Study H-855 December 6, 2010

Memorandum 2010-59

Common Interest Development: Statutory Clarification and Simplification of CID Law (Comments on Dispute Resolution Provisions)

This memorandum continues the analysis and discussion of the public comments received on the Commission's tentative recommendation on *Statutory Clarification and Simplification of CID Law* (Feb. 2010). It addresses comments on the dispute resolution provisions of the proposed law.

For the most part, the Comments discussed in this memorandum are set out in the Exhibit to Memorandum 2010-36. However, we have also received additional letters, which are attached in an Exhibit to this memorandum, as follows:

Because of the large number of comments and the importance of completing review of those comments before the end of this year, if possible, this memorandum employs a practice that the Commission sometimes uses to expedite review of voluminous material — issues that appear to require Commission discussion at the meeting are marked with the "☞" symbol in the heading for that issue.

All other issues in the memorandum are presumed to be noncontroversial "consent" items, which are deemed approved without discussion. *That is only a presumption, and Commissioners and members of the public will have an opportunity to discuss those issues at the meeting, if discussion is needed.*

Where this memorandum sets out a provision of the proposed law, the text includes any changes that were made at prior meetings.

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.

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.

REVIEW OF METHODOLOGY

The goal of the current study is to reorganize and, to a lesser extent, restate the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act"), in order to make it easier to understand and use. In addition, some uncontroversial substantive improvements will be proposed.

Recent Commission experience makes clear that a project of this type becomes more difficult to enact the more it strays from the letter and substance of existing law.

Every deviation from existing language carries the potential for an unintended change in meaning. Even an arguable change in meaning may be problematic, to the extent that it produces uncertainty, disagreement, or litigation.

Every substantive change could give rise to opposition to the proposed law as a whole. Even if no objections are raised during the Commission's process, such objections can arise in the legislative process, greatly complicating the process and prospect of enactment of the proposed law.

For those reasons, the Commission has adopted a conservative approach in drafting and evaluating the proposed law. Specifically, it decided on the following methodology:

(1) Noncontroversial substantive improvements will be retained.
(2) Changes in wording that are necessary to clarify unclear language in existing law will be retained.
(3) Improvements to the structural organization of the Davis-Stirling Common Interest Development Act will be retained.
(4) The attempt to integrate applicable elements of the Corporations Code into the Davis-Stirling Common Interest Development Act will be abandoned. Where appropriate, cross-references to relevant provisions of the Corporations Code may be added to the proposed law, in statutory or Comment language.
(5) The general attempt to make the language of existing law simpler and easier to understand will be abandoned. But see (2) above.

Minutes (April 2009), p. 3.

When points (2) and (5) are read together, the result is that the Commission will propose changes to existing language only where necessary to cure ambiguous or confusing language. *Minor stylistic improvements, however meritorious, will not be made.* This last point has been emphasized in order to provide context for the staff recommendations in this memorandum. There are

many instances where the staff has recommended against making a change to language because the change does not meet the high bar described above (i.e., the change is not strictly necessary in order to cure an ambiguity or avoid misunderstanding). The staff recognizes that many of these proposed changes would be stylistic improvements. In another context, the staff would recommend that they be made.

It is only because of the practical difficulties involved in enactment of a large recodification proposal, which the Commission sought to minimize through its conservative methodology, that the staff is recommending against making these types of changes. The staff regrets the missed opportunity, but believes that the Commission's approach is the right one. As regrettable as it is to reject thoughtful and meritorious suggestions for improvement, it would be even more regrettable to include them in the proposal and have it sink under the weight of generalized concern that "too many language changes were made."

GENERAL RECOMMENDATIONS

As with previous memoranda in this study, many of the comments that we have received express concerns about existing law, rather than about any change that the proposed law would make. **As a general matter, the staff recommends against making significant substantive changes to existing law in the current study.**

We have also received comments proposing technical or clarifying changes to the language of existing law. As discussed above, the Commission has adopted a conservative approach to drafting the proposed law. Minor stylistic and technical changes to existing language will generally not be made, unless it is clear that they are necessary to cure a plain defect. **For that reason, the staff recommends against making many of the suggested language changes discussed below.**

Substantive Changes to Existing Law

The comments listed below raise substantive concerns about existing law that are too significant or potentially controversial (or both) for inclusion in the proposed law:

- Proposed Section 5850 should be revised to provide that any increase in monetary *penalties* should be treated as an increase in *assessments*, for the purpose of the limitation on the levying of

assessments expressed in proposed Section 5600(b). See Memorandum 2010-36, Exhibit p. 84.

