Study H-855 August 5, 2010

Memorandum 2010-29

Statutory Clarification and Simplification of CID Law: Comments on Preliminary Provisions

In March 2010, the Commission circulated a tentative recommendation on the *Statutory Clarification and Simplification of CID Law* (Feb. 2010). The purpose of the proposed law is to recodify the Davis-Stirling Common Interest Development Act (the "Davis-Stirling Act"), in order to improve the Act's organization, make it easier to understand and use, and implement noncontroversial substantive improvements. For the existing Davis-Stirling Act, see Civil Code Sections 1350-1378.

The Commission received extensive public comment on the proposed law. That comment is collected as an Exhibit to Memorandum 2010-36.

This memorandum begins the analysis of the comments received by the Commission. It discusses comments on general drafting issues and the proposed "preliminary provisions" (proposed Sections 4000-4070).

PROCEDURAL HISTORY

The Commission first began work on the proposed recodification of the Davis-Stirling Act in 2005. A draft of the proposed law was developed over the course of two years, with considerable input from interested persons and groups. A recommendation was approved in December 2007 and a bill to implement the Commission's recommendation was introduced in 2008. See AB 1921 (Saldaña) (2008).

Once the bill was introduced, a number of groups raised concerns about the proposed law that had not been raised during the Commission's process. A significant amount of staff time was involved in analyzing the concerns and developing amendment language to address them. Eventually, every concern

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The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

that was specifically identified was resolved through revision of a Commission Comment or amendment of the bill.

Unfortunately, when that process was completed, there was very little time remaining in the legislative year. That time pressure was compounded by the fact that the bill was "double-referred" in the Senate, meaning that it would need to be heard and approved by two different policy committees (the Committee on Judiciary and the Committee on Transportation and Housing).

Shortly after the bill arrived in the Senate, a group of attorneys who specialize in CID law submitted a lengthy letter of opposition, raising numerous concerns. That opposition, arriving when it did, made it impracticable for the bill to proceed in the limited time remaining in the legislative year. For that reason, the bill was withdrawn by its author.

After considering the attorney group's letter, the Commission decided to prepare a revised version of the proposed law that would address the main concerns raised by the attorney group. The revised draft would then be circulated for a new round of public review and comment. In particular, the Commission took steps to ensure that the revised draft would be reviewed by a working group of the Real Property Law Section of the State Bar ("RPLS Working Group").

In preparing the revised draft of the proposed law, the Commission took a conservative approach. Existing statutory language was preserved, except as necessary to implement an organizational change, resolve a plain problem with the existing language, or make an uncontroversial substantive improvement. Every deviation from existing language was identified in the Comments and Notes following each section of the proposed law. It is expected that this conservative drafting approach will make the bill easier for interested groups and individuals to analyze, thereby reducing the likelihood of opposition in the legislative process.

The Commission hopes to complete work on the revised draft by the end of this year, to enable introduction of implementing legislation in 2011. This timing is important, as 2011 is the first year of the two-year legislative session. Introduction in the first year of the session allows for up to two-years in the legislative process, if needed.

GENERAL REACTION

Most of the comments that we received offer specific suggestions for improvement to the proposed law, rather than expressing any general view on the advantages or disadvantages of recodifying the Davis-Stirling Act. This is not surprising, as many of our commenters have been providing input on this study for a number of years and have already expressed opinions on the overall merit of recodifying the Davis-Stirling Act.

Those who did comment on the general merits of the proposed law were supportive:

- George B. Porter, current president of the Sun City Roseville Community Association, believes that the proposed law will "make it easier for homeowner boards to understand and apply the law to their governing efforts." See Memorandum 2010-36, Exhibit p. 42. He thanks the Commission for its efforts and indicates that Sun City Roseville intends to support enactment of the proposed law. *Id*.
- Oliver Burford, Executive Director of the Executive Council of Homeowners, applauds the Commission's work on this study and "welcomes the organizational shift proposed by the CLRC" and "hope[s] the end result will be more approachable for those living or working with common interest developments and their associations." See Memorandum 2010-36, Exhibit p. 81.
- Ravi Kapoor, a CID homeowner in Paramount, congratulates the Commission on its efforts to improve CID law. See Memorandum 2010-36, Exhibit p. 85.

ORGANIZATION OF THE PROPOSED LAW

The RPLS Working Group commented on two aspects of the overall organization of the proposed law. Those comments are discussed below.

Location of Proposed Law

The RPLS Working Group supports the Commission's proposal to move the Davis-Stirling Act to a new location in the Civil Code, allowing greater room for future development of the law. See Exhibit to Memorandum 2010-36, pp. 92 n.2, 94.

