4923	1365.2(g)	5240(c)
1363.05(h).....	4925(b)	1365.2(h)	5205(h)
1363.05(i).....	4930	1365.2(i)-(j)	5210(a)-(b)
1363.05(j).....	4090	1365.2(k)	5210(c)
1363.07 (except (a)(3)(f))	4600	1365.2(l)	5240(a)
1363.07(a)(3)(F).....	4025(a)(4)	1365.2(m)	5240(d)
1363.09 (re elections).....	5145	1365.2(n)	omitted
1363.09(a)-(b) (re exclusive use grant).....	4605	1365.2.5	5570
1363.09(a)-(b) (re open meetings)	4955	1365.2.5(b)(3)	5300(e)
1363.1(a).....	5375	1365.3	5580
1363.1(b).....	4155(a), (b)(1)-(2)	1365.5(a)	5500
1363.2(a)-(e).....	5380(a)-(e)	1365.5(b)	5510(a)
1363.2(f)	4155	1365.5(c)(1).....	5510(b)
1363.2(g).....	5380(f)	1365.5(c)(2).....	5515
1363.5.....	4280	1365.5(d)	5520
1363.6.....	5405	1365.5(e) (1)-(4), (5) (1st sent.)	5550
1363.810	5900(a)-(b)	1365.5(e)(5) (except 1st sent.)	5560
1363.820	5905	1365.5(f).....	4177
1363.830	5910	1365.5(g)	4178
1363.840	5915	1365.5(h)	omitted
1363.850	5920	1365.6	5350(a)
1364(a)	4775(a)	1365.7	5800
1364(b).....	4780	1365.9	5805
1364(c)	4775(b)	1366(a) (1st sent.)	5600(a)
1364(d)-(e).....	4785	1366(a) (2d sent.)	5605(a)
1364(f).....	4790	1366(a) (3d sent.)	5605(c)
1365(a)(1)	5300(b)(1)	1366(b) (1st sent.)	5605(b)
1365(a)(2) (intro. cl.)	5300(b)(2)	1366(b) (2d sent.).....	5605(c)
1365(a)(2)(A)-(D)	5565	1366(b) (3d & 4th sent.)	5610 (intro.)
1365(a)(3)(A)	5300(b)(4)	1366(b)(1)-(3)	5610(a)-(c)
1365(a)(3)(B).....	5300(b)(5)	1366(c).....	5620
1365(a)(3)(C).....	5300(b)(6)	1366(d)	5615
1365(a)(3)(D)	5300(b)(8)	1366(e).....	5650(b)
1365(a)(4) (1st ¶).....	5300(b)(7)	1366(f).....	5650(c)
1365(a)(4) (2d ¶)	5300(d)	1366.1	5600(b)
1365(a)(4) (3d ¶)	5300(a)	1366.2(a)	4205
1365(b).....	5300(b)(3)	1366.2(b)	omitted
1365(c)	5305(a)	1366.4	5625
1365(d).....	5320	1367	omitted, but see 5740
1365(e)	5310(a)(7)	1367.1(a) (1st sent.)	5650(a)
1365(f)(1).....	5300(b)(9) (1st & 2d sent.)	1367.1(a) (2d sent.).....	5660 (intro.)
1365(f)(2).....	5810	1367.1(a)(1)-(6)	5660(a)-(f)
1365(f)(3).....	5300(b)(8) (3d sent.)	1367.1(b)	5655
1365(f)(4).....	5300(b)(8) (4th sent. & 2d ¶)	1367.1(c)(1)(A).....	5670
1365.1.....	5730	1367.1(c)(1)(B)	omitted, but see 5705(b)
1365.2(a)(1) (except (I)(ii)-(iii))	5200(a)	1367.1(c)(2).....	5673
1365.2(a)(1)(I)(ii)	5225	1367.1(c)(3).....	5665
1365.2(a)(1)(I)(iii).....	5220	1367.1(d) (1st - 5th sent.)	5675(a)-(e)

<i>Existing Provision</i>	<i>Proposed Provision(s)</i>	<i>Existing Provision</i>	<i>Proposed Provision(s)</i>
1367.1(d) (6th sent.)	5685(a)	1368(c)(3)	4110
1367.1(d) (7th & 8th sent.)	5725(a)	1368(d)	4540
1367.1(e)	5725(b)	1368(e)	4545
1367.1(f)	5680	1368(f)	4535
1367.1(g) (1st sent.)	5735	1368(g)	omitted
1367.1(g) (2d sent.)	5700(a)	1368.1	4730
1367.1(g) (3d sent.)	5710(a)	1368.3	4810
1367.1(g) (4th sent.)	5710(c) (intro.)	1368.4	4815
1367.1(g)(1)-(2)	5710(c)(1)-(2)	1368.5	6150
1367.1(h)	5700(b)	1369	4615
1367.1(i)	5685(b)	1369.510	5925
1367.1(j)	5710(b)	1369.520	5930
1367.1(k)	5675(f)	1369.530	5935
1367.1(l)	5675(g)	1369.540	5940
1367.1(m)	omitted, but see 5740	1369.550	5945
1367.1(n)	omitted	1369.560	5950
1367.4(a)	5705(a), 5715(a), 5720(a)	1369.570	5955
1367.4(b)	5720(b)	1369.580	5960
1367.4(c) (intro.)	omitted, but see 5705, 5715	1369.590	5965
1367.4(c)(1)	5705(b)	1370	4215
1367.4(c)(2)	5705(c)	1371	4220
1367.4(c)(3)	5705(d)	1372	4020
1367.4(c)(4)	5715(b)	1373	4025
1367.4(d)	5720(c)(2)-(3)	1374	4015
1367.5	5685(c)	1375	6000
1367.6	5658	1375.05	6050
1368(a)	4525(a)-(h)	1375.1	6100
1368(b)	4530	1376	4725
1368(c)(1)	4575	1378	4765
1368(c)(2)	4580		