- Proposed Section 5855 should be revised to recognize a right of an association to recover the fair market value of common area property damaged by a member, if the association decides against repairing or replacing the damaged property. See Memorandum 2010-36, Exhibit p. 189.
- Proposed Section 5855 should be revised to permit an association to recover its compliance and legal costs when imposing a monetary penalty or charge. See Memorandum 2010-36, Exhibit p. 190.
- Proposed Section 5900 should be revised to provide that an association's internal dispute resolution procedure is governed by the mediation confidentiality rules provided in Evidence Code Sections 1115-1128. See Exhibit p. 1.
- Proposed Section 5905(b), requiring that an association's internal dispute resolution procedure "make maximum, reasonable use" of local dispute resolution services, should be clarified or eliminated. See Memorandum 2010-36, Exhibit pp. 191-92.
- Proposed Section 5920 should be revised to provide a penalty for an association that does not include notice of its internal dispute resolution procedure in its annual policy statement. See Memorandum 2010-36, Exhibit p. 84.
- Proposed Section 5960 should be revised to narrow the scope of attorney fee awards referenced in the section. See Memorandum 2010-36, Exhibit p. 193.
- The second sentence of proposed Section 5975(a) provides that a declaration can limit the enforceability of restrictions expressed in the governing documents. That existing rule should be reevaluated and perhaps eliminated. See Memorandum 2010-36, Exhibit p. 84.
- Proposed Section 5975 should be revised to broaden its fee-shifting provision, to also apply to an action for declaratory relief. See Memorandum 2010-36, Exhibit p. 193.
- Proposed Section 5980 should be revised to provide for an award of costs and fees to a prevailing member in a suit to enforce the Davis-Stirling Act. See Memorandum 2010-36, Exhibit p. 84.
- Proposed Section 6000 should be revised to implement a number of suggested substantive changes. See Memorandum 2010-36, Exhibit p. 194.

The staff recommends against addressing those issues in the proposed law.

Technical Revisions to Existing Language

The comments listed below suggest technical changes to existing language that are not consistent with the conservative drafting approach taken in the current study:

- Proposed Section 5850 should be revised to clarify the application of the statutory rulemaking procedure, with respect to the adoption of monetary penalties. See Memorandum 2010-36, Exhibit p. 83.
- Proposed Section 5910(d) should be revised to clarify the meaning of the existing phrase "other than by agreement of the member." See Memorandum 2010-36, Exhibit p. 192.

The staff recommends against making those revisions in the proposed law.

☞ SCHEDULE OF MONETARY PENALTIES

Proposed Section 5850 would provide as follows:

> If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents, the board shall adopt and distribute to each member, in the annual policy statement prepared pursuant to Section 5310, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents.

The basic purpose of that provision seems plain. Before an association can impose a monetary penalty for a governing document violation, the amount of the penalty must be published and distributed to the members. In other words, the punishment imposed for a violation should not be ad hoc, secret, or determined after the fact.

The Commission has expressed interest in the possibility of revising that language to (1) address whether the schedule of monetary penalties must be revised if a new or revised penalty is adopted, and (2) make clear that the association must provide a copy of the schedule to a member on request. See Minutes (October 2010), p. 7 (discussing those issues in connection with parallel provision of proposed tentative recommendation on *Commercial and Industrial Common Interest Developments*).

Republication of Schedule After Adoption of New or Revised Penalty

Proposed Section 5850 would use the annual policy statement as a vehicle for publication of the schedule of monetary penalties. See proposed Sections 5310, 5320. Under that approach, the schedule of monetary penalties need only be published once a year.

The proposed section provides no guidance on whether an association can adopt a new or revised penalty in the period between the distribution of annual policy statements. If so, then the purpose of the provision would be undermined — members could be subjected to penalties without advance notice of those penalties. If not, then the association could only adjust its penalty amounts annually, undermining its ability to adapt quickly to changes in circumstances.

The staff believes that these problems could be avoided if proposed Section 5850 were revised to expressly require publication of any new or revised penalty *before that penalty could be enforced*. That would avoid the unfairness of enforcing a penalty without advance notice. It would also provide an incentive for associations to provide the required notice on a timely basis. Until they do, they could not enforce a new penalty.