Proposed New Chapter

The RPLS Working Group proposes adding a new chapter to the proposed law, to collect the provisions relating to the formation of a CID. The new chapter

would follow "Chapter 1. General Provisions." The group explains its proposal as follows:

> In their collective practical experience, the Authors have encountered many instances in which a real estate developer, or individuals who are in a leadership position in a community that is subject to recorded covenants (primarily board members or property managers) are uncertain as to whether or not their development has the elements that classify their subdivision as a "common interest development," that is subject to all of the regulations, reporting and record-keeping requirements of the Act.[3] It is often only the most experienced and seasoned attorneys who are in a position to know where to look in the current Act in order to determine whether the structure of a development and its governing documents include the requisite elements of a CID. Providing a reasoned opinion on that issue typically involves review and analysis of not only the Act, but also numerous recorded and unrecorded documents (such as declarations of CC&Rs, easements, Department of Real Estate Public Reports, and deeds), with the result being that resolving the issue can be expensive. Significant legal rights and responsibilities of property owners rest upon a proper and informed resolution of that basic question.
>
> Proposed Section 4030 ("Creation of common interest developments") presents the essential definition and indicia of what forms of real estate development will constitute a "common interest development," yet that proposed section receives no particular emphasis or prominence in the current structure of the CLRC Proposed Act. Instead, proposed Section 4030 is simply another statute in the CLRC Proposed Act's series of General Provisions. The relative obscurity that is accorded to this foundational issue in the CLRC Proposed Act's organizational scheme (proposed Section 4030 is positioned in the proposal following a long section (Section 4025) that addresses nonresidential developments and enumerates the sections of the CLRC Proposed Act that do *not* apply to such developments) is very questionable. Before even defining the universe of subdivided lands that are classified as common interest developments in California, an assumed subset of that universe is being *exempted* from many of the regulations of the CLRC Proposed Act. Further comments on that exemption are presented below).
>
> Section 4015 ("Application of part") is another provision of the CLRC Proposed Act that the Authors would recommend for inclusion in a proposed introductory Chapter on the formation of CIDs because this section offers the threshold analysis that often must be made in determining whether a particular development should (or is intended to) be classified as a CID. Under the present organization of the CLRC Proposed Act, Section 4015 is positioned near the top of the proposal's introductory provisions. However,

> from a practitioner's perspective, Section 4015's placement is not of tremendous assistance because, analytically, proposed Section 4030 is the more important of the two companion sections and yet the sections are not aligned, one-to-the-other in the orderly progression of sections. Also, Section 4015 is misnamed. While purporting to be the seminal provision of the CLRC Proposed Act that will instruct readers as to which forms of real estate development are subject to the Act, the section in fact only identifies certain developments to which the Act does *not* apply. In summary, proposed Section 4015 is important but must […] be read in conjunction with Section 4030, which in our view is primary.
>
> [3] For example, there are many developments, particularly in rural areas of the State, that are subject to CC&Rs that provide for a voluntary association of property owners while operating pursuant to a plan of development that includes fee simple title in that association of rather significant common facilities (generally, available only to owners who, *of their own volition, elect* to become members, with a corresponding right to resign that membership at any time). There also are many developments that have CC&Rs that present ordinary use restrictions, that have no recreational or open space common facilities and provide only for a road maintenance association (incorporated or unincorporated).

See Exhibit to Memorandum 2010-36, pp. 94-95 (emphasis and note in original).

In general, the staff believes that the addition of the proposed new chapter would be an improvement. However, the staff would not limit the content of the chapter to issues involving "formation" of a CID. The issue at the center of the RPLS Working Group's concern appears to be the scope of application of the Davis-Stirling Act, rather than the method by which a new CID is formed. For that reason, the staff believes that the proposed new chapter should be entitled "Application of Act," and it should also include proposed Section 4025, which sets out important exemptions for nonresidential developments.

With those changes, the staff would recommend adding the new chapter.

Doing so would involve moving proposed Sections 4015, 4025, and 4030 into a new Chapter 2 as follows:

CHAPTER 2. APPLICATION OF ACT

§ 4250 (REVISED). Application of Act

4250. (a) This part applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided all of the following are recorded:

(1) A declaration.

(2) A condominium plan, if any exists.

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

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

Comment. Subdivision (a) of Section 4250 continues former Section 1352 without change, except that the term "title" is replaced with "part."

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

See also Sections 4095 ("common area"), 4100 ("common interest development"), 4120 ("condominium plan"), 4135 ("declaration"), 4185 ("separate interest"), 4190 ("stock cooperative").

§ 4260 (UNCHANGED). Exemption of development without common area

4260. Nothing in this part may be construed to apply to a development wherein there does not exist a common area as defined in Section 4095. This section is declaratory of existing law.

Comment. Section 4260 continues former Section 1374 without change, with the following exceptions:

(1) The term "title" is replaced with "part."

(2) A cross-reference is updated to reflect the new location of the referenced provision.

§ 4265 (REVISED). Nonresidential developments

4265. (a) The following provisions do not apply to a common interest development that is limited to industrial or commercial uses by zoning or by a declaration of covenants, conditions, and restrictions that has been recorded in the official records of each county in which the common interest development is located:

(1) Section 4275.

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

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

(4) Section 4600.

(5) Section 4765.

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

(7) Sections 5500 through 5560, inclusive.

(8) Subdivision (b) of Section 5600.

(9) Subdivision (b) of Section 5605.

(b) The Legislature finds that the provisions listed in subdivision (a) are appropriate to protect purchasers in residential common interest developments, however, the provisions may not be necessary to protect purchasers in commercial or industrial

developments since the application of those provisions could result in unnecessary burdens and costs for these types of developments.