Proposed Revision

The staff recommends revising proposed Section 5850 along the lines described above. The provision should also be revised to expressly require an association to provide a copy of the schedule to a member who requests a copy. Thus:

> 5850. (a) If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents, the board shall adopt and distribute to each member, in the annual policy statement prepared pursuant to Section 5310, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents.
>
> (b) An association may not enforce a new or revised monetary penalty until the new or revised monetary penalty has been included in either (1) a schedule of monetary penalties that is distributed pursuant to subdivision (a), or (2) a supplement to the schedule of monetary penalties that is delivered to the members individually pursuant to Section 4040.
>
> (c) An association shall provide a copy of the most recently distributed schedule of monetary penalties, along with any

applicable supplements to that schedule, to any member on request.

The reference to a "supplement" in the new language is intended to provide a less costly and more flexible alternative to republication of the entire schedule of monetary penalties. This would allow an association to respond quickly if there is a need to add or revise a penalty amount prior to distribution of the next annual policy statement.

The staff believes that the revisions set out above would help to promote the purpose of the existing provision (to guarantee advance notice of a penalty amount before it is enforced) and would also help to avoid disputes that might arise under the existing language (over the enforceability of a new or revised penalty that has not yet been "scheduled"). **Should the proposed revisions be made?**

Parallel Revision to Proposed Section 6850

In reviewing a proposed tentative recommendation on *Commercial and Industrial Common Interest Developments*, the Commission approved the following revision to proposed Section 6850 (which would parallel proposed Section 5850):

> 6850. If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents, the board shall adopt and distribute to each member, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents.
>
> The board of directors shall not be required to distribute any additional schedules of monetary penalties unless there are changes from the schedule that was adopted and distributed to the members pursuant to this section.

Minutes (October 2010), p. 7. The Commission also directed the staff to consider whether the purpose of that new language could be stated more clearly. *Id.*

The staff recommends that the language inserted in proposed Section 6850 be deleted and replaced with the language from the proposed revision of Section 5850, thus:

> 6850. (a) If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents, the board shall adopt and distribute to each member, by personal

delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents.

(b) An association may not enforce a new or revised monetary penalty until the new or revised monetary penalty has been included in either (1) a schedule of monetary penalties that is distributed pursuant to subdivision (a), or (2) a supplement to the schedule of monetary penalties that is delivered to the members by personal delivery or first class mail.

(c) An association shall provide a copy of the most recently distributed schedule of monetary penalties, along with any applicable supplements to that schedule, to any member on request.

The staff believes that this language would do a more thorough job of addressing the republication issue than the language approved at the October meeting. It would also provide the more flexible "supplement" option for publication of new or revised penalties.

Should proposed Section 6850 be revised in that way?

DISCIPLINARY HEARING

Proposed Section 5855 would continue an existing provision that requires notice and an opportunity to be heard before a member is disciplined by the association.

Proposed Section 5855 would also *broaden* the scope of the existing procedure to provide a similar opportunity to be heard when a member is alleged to have damaged the common area and the association is seeking reimbursement of the cost of repair.

The RPLS Working Group supports that expansion as a matter of policy, but has some technical suggestions regarding its implementation. See Memorandum 2010-36, Exhibit p. 188. (The group's proposals for substantive change to proposed Section 5855 are discussed on page 4, above.)

First, the group suggests that the article heading, "Disciplinary Action" may not be appropriate for a provision that covers both punitive discipline and damage recovery. They suggest renaming the article, "Disciplinary Action and Enforcement." *Id*. The staff is not sure that "Enforcement" accurately describes an action for reimbursement of costs. **The staff recommends that the article be renamed "Discipline and Cost Reimbursement."**

Second, the RPLS Working Group notes that the new language in proposed Section 5855 differs from related language in proposed Section 5725, which would provide, in relevant part:

> *A monetary charge imposed by the association as a means of reimbursing the association for costs incurred by the association in the repair of damage to common area and facilities* caused by a member or the member's guest or tenant may become a lien against the member's separate interest enforceable by the sale of the interest under Sections 2924, 2924b, and 2924c, provided the authority to impose a lien is set forth in the governing documents.
>
> …

(Emphasis added.) The group suggests reconciling the language used in the two provisions. See Memorandum 2010-36, Exhibit p. 189.

It would be better if the language in the two provisions was more uniform. This could be achieved, without disturbing existing language, by revising the *new* language in proposed Section 5855, thus:

> 5855. (a) When the board is to meet to consider or impose discipline upon a member, or to ~~assess costs for damage to the common area~~ impose a monetary charge as a means of reimbursing the association for costs incurred by the association in the repair of damage to common area and facilities caused by a member or the member's guest or tenant, the board shall notify the member in writing, by either personal delivery or individual delivery pursuant to Section 4040, at least 10 days prior to the meeting.
>
> (b) The notification shall contain, at a minimum, the date, time, and place of the meeting, the nature of the alleged violation for which a member may be disciplined or the nature of the damage to the common area and facilities for which ~~the member may be assessed~~ a monetary charge may be imposed, and a statement that the member has a right to attend and may address the board at the meeting. The board shall meet in executive session if requested by the member ~~being disciplined or assessed costs~~.
>
> (c) If the board imposes discipline on a member or ~~assesses~~ imposes a monetary charge on the member for damage to the common area and facilities, the board shall provide the member a written notification of the decision, by either personal delivery or individual delivery pursuant to Section 4040, within 15 days following the action.
>
> (d) A disciplinary action or ~~assessment of costs~~ the imposition of a monetary charge for damage to the common area shall not be effective against a member unless the board fulfills the requirements of this section.

The staff recommends that those revisions be made.

The RPLS Working Group also questions the need for the words "and facilities" in either of the two provisions discussed here. Any association facilities would seem necessarily to be included within the term "common area." See Memorandum 2010-36, Exhibit p. 189. **Nonetheless, the staff recommends against deleting the words.** At worst, they are redundant. It would be better to preserve a possible redundancy than risk an inadvertent change in the meaning of the provisions.

LIABILITY FOR MISCONDUCT OF GUEST, INVITEE, OR TENANT

Existing Section 1363(g) (which would be continued in proposed Section 5850) regulates the process by which an association can impose a monetary penalty for a violation of the governing documents, including a penalty "relating to the activities of a guest or invitee of a member." This implicitly recognizes that an association might penalize a member for the misconduct of the member's guest or invitee.

Similarly, Section 1367.1(d) regulates the manner by which an association can impose a monetary charge against a member for damage to the common area and facilities caused by the member "or the member's guests or tenants."

Proposed Section 5860 was intended to generalize those provisions, thus:

> For the purposes of this article, a member may be held responsible for a violation of the governing documents or damage to the common area caused by the member's guest, invitee, or tenant of the member's separate interest.

The RPLS Working Group believes that the language used in that provision is too general. They propose that it be recast as follows:

> For the purpose of this article, a member may be disciplined, fined, or otherwise held responsible for a violation of the governing documents or damage to the common areas caused by the member's guest, invitee, or occupant of the member's separate interest. A member's responsibility under this section shall include responsibility for costs assessed and reimbursement assessments imposed on the member for damage to the common area caused by the member's guest, invitee, or tenant, or occupant of the member's separate interest.

See Memorandum 2010-36, Exhibit p. 190.

The staff recommends against revising the provision in that way. For reasons discussed below, the language proposed by the RPLS Working Group could be read to make a substantive change to existing law.

The existing provisions, from which proposed Section 5860 is drawn, *acknowledge* that a member might be held vicariously liable for the misconduct of a guest, invitee, or tenant, but they do not affirmatively *establish* such liability:

- Section 1363(g) requires a schedule of monetary penalties *if* an association has adopted a policy imposing such penalties (including any penalties imposed for the conduct of a member's guest or invitee).
- Section 1367.1(d) provides that a monetary charge for damage to the common area caused by the member (or the member's guests or tenants) may become a lien *if* the governing documents provide authority to impose a lien.

The proposed new language would seem to go beyond merely recognizing that vicarious liability might exist. It would appear to affirmatively establish statutory authority for such liability.

The staff believes it would be inappropriate to make such a substantive change in the proposed law. Some associations may have governing documents that do not permit the imposition of monetary penalties and charges through the association's own internal processes. If the members of such associations wish to authorize such practices, they can amend their governing documents. The staff sees no compelling policy reason for the proposed law to override the governing documents on that issue. What's more, such a change would be substantive and would very likely be too controversial for inclusion in the proposed law.

In fact, the current language in proposed Section 5860 might be read in the same way. The phrase "a member may be held responsible" was intended to recognize the *possibility* of liability, but could be construed as establishing a statutory basis for liability.

In order to avoid any confusion on this issue, the staff recommends that the existing language be preserved. This would require the deletion of proposed Section 5860 and the following revision of proposed Section 5850:

> 5850. If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents, <u>including any monetary penalty relating to the activities of a guest or tenant of the member,</u> the board shall adopt and distribute to each member, in the annual policy statement prepared pursuant to Section 5310, a

> schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents.