Comment. Section 4265 continues former Section 1373 without change, with the following exceptions:

(1) Former Section 1373(a)(3) is superfluous and is not continued.
(2) Cross-references are updated to reflect the new location of the referenced provisions.
(3) Subdivision (a)(4) is added to continue the substance of former Section 1363.07(a)(3)(F).
(4) Subdivision (a)(9) refers only to Section 5605(b). It does not refer to the emergency exception provisions of Section 5610, which were also part of former Section 1366(b).

See also Sections 4100 ("common interest development"), 4135 ("declaration").

This organizational change would also require some conforming changes to chapter and section numbers that would follow the proposed new chapter. **Should the proposed chapter be added?**

GENERAL DRAFTING ISSUES

A number of the comments raise general drafting issues that are not limited to specific provisions of the proposed law. Those comments are discussed below.

Avoiding a "Lawyer's Document"

The RPLS Working Group raises an important point about the unusual character of the Davis-Stirling Act:

> The Act is perhaps unique among California's statutes in both its prominence and impact on the everyday lives of California residents who must consult the Act's provisions and requirements on a regular basis to determine their rights and obligations as owners of property in common interest communities. Certainly many other laws are designed to protect the rights of ordinary individuals (debt collection laws, tax laws, consumer protection laws, and the Vehicle Code for example), but very few of those laws are consulted regularly by non-lawyers in a way that is similar to the Act's regular audience. That very unique utilization of the Act by persons who are not lawyers presents a special challenge to the CLRC, whose Staff must constantly bear in mind that this effort at better organization and clarity of the Act must be viewed as such not only by lawyers, but also by a broad audience comprised of property owners, managers, accountants, title officers, real estate agents, and real estate developers.

See Memorandum 2010-36, Exhibit p. 96.

The staff thoroughly agrees with the RPLS Working Group on the importance of making the proposed law as understandable and easy to use as possible. To the extent that this can be done without introducing legal ambiguity or violating California statutory drafting practices, it should be done.

The RPLS Working Group makes a number of suggestions on how to make the proposed law more accessible to non-lawyers. Those suggestions, and the feasibility of implementing them, are discussed below.

Add Definitions

The RPLS Working Group suggests that the proposed law include more definitions, to direct readers to commonly used concepts in the Act.

For example, every association is required by law to provide an informal dispute resolution program, to be available for use in a dispute between the association and a member. See proposed Sections 5900-5920. If an association does not craft a procedure of its own, a statutory "meet and confer" procedure is available as a default. The RPLS Working Group suggests adding a definition of "meet and confer" that would refer a reader to the provisions governing the procedure. See Memorandum 2010-36, Exhibit p. 97.

This could simplify research and help to create an established term of art within the CID community, making it easier for homeowners to understand their rights and obligations.

In general, the suggestion to add definitions to make the Davis-Stirling Act more approachable seems reasonable. However, each specific suggestion will need to be evaluated on its own merits. Those evaluations will be included in a future memorandum, in connection with discussion of other comments relating to definitions.

Avoid Referring to "Article" or "Chapter"

The RPLS Working Group believes that cross-references to specific articles or chapters of the Davis-Stirling Act are too "esoteric" for easy understanding by the general public. Instead, they suggest that these references be replaced with a reference to the range of sections included within the referenced article or chapter. So, for example, a reference to "Article 2 (commencing with Section 5900) of Chapter 8" would be replaced with a reference to "Sections 5900 through 5920." See Memorandum 2010-36, Exhibit p. 98.

The staff is not sure that the benefits of the suggested change would outweigh the potential problems that might result. The value of a statutory reference to an article or chapter is that it refers to *all* of the provisions included in the article or chapter, even if a future amendment changes the content of the article or chapter.

By contrast, a statutory reference to a specified range of sections can more easily become defective as a result of a future amendment. Civil Code Section 1633.3 provides a concrete example of this problem. It includes a reference to "Sections 1350 to 1376, inclusive." At the time that the reference was added to the law, it described the entirety of the Davis-Stirling Act. However, a later amendment added a new section to the end of the Davis-Stirling Act (Section 1378). Consequently, Section 1633.3 no longer refers to the entire Davis-Stirling Act as intended. It will need to be amended to correct that problem. The same sort of problem can arise if a reference to an article or chapters is replaced with a reference to a fixed range of sections.

Furthermore, the staff is not convinced that a reference to an article or chapter is too esoteric for easy understanding. The standard reference to an article or chapter includes a parenthetical indicating the section with which the article or chapter commences, making it fairly easy to locate the referenced provisions.

Avoid Referring to "Part"

For similar reasons, the RPLS Working Group suggests that the proposed law should not refer to the Davis-Stirling Act as "this part." Although such a reference is technically correct, it could be confusing to non-lawyers who must understand the Act. See Memorandum 2010-36, Exhibit p. 99.