(The language above does not show the other revisions to proposed Section 5850, discussed on pages 6 and 7 of this memorandum.)

AUTHORITY TO IMPOSE MONETARY PENALTIES

Existing Section 1363(j) provides:

> Nothing in this section shall be construed to create, expand, or reduce the authority of the board of directors of an association to impose monetary penalties on an association member for a violation of the governing documents or rules of the association.

It seems that this caveat is only relevant to two provisions of Section 1363:

(1) Section 1363(g), which requires the distribution of a schedule of monetary penalties, *if* the governing documents permit the imposition of monetary penalties for a violation of the governing documents. See proposed Section 5850.
(2) Section 1363(h), which requires notice and an opportunity to be heard *if* a board meets to impose discipline on a member. See proposed Section 5855.

The purpose of the caveat seems clear. As discussed earlier, those provisions of Section 1363 are meant to *regulate* the exercise of disciplinary authority. They are not meant to *establish or alter* an association's disciplinary authority. The existence and nature of such authority is left to the association's governing documents.

Proposed Section 5865 would continue Section 1363(j) as follows:

> Nothing in Sections 5850 or 5855 shall be construed to create, expand, or reduce the authority of the board to impose monetary penalties on a member for a violation of the governing documents.

The RPLS Working Group believes that proposed Section 5865 is inaccurate, because the notice and hearing rules in proposed Section 5855 have been broadened to apply when the board meets to impose a monetary charge for reimbursement of damage repair costs. They see that as an expansion of the board's authority to impose monetary penalties. See Memorandum 2010-36, Exhibit p. 191.

The staff disagrees, for two reasons:

(1) Imposition of a monetary charge for reimbursement of repair costs is not a "penalty." Nor is it imposed for "a violation of the governing documents." It is non-punitive cost recovery.

(2) As discussed earlier, proposed Section 5855 would regulate the *manner* in which discipline and reimbursement charges may be imposed. It would not establish or alter the association's *authority* to pursue such actions. This would be equally true if the provision is expanded to provide a procedure for the imposition of reimbursement charges.

Consequently, the staff sees no error in proposed Section 5865 and recommends against making any change to the provision.

INTERNAL DISPUTE RESOLUTION

Under existing law, an association is required to provide an internal dispute resolution ("IDR") procedure for its members, at no cost. See Section 1363.820; proposed Section 5905. The procedure must meet specified minimum standards. See Section 1363.830; proposed Section 5910. If the association does not adopt its own procedure, a default "meet and confer" procedure applies, under which a member has the right to meet with a member of the board to discuss and perhaps resolve the dispute. See Section 1363.840; proposed Section 5915.

Curtis C. Sproul, writing as an individual, urges the Commission to clarify the relationship between the IDR procedure, the disciplinary hearing procedure (proposed Section 5855), and the right to board reconsideration of a negative architectural review decision (proposed Section 4765(a)(5)). He believes that the law should more clearly state whether these procedures overlap, and if so, how. He describes experiences where these questions have led to disagreement and delay. See Exhibit pp. 2-7.

The previous version of the proposed law would have partially addressed this issue. It included the following language:

> **§ 5900 (REVISED). Application of article**
>
> 5900. …
>
> (c) This article does not apply to a decision made pursuant to Section 5665 or 5855.
>
> **Comment**. …
>
> Subdivision (c) is new. It makes clear that the procedure provided in this article is not available to review a decision made pursuant to the specified sections, which provide a formal opportunity to be heard by the board. The subdivision would not

> preclude the application of this article to a dispute that involves a failure of the association to comply with Section 5665 or 5855. Nor would it preclude the use of this article before a final decision is made under Section 5855. Prior to making a final decision, an association could defer or suspend action under Section 5855 and instead proceed under this article.

Proposed Section 5665 would provide an opportunity to meet with the board to request a payment plan; proposed Section 5855 would provide for a hearing before the board before being disciplined.

The purpose of proposed Section 5900(c) had been to avoid procedural redundancy. If a member has a right to meet with the board under proposed Sections 5665 and 5855, why provide a second opportunity to meet with the board about the same matters under the IDR procedure?