Instead, the group proposes adding language to proposed Section 4000 to expressly authorize reference to the proposed law as "the Act." That short name could then be used throughout the proposed law in place of references to "this part." *Id.*

The staff does not see any problems that would result from making the proposed change, and it might well make the proposed law easier for non-lawyers to use. **As a general matter, it seems like a good idea and the staff recommends that it be implemented, thus:**

> **§ 4000 (REVISED). Short title**
>
> 4000. This part shall be known and may be cited as the Davis-Stirling Common Interest Development Act. In a provision of this part, the Davis-Stirling Common Interest Development Act may be cited as the Act.

> **Comment**. The first sentence of Section 4000 continues former Section 1350 without change. The second sentence is added for drafting convenience.

Should the change described above be made?

Add Descriptive Terms to Cross-References

To aid in understanding, the RPLS Working Group suggests that statutory cross-references should include some textual description of the referenced material:

> For example, instead of simply stating that something has to be done "in accordance with Section 5300," the opportunity is presented in that context to more helpfully say "in accordance with the budget preparation and distribution requirements in Section 5300."

See Memorandum 2010-36, Exhibit p. 97.

The appeal of that suggestion is obvious, and some existing provisions of law do follow that approach. Nonetheless, the staff is concerned that adding a textual gloss could introduce new ambiguity into the law, resulting in misunderstanding or disputes. The specific example offered by the RPLS Working Group illustrates the problem. Proposed Section 5300 governs preparation and distribution of the "annual budget report," which must include a "pro forma operating budget" (subdivision (a)(1)). However the "annual budget report" must also include information that arguably is not the "budget." See, e.g., proposed Section 5300(a)(3) (summary of reserve funding plan), (a)(4) (statement of deferred maintenance decisions), (a)(8) (list of outstanding loans), (a)(9) (summary of insurance coverage).

Therefore, one could read a reference to "the budget preparation and distribution requirement" as limiting language, that is intended to exclude the *non-budget* requirements of Section 5300 (e.g., the insurance disclosure).

Crafting descriptive glosses with such precision as to avoid any unintended limitation or interpretive inference would be very difficult, and would be at odds with the Commission's general policy of avoiding changes to existing language except as clearly required to resolve a clear defect in the existing language. That policy was adopted in large part as a response to attorney group criticism of the former iteration of the proposed law. The group suggested that unnecessary changes in language would create too great a scope of unintended changes in meaning or misunderstanding.

While the staff sees merit in the general premise of RPLS Working Group proposal, it would be very difficult to implement and could result in unintended problems of the type that the Commission is consciously trying to avoid. **The staff recommends against implementing the proposal.**

Add Numerical Parentheticals

The proposed law uses parenthetical cross-references after certain terms specifying a general procedure. For example, when requiring distribution of a notice using the procedure for "individual delivery," the proposed law includes a reference to the section setting out that procedure, thus: "the notice shall be sent by individual delivery (Section 4040)."

The RPLS Working Group favors that practice and suggests that it be expanded. They favor using parentheticals of that type after the use of a defined term:

> Such parenthetical shorthand references direct the reader back to a core definition or term that contains added requirements, if needed. Adding these short, crisp references to more contexts in the Act where defined terms are employed would aid interested stakeholders in familiarizing themselves more quickly with the reorganized format of the CLRC Proposed Act. It is the Authors' anticipation that those improvements would, in turn, help to diffuse resistance among stakeholder groups to ambitious changes in current law that are reflected in the CLRC Proposed Act. A significant, yet necessary, casualty of the reorganization of Davis-Stirling that is at the heart of the CLRC Proposal is the loss of abbreviations and short-hand references that all common interest stakeholders have come accustomed to using on a routine basis, such as "1356 petitions," "1366 limits on assessments," and "1368 disclosures". More numerical parentheticals could more quickly help restore that ease of reference as persons utilizing the revised Act familiarize themselves with the new sequencing and organization of Davis-Stirling Code sections in the CLRC Proposed Act.

See Exhibit to Memorandum 2010-36, pp. 97-98.

However, the use of parentheticals discussed above is contrary to general statutory drafting practice in California. When the Legislative Counsel's office reviewed the proposed law, the reviewing attorneys were uniform in objecting to the use of parenthetical cross-references. Commissioner and Legislative Counsel Diane Boyer-Vine confirmed that use of the parentheticals would be problematic. A possible alternative would be to replace the parentheticals with textual clauses,

thus: "the notice shall be sent by individual delivery, pursuant to Section 4040." That would achieve the same purpose without violating standard drafting practice. **As a preliminary matter, the staff recommends that the parentheticals in the proposed law be replaced as suggested immediately above.**

The Commission then needs to decide how to address the RPLS Working Group's suggestion that cross-references be added whenever using a defined term, thus:

> 4060. In any notice, ballot, report, or other writing that the association, as defined in Section 4080, is required to prepare and deliver to a member, as defined in Section 4160, pursuant to this part, the text shall be printed in a 12 point font or larger.

That relatively short section suggests the problem with that approach. In a section that uses many defined terms, the cross-references could be a real impediment to readability.

What's more, it isn't clear that cross-references to definitions add enough value to justify the resulting wordiness. Once a reader realizes that there is a "dictionary" of defined terms at the beginning of the proposed law, it would not be too difficult to refer back to the definitions to determine the meaning of any terms used in a provision. That process would be facilitated by the Commission's Comments, which include cross-references for all defined terms used in a section.

On balance, the staff is inclined against adding cross-references to definitions.

Accounting Issues

Prior to distribution of the tentative recommendation, the Commission received a number of comments describing perceived deficiencies in the accounting provisions of the Davis-Stirling Act. Some of the comments involved substantive issues, but many noted terminological problems. In response, the Commission has indicated that it intends to conduct a comprehensive review of the accounting provisions of the Davis-Stirling Act, as a separate study.

Kazuko K. Artus is concerned that the tentative recommendation does not expressly affirm that intention:

> I find it also troubling that the introductory note does not reiterate that the Commission should conduct a separate general review of the accounting terminology used in the Davis-Stirling Act (*see* First Supplement to Memorandum 2009-33, p. 7) or that it intends to comprehensively review the financial and accounting

> provisions (*see* Memorandum 2009-53, p. 57). The statutory clarification and simplification of CID law would be incomplete until and unless the provisions relating to CID associations' financial management are properly restated.

See Memorandum 2010-36, Exhibit p. 49.

While the staff has no objection to reaffirming the Commission's previously stated intention to conduct a review of the financial and accounting provisions of the Davis-Stirling Act, it would not be prudent to commit to any particular timetable for such a review. There is always a possibility that other priorities will intercede (e.g., the Legislature might assign higher priority work to the Commission).

In fact, it might be helpful to revise the narrative "preliminary part" of the recommendation, to note that the Commission intends to review the financial and accounting provisions in a future study. Such a statement might forestall objections that the proposed law does too little to address such problems. **Should such a statement be added (without specifying any timetable for completion of the study)?**

Enforcement Issues

Kazuko Artus urges the Commission to study issues relating to the enforcement of the Davis-Stirling Act. As she indicates, such a topic would fall outside the scope of the present study. See Memorandum 2010-36, Exhibit p. 49.

The Commission should consider this suggestion when it next sets its priorities for future work.

PRELIMINARY PROVISIONS

The Commission received a number of comments specific to the sections of the proposed law that are grouped under Article 1 ("Preliminary Provisions") of Chapter 1 ("General Provisions"). Those sections state rules of application, general rules of construction, and notice and member approval rules that would be common to the entire Davis-Stirling Act.

As noted above, the staff recommends that three provisions relating to the application of the Davis-Stirling Act be moved to a new chapter.

Other issues relating to preliminary provisions are discussed below.

Proposed § 4000. Short Title

Proposed Section 4000 would continue the existing short title of the Act ("Davis-Stirling Common Interest Development Act"). See Civ. Code § 1350.

Kazuko Artus suggests that the current short title is not user-friendly and should be replaced with something shorter and less confusing. See Memorandum 2010-36, Exhibit p. 50. The Commission has received similar suggestions before.

One possibility would be to change the name of the Act to the "Common Interest Development Act." That would certainly be shorter, but it would achieve that concision by deleting the honorific reference to the Act's original authors, former Governor Gray Davis and Judge Larry Stirling (Ret.).

It also seems likely that those who already know of the Act, know it by its current name. For example, one CID law firm (with which Judge Stirling is associated) operates a website at <www.davis-stirling.com>. Furthermore, a Google search for the term "Davis-Stirling Act" produced over 200,000 results. To the extent that knowledge of the current name is widespread, changing the name could be disruptive.

For those reasons, the staff has generally been unenthusiastic about changing the short title of the Act.

One possible alternative would be to provide for alternative short titles, thus:

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

That would preserve the existing name while also authorizing a shorter version for use by those who prefer it.

The staff is unsure whether authorizing an alternative name would cause new problems. **We invite public comment on that point.**

Proposed § 4005. Effect of headings

Proposed Section 4005 continues existing Section 1350.5, which states a general rule of construction — that headings do not affect meaning.

The RPLS Working Group makes two minor suggestions for improvement of the provision:

(1) If the Commission agrees to add "Act" as an acceptable shorthand for the entirety of the proposed law, then the term "Act" should be

added to the list of heading types in proposed Section 4005. See Memorandum 2010-36, Exhibit p. 100.

The staff recommends against making that change. Even if "Act" is authorized as a short name for the proposed law, "Act" would not be a heading. Section 4005 only addresses the effect of headings.

(2) Remove "division" and "title" from the heading types listed in Section 4005. Neither heading type is used in the proposed law, so it is not necessary to include them in the list. *Id*.

It might be appropriate to delete "division" from the list, as divisions are organizationally superior to "parts" in the Civil Code and so could never be used as an organizational subdivision of the proposed law. However, "titles" are organizationally inferior to "parts" in the Civil Code, and so could be added to the recodified Davis-Stirling Act through some future enactment. If that were to occur, the reference to "title" in Section 4005 would be useful. **For that reason, the staff recommends against deleting "title" from the provision. Should "division" be deleted as unnecessary?**

Proposed § 4010. Continuation of prior law

Proposed Section 4010(a) is a standard rule of construction, governing the continuation of former provisions that have been restated without substantive change. It provides:

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

Subdivision (b) of the section extends the last element of that provision to include references to a former provision in an association's governing documents:

> A reference in the governing documents, to a former provision that is restated and continued in this part, is deemed to include a reference to the provision of this part that restates and continues the former provision.