Nonetheless, proposed Section 5900(c) proved too controversial for inclusion in the proposed law and was deleted. See Minutes (Oct. 2009), p. 10. If that fairly modest change was too substantive and controversial for inclusion in the proposed law, the more comprehensive treatment contemplated by Mr. Sproul would also be too controversial for inclusion in the proposed law. **The staff recommends against studying the issue at this time.**

CIVIL ACTIONS

Proposed Section 5980 would be new. It would provide blanket authorization for a member to sue to enforce the provisions of the Davis-Stirling Act, thus:

> 5980. In addition to any other remedy provided by law, a member may bring an action in superior court to enforce a provision of this Act.
>
> **Comment**. Section 5980 is new. Relief under this section may include a writ of mandate, an injunction, or other appropriate relief. See also Section 4160 ("member").

The RPLS Working Group strongly opposes the addition of this proposed section:

> This new section is extremely troublesome, greatly expands existing law and may have significant unintended consequences. It states: "In addition to any other remedy provided by law, a member may bring an action in superior court to enforce a provision of this Part."
>
> The CLRC note states that the new section would "make it clear that a member may bring a civil action to enforce any requirement

> of the Davis-Stirling Act." We do not think it is by any means "clear" that currently members may bring such civil actions. For example, members do not currently have the right to enforce the Association's assessment collection rights, lien and foreclosure rights, Calderon rights, section 1356 petitions to amend the governing documents, and right to discipline members, among many others. Furthermore, are the new rights created by this section enforceable by derivative actions or by personal lawsuits? And, does this section give members a new right to sue associations for damages?
>
> This is a very problematic new section which will have a negative effect on the entire administration of the revised Davis-Stirling Act. Its addition is totally inconsistent with the CLRC's mission to merely "clarify and simplify" the Act. Consequently, the Authors strongly recommend that the proposed new provision be eliminated from the CLRC proposal.

See Memorandum 2010-36, Exhibit pp. 193-94.

It is correct that the proposed section would do more than merely "clarify and simplify" the Act. It is intended as a minor substantive improvement — a backstop for the piecemeal judicial enforcement provisions in existing law.

Proposed Section 5980 would be too controversial for inclusion in the proposed law. The staff recommends that it be deleted. Note that the Commission has previously discussed the possibility of conducting a broad review of the judicial enforcement provisions of the Davis-Stirling Act. Such a study would obviate the need for a gap-filling provision of the type proposed in Section 5980.

Respectfully submitted,

Brian Hebert
Executive Secretary

EMAIL FROM JAMES P. LINGL
(7/21/10)

Hello Mr. Hebert.

I'm downloading the memorandum and will begin reading it this evening, but had intended to write to you anyway about something that has come up in connection with the CLRC sponsored IDR/meet and confer process - CC 1363.810 et seq. Although the **mediation** process is surrounded by confidentiality, the presently worded IDR process is not. In the past several months I have seen several instances in which the parties agree to meet, as they must under the statute, but then the discussions go no where because they are afraid to say anything that might later come back to bite them. Where an admission coupled with an apology may go a long way to resolve a conflict in a mediation, that same admission can't be made in an IDR because if it is, and the matter ends up in court, the admission can be used against the party making it.

I have a suggested fix. If the Commission were to propose the addition of a new subsection (c) to 1363.810, one that said in effect that all discussions that occur in connection with an IDR session, and all documents specifically prepared for or in connection with an IDR process, shall have the same confidentiality as though the session was a mediation, it would go a long way toward overcoming the present issue. Or, in the alternative, just graft the confidentiality provisions of mediation [Evid C. Sections 1115 - 1128, copy attached] in that subsection (c) and the problem is solved.

It would seem that the same public policy that promotes confidentiality in order to encourage candor in a mediation would be applicable to Internal Dispute Resolution sessions in an HOA.

Thank you for your time and attention to this matter.

JAMES P. LINGL

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August 64, 2010

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Re: Making Sense Out of the Chaos of Current Civil Code Sections 1354 (b) & (c), 1363.810-1363.850, 1369.510-1369.590 and 1378(a)(5). Another matter that could be resolved in the Commission's revision of the Davis-Stirling Common Interest Development Act.

Dear Brian:

In the lengthy comments that were submitted to the California Law Revision Commission by Sandy Bonato, Mary Howell, Gary Kessler and me (on behalf of the State Bar Real Property Law Section), we noted several concerns with respect to Chapter 8 of the Commission's Tentative Recommendations (the Dispute Resolution Chapter), including a concern that many lawyers who represent owners who are in disputes with their association use the existing maze of differing dispute resolution procedures in the Davis-Stirling Act as a means of frustrating or unduly prolonging legitimate Association enforcement efforts.

An association/owner dispute that is currently on my desk where that sort of procedural gamesmanship is happening led me to review our comments on the Commission's proposed Chapter 8 provisions and it became apparent to me that we should have been even more emphatic in urging the Commission to ensure that its proposed revisions to Davis-Stirling result in greater clarity as to what process an Association must follow when confronted with a conflict, disagreement or dispute with an owner and what types of disputes trigger the need to follow a particular set of procedures.

Here is a summary of a very routing dispute that I am currently handling for an Association in which the opposing counsel's gaming of the system has impeded and prolonged resolution of a matter that could have been resolved much more quickly and inexpensively:

The situation involves a fellow who purchased a residential lot in a high-end golf course community in a foreclosure proceeding. At the time of the purchase, the lot had a substantially completed home (some interior work remaining) but no landscaping whatsoever. Although the present owner has given lip service to having sincere intentions to complete construction, he has been largely unresponsive to the many efforts of the Association's Design Review Committee to arrange a meeting and, to date, the property owner has failed to submit required plans or to tender required plan review fees and deposits. The property, which is situated at a prominent location near the entrance to the development, has been sitting in its uncompleted state for over a year. In email exchanges the owner has contended that as a buyer at a foreclosure he should not be obligated to pay any fees or to provide any performance deposits.

Out of frustration over their inability to establish meaningful communication with the owner, the Design Review Committee asked the Board to schedule a hearing with the owner. Although termed a "Hearing", the goal of the Board was simply to get the owner to sit down with the Board and representatives of the DRC in order to discuss how and when the owner intends to proceed. Because no plans are pending before the Design Review Committee and no formal action, pro or con, has been taken by the DRC, this fact situation does not seem to fall under Civil Code section 1378(a)(5). As you know, that is the Civil Code section that gives a common interest property owner the right to appeal to the Board of Directors if the Association's architectural or design review committee rejects improvement plans. Instead, the Board's notice advised the owner that the Hearing was being called pursuant to Civil Code section 1363(h) (disciplinary hearing before the Board).

Upon receipt of the hearing notice the owner hired a lawyer who promptly responded by claiming that the hearing was flawed and that his client had the right to proceed pursuant to Civil Code sections 1363.810-1363.850. In spite of a voluminous record to the contrary, the lawyer further alleged that the Association and its Committee were acting arbitrarily, capriciously, and in bad faith, with the intention of driving the property owner out of the community. The lawyer demanded that the hearing be taken off calendar and that the mediation proceed in the fall. Seeing no merit in the lawyer's contentions, the Board elected to proceed with the scheduled hearing. Neither the owner nor the owner's lawyer participated, although they were given the opportunity to either attend the hearing in person or to participate by conference telephone. At the conclusion of the hearing the Board determined that no fines or penalties should be imposed at this time and the owner was provided with a written statement of what the Board and the DRC expected of him in terms of plan submittals and the payment of fees and deposits. Given that posture of the proceedings it is uncertain how the property owner and his counsel will respond.

A significant ambiguity in the present statutory scheme relates to the interface between Civil Code section 1363(h) and the more complicated IDR provisions of Civil Code sections 1363.810-1363.850. At what point is the Board precluded from calling for a member to appear before the Board and, instead, must follow the Civil Code section 1363.810 Internal Dispute Resolution process? As noted in our prior comments of July 1, 2010, once the Association determines that it is obligated to engage in IDR, the present law's direction to make maximum use of outside mediation services is also problematic, particularly given the default IDR

procedures set forth in Civil Code section 1363.840 (which do not mandate use of an outside service).

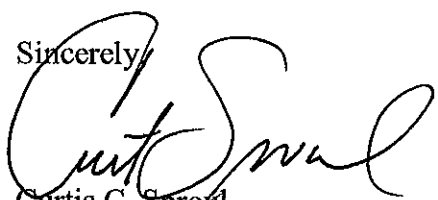
Pursuant to Civil Code section 1363.830 an association is empowered to adopt its own dispute resolution procedure so long as the procedure that is adopted meets the minimum requirements of that section. However, if the procedure that is adopted by the Board contemplates a progressive process of dispute resolution, beginning with a hearing before the Board pursuant to Civil Code section 1363(h), would the second step in the process, calling for IDR be "fair and reasonable" if the IDR step called for the board to then designate one member of the Board to meet and confer with the member following an adverse determination by the entire Board, or would the Association be compelled at that juncture to engage the services of a third party neutral?