That provision should eliminate the need for associations to revise their governing documents to correct cross-references to the "former" provisions of the Davis-Stirling Act. (It would still be a good practice to revise those references, but proposed Section 4010(b) would make doing so optional.)

The RPLS Working Group has a number of concerns about Section 4010. See Exhibit to Memorandum 2010-36, pp. 100-01. The staff does not fully understand all of those concerns, and invites the Working Group to clarify them if necessary. The staff will do its best to restate and address the concerns below.

(1) It will often be unclear whether a provision of the proposed law is "substantially the same" as a former provision, especially as provisions change over time. This introduces ambiguity.

That is true, but unavoidable if the provision is to have a significant beneficial effect. The staff sees no way to eliminate all ambiguity in a provision of this type.

However, the proposed law also includes detailed Commission Comments, explaining exactly how the proposed new provisions would continue existing law, and where the new law and the old diverge. Those Comments would be accepted by the courts as evidence of legislative intent. That body of commentary should resolve most disputes about the effect of Section 4010.

(2) The provision should be revised to include a statement regarding the effect of a statutory reference in a court decision.

The following change might accomplish what the RPLS Working Group is suggesting.

> A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment, and a reference in a statute or court decision to the provision of this part shall be deemed to include a reference to the previously existing provision unless a contrary intent appears.

If the provision is retained, that change would appear to be an improvement.

(3) The provision includes an exception for circumstances where "a contrary intent appears." It would be better not to rely on "appearances." Instead, the exception should be for circumstances where "a contrary intent is expressed in the statute."

The exception for instances where a "contrary intent appears" is standard language used in many provisions of this type. See, e.g., Fam. Code § 2; Gov't Code § 9604. The language provides a court with room to exercise judgment about whether the application of the general rule makes sense in a particular situation.

The staff does not believe it would be practical to limit the exception to circumstances where a statute expressly declares itself to be an exception to the

general rule. Such an approach would almost certainly break down over time, creating broad scope for errors and unintended effects.

> *(4) The rule provided in subdivision (b), declaring that a reference to a former provision in the governing documents includes a reference to the provision that restates and continues the former provision will lead to confusion, due to the complexity of the proposed reorganization.*

The RPLS Working Group seems to be concerned about how to construe a reference to a former section, when the components of that section have been split or blended into more than one new provision. They believe that the "tracing" required will be burdensome for nonlawyers.

Part of the answer to that objection can be found in the detailed disposition table provided at the end of the tentative recommendation. That table will also be included in any final recommendation. It shows exactly how to trace former provisions to the new provisions that replace them.

The other part of the answer is to recognize Section 4010(b) for what it is — a savings clause. It would relieve associations of the legal *necessity* to amend their governing documents to conform to the new law. For sophisticated associations, this would provide time to make conforming revisions. For unsophisticated associations, it would prevent attacks on their documents as being legally defective.

The complexity of tracing old provisions to their new counterparts will be somewhat difficult regardless of whether such a savings clause exists or not. Would homeowners be better off without the savings clause?

> *(5) Subdivision (a) refers to provisions that are "substantially the same" as former provisions. Subdivision (b) refers to provisions that "are restated and continued" in the proposed law. The terminology should be made uniform.*

Although the staff believes that the meaning of proposed Section 4010 is clear, the proposed revision would probably make it clearer. **If Section 4010 is retained, the staff will rephrase subdivision (b) to use the "substantially the same" language.**

Alternative Approach: Delete the Provision

Section 4010 was intended to be a useful clarifying provision, that would help to avoid constructional problems. The breadth of the RPLS Working Group's concerns about the section suggests that the provision might not achieve its purpose. Worse, it might create new problems. Given those concerns, the

Commission should consider simply deleting the provision. If that were done, the new law would still be governed by a general rule of construction provided in Government Code Section 9604:

> When the provisions of one statute are carried into another statute under circumstances in which they are required to be construed as restatements and continuations and not as new enactments, any reference made by any statute, charter or ordinance to such provisions shall, unless a contrary intent appears, be deemed a reference to the restatements and continuations.

This alternative approach would have the advantage of simply preserving existing law on the issue, thereby avoiding any controversy over the phrasing or utility of proposed Section 4010.

The main disadvantage of the alternative approach is that many readers of the Davis-Stirling Act will be unaware of the existence of Government Code Section 9604. Also, Section 9604 doesn't include a savings clause for references in an association's governing documents.

On balance, the staff recommends that Section 4010 be deleted. Perhaps a cross-reference to Government Code Section 9604 could be added to an appropriate Comment to help readers find the general rule.

Proposed § 4015. Application of Part

Proposed Section 4015 would continue the general rule for determining the application of the Davis-Stirling Act. See Civ. Code § 1374.

As noted above, the RPLS Working Group proposes that this section be made the lead section of a new chapter, to make it easier to find.

In addition, Duncan McPherson, writing on behalf of a group of three attorneys (himself, Jeffrey Wagner, and Peter Saputo) (hereafter, the "McPherson Group"), suggests the following clarifying revision of the section:

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

See Memorandum 2010-36, Exhibit p. 9. Mr. McPherson also writes as an individual to suggest further simplifying revisions of the section, thus:

> 4015. Nothing in this part may be construed to apply to a real estate development ~~wherein there~~ that does not ~~exist a~~ contain common area ~~as defined in Section 4095. This section is declaratory of existing law~~.

See Memorandum 2010-36, Exhibit p. 66.

The staff sees no problem with adding "real property" as proposed in the first suggested revision. It is absolutely clear that a CID is a real property development. Also, this change would be consistent with later suggested clarifications in a similar vein.

The staff agrees that the second proposed revision would state the provision more cleanly, without any change in its meaning. **The staff recommends that the first sentence be restated as suggested.** (As a separate matter, the Commission should decide whether it wants to preserve existing cross-references to definitions.) **The staff recommends against deleting the second sentence.** It might still provide useful historical context. Unless we are certain that it does not, it should be preserved.

Proposed § 4020. Construction of Zoning Ordinance

Continuing existing Section 1372, proposed Section 4020 provides:

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

The RPLS Working Group suggests simplifying the last clause, along these lines:

> 4020. Unless a contrary intent is clearly expressed, a local zoning ordinance is construed to treat like structures, lots, parcels, areas, or spaces in like manner regardless of ~~whether the common interest development is a community apartment project, condominium project, planned development, or stock cooperative~~ the form of the common interest development, as defined in Section 4100.

See Memorandum 2010-36, Exhibit p. 102. That would appear to be a nonsubstantive change, which might make the provision slightly easier to use. **The staff is inclined toward making a change along those lines.** However, as discussed earlier, it may not be a good idea to include a cross-reference after use of a defined term.

Proposed § 4025. Nonresidential CIDs

Proposed Section 4025 would continue existing Section 1373, which exempts entirely nonresidential CIDs from specified provisions of the Davis-Stirling Act.

In addition to some general drafting suggestions discussed earlier, the RPLS Working Group raises a question about the application of the provision in master planned communities. See Memorandum 2010-36, Exhibit p. 102.

Section 1373 is the subject of a separate study that is currently ongoing. The issue raised by the RPLS Working Group will be considered as part of that study.

Proposed § 4030. Application of part

Proposed Section 4030(a) would continue existing Section 1352 without change. Subdivision (b) of that section would add a new provision, to address a problem relating to stock cooperatives. The proposed section provides:

> 4030. (a) This title applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided all of the following are recorded:
>
> (1) A declaration.
>
> (2) A condominium plan, if any exists.
>
> (3) A final map or parcel map, if Division 2 (commencing with Section 66410) of Title 7 of the Government Code requires the recording of either a final map or parcel map for the common interest development.
>
> (b) Notwithstanding subdivision (a), this part governs a stock cooperative that has not recorded a declaration.

The RPLS Working Group correctly notes that the term "this title" in the first sentence should be replaced with "this part" (or, if the Commission adopts a suggestion discussed earlier, "this Act"). See Memorandum 2010-36, Exhibit p. 103.

Substantive concerns about proposed Section 4030 are discussed below.

Creation of Security Interest as Trigger for Application of Davis-Stirling Act

Under existing law, continued in proposed Section 4030(a), the application of the Davis-Stirling Act is triggered when "a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed," provided that other formalities are satisfied. The staff's understanding is that the intent is to trigger application of the Act when the owner of the development sells the first unit or lot.

The McPherson group is concerned that, under existing law, the application of the Davis-Stirling Act might be triggered by the conveyance of a security interest. See Memorandum 2010-36, Exhibit p. 10. The concern appears to be that a construction lender might acquire a security interest in the entire development,

which would include an interest in each separate interest, along with an interest in the common area. The "conveyance" of such an interest might be interpreted as satisfying the letter of Section 1352, thereby triggering the application of the Davis-Stirling Act.

It is not clear whether this has been a problem in actual practice. The staff did not find any reported cases involving that kind of misreading of the statute. It seems more likely that the McPherson Group is concerned with plugging a technical hole in the provision, to avoid any possible misunderstanding.

The staff has no objection to revising the provision to avoid misunderstanding, but it is not clear how that could be done without causing other possible misunderstandings. For example, the McPherson Group has proposed revising the introductory paragraph as follows:

> This title applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed (excluding the conveyance of a security interest), provided all of the following are recorded:

One problem that the staff sees with the proposed language is that the sale of a separate interest to an individual homeowner will typically also include the creation of a security interest. If so, what would be the effect of the proposed exception?

Ultimately, the staff is not convinced that the existing language is likely to be misunderstood. It speaks of the conveyance of a separate interest, not an interest in a separate interest. "Separate interest" is a defined term, and it refers to a unit, lot, or apartment. The defined term does not seem to encompass a security interest in those types of property.

Unless a stronger case can be made for the necessity of the proposed revision, the staff recommends against changing the existing language.

Application of Davis-Stirling Act to Stock Cooperative Without Declaration

Subdivision (b) was added to address an apparent problem with the application of the Davis-Stirling Act to a stock cooperative. As continued in proposed Section 4030(a)(1), it appears that the Davis-Stirling Act only applies when a common interest development has recorded a declaration. The Commission was informed, with informal confirmation from the Department of Real Estate, that many stock cooperatives do not record declarations. This is not surprising, as one of the principal functions of a declaration is to establish

equitable servitudes that can be enforced against each of the separate interests comprising a CID. In a stock cooperative, the same result can be achieved without a recorded declaration, because the stock cooperative itself holds title to the entirety of the development. All duties and restrictions incidental to ownership of a separate interest can be expressed in a lease agreement.

This suggests that there may be an unintended gap in the coverage of the Davis-Stirling Act. It is clear that the Davis-Stirling Act was intended to apply to stock cooperatives (they are expressly named as a type of CID and repeatedly referenced in the Act). But the requirement of a recorded declaration in Section 1352 appears to make the Act inapplicable to many stock cooperatives.

The Commission saw no good policy reason for such a gap in coverage and heard testimony suggesting that most stock cooperatives operate on the assumption that they are covered by the Davis-Stirling Act, regardless of whether they have a recorded declaration. Consequently, the Commission proposed adding Section 4030(b) to make clear that the Davis-Stirling Act applies to all stock cooperatives.

The RPLS Working Group now suggests that some stock cooperatives have been advised by counsel that they are *not* subject to the Davis-Stirling Act, because they have no recorded declaration. The RPLS Working Group argues that this established understanding should not be disturbed. If subdivision (b) is to be included in the proposed law, they believe it should not apply retroactively. See Memorandum 2010-36, Exhibit p. 103.

Thus, it appears that there is no settled view on whether a stock cooperative without a declaration is governed by the existing Davis-Stirling Act. It also appears that any provision settling that question would be substantive and controversial. Consequently, it would probably not be appropriate for inclusion in the proposed law. **The staff recommends the deletion of proposed Section 4030(b).** The underlying issue could instead be examined as part of a separate study of the application of the Davis-Stirling Act to a stock cooperative (a topic that the Commission has already acknowledged as requiring study).

Existence of Association Prior to First Conveyance

Writing as an individual, Duncan McPherson points out a recent court decision that construed Section 1352. Although that case involved the enforceability of an arbitration clause in a condominium project's CC&Rs, the court stated its view that a homeowners association "springs into existence" on

conveyance of the first separate interest under Section 1352. See Villa Vicenza Homeowners Ass'n v. Nobel Court Development, LLC, 185 Cal. App. 4th 23, 29, 110 Cal. Rptr 3d 149 (2010).

The idea that the association "springs into existence" only upon the sale of the first separate interest implies that the association cannot be formed and cannot act until after the first sale. Mr. McPherson explains why that view is contrary to existing practice and problematic:

> The ability of an association to contract and bind the association to security agreements, completion agreements and the like used by the [Department of Real Estate] to protect the interests of buyers during the development process is a key element in the existing DRE consumer protection process.

Mr. McPherson is correct. There are contracts that the association must enter into prior to the first sale, in order to satisfy DRE regulations. See, e.g., 10 Cal. Code Regs. § 2792 (requiring contract between developer and association obligating developer to provide security for initial operating costs). This is a prerequisite to DRE approval of the CID and so must necessarily occur prior to the sale of the first unit. It would therefore be unworkable to maintain that the association has no legal existence prior to the first sale.

It would be helpful to clarify this issue in the statute. This could be done by adding a subdivision to proposed Section 4030 along the following lines:

> 4030. (a) This title applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided all of the following are recorded:
>
> (1) A declaration.
>
> (2) A condominium plan, if any exists.
>
> (3) A final map or parcel map, if Division 2 (commencing with Section 66410) of Title 7 of the Government Code requires the recording of either a final map or parcel map for the common interest development.
>
> (b) Notwithstanding subdivision (a), this part governs a stock cooperative that has not recorded a declaration.
>
> (c) Nothing in this section precludes the creation of an association for the purpose of managing a common interest development, prior to satisfaction of the conditions in subdivision (a).
>
> **Comment**. …
>
> Subdivision (c) is new. It makes clear that an association may be created and may act prior to the satisfaction of the conditions stated in subdivision (a). This provision is necessary in order to permit the

association to enter into agreements required prior to the legal creation of the common interest development. See, e.g., 10 Cal. Code Regs. § 2792 (requiring contract between developer and association as part of Department of Real Estate approval process). This provision abrogates any contrary implication that might be drawn from *Villa Vicenza Homeowners Ass'n v. Nobel Court Development, LLC*, 185 Cal. App. 4th 23, 29, 110 Cal. Rptr 3d 149 (2010), which states that an association "springs into existence" when the conditions in subdivision (a) are satisfied.

The staff invites public comment on this proposed new provision.

FURTHER PRELIMINARY PROVISION ISSUES

There are a small number of additional comments on the preliminary provisions of the proposed law. The staff expects to discuss those comments in a supplement to this memorandum.

Respectfully submitted,

Brian Hebert
Executive Secretary