Conversely, can the simple Civil Code section 1363(h) process of a hearing before the Board be the start and end of the dispute resolution process (absent resort to the pre-litigation ADR provisions of Civil Code section 1369.510 through 1369.590), rather than being the first step in a process of progressive dispute resolution and, if so, what sorts of disputes could start and end at a board hearing?

Brian, I can cite other instances where, for example, in response to an association's issuance of a traffic citation for an illegally parked vehicle the cited owner has engaged a lawyer who has demanded that the matter go to either IDR or ADR, rather than having the first step be a simple hearing before the Board. Disputes that should be capable of resolution through a simple, inexpensive process become protracted procedural battles.

This is a very real problem that could benefit from the work of the Commission.

Sincerely,



Curtis C. Sproul

cc: Sandy Bonato, Mary Howell, Gary Kessler, Paul Dubrasich, Marianne Adriatico, Mia Weber Tendle

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November 12, 2010

Brian Hebert
California Law Revisions Commission
U. C. Davis School of Law
400 Mrak Hall
Davis, CA 95616

Re: An update on my comments in August regarding a need for greater clarity Among the many dispute resolution procedures in the current Davis-Stirling Common Interest Development Act.

Dear Brian:

In August of this year I sent you a rather long letter describing a situation in which a property owner had acquired a lot in foreclosure that is located in a high-end gated, golf course community. At the time of the acquisition the foreclosed owner had substantially completed a home on the Lot (very minor interior work remained to be completed), but no other landscaping or exterior improvements had been done. So the scene, at the time of the foreclosure sale was an attractive custom home surrounded by red, clay dirt. We are now 18 months past that acquisition date and the lot improvements are no closer to completion; in fact absolutely nothing has been done to the property.

The delays and lack of progress are the byproducts of the owners' efforts, aided by an attorney, to challenge, avoid and delay every step in the established architectural review and approval process, in spite of the Association's very measured efforts to keep the process moving forward. One perhaps cynical spin on what is really going on is that the owners have no real intention of completing the project, but instead are looking to make a profit in a resale of the property, as-is. Under this development's CC&Rs, home construction projects are supposed to be completed within one year and all landscaping is supposed to be installed prior to occupancy of the residence.

The centerpiece of the owners' delay strategy is their repeated demand for approval of a second driveway to the front of their home (the present driveway travels to the garage at the back

of the home), along a route that places most of the desired driveway in the front setback area of the lot. The recorded CC&Rs, the Design Guidelines, and the County's Conditions of Approval for the development all prohibit hardscape improvements in setbacks, with very limited exceptions that are not applicable to this situation.

In my August letter I commented that perhaps the State Bar Real Property Law Section's common interest working group ought to have been even more emphatic in urging the Commission to ensure that its proposed revisions to Davis-Stirling result in greater clarity as to what process an Association must follow when confronted with a conflict, disagreement or dispute with an owner and what types of disputes trigger the need to follow a particular set of procedures. The earlier letter presents a detailed description of what I perceive as the current chaos and confusion in the Davis Stirling Act's several dispute resolutions procedures, so I will not repeat that summary here.

Instead I will simply focus on the seemingly simple process found in Civil Code section 1378(a)(5) in which an owner who is faced with an adverse determination by an association's architectural review committee has a right to appeal that decision to the Board of Directors for reconsideration. If that appeal is lodged, the section instructs that the reconsideration is not dispute resolution pursuant to Civil Code section 1363.820 (thus suggesting, without expressly saying so, that an owner could have still another bite at the apple by demanding ADR if the Board upholds the committee).

What is interesting with respect to the situation that is pending before me is that the owners in question have not paid their required deposits and fees to start the architectural review process and they have not submitted any formal landscape plan (all as required by the governing documents). Instead they have simply informally indicated to the Board that they desire a second driveway and they tendered a draft conceptual plan showing the route of that driveway through the setback. When the design review committee responded with an indication that more formal plans that included the driveway would not be approved, the owners responded through their lawyer with a written demand that the owners "are adamant in their demand for resolution of this dispute by ADR before an independent, unbiased arbitrator pursuant to Civil Code section 1369.530. The letter makes no effort to actually comply with the procedural requirements of that ADR process.

Aside from that procedural deficiency, in rejecting this demand I made the following argument to the lawyer:

> Finally, and most importantly, the IDR and ADR provisions of the Davis-Stirling Act were never intended to permit a property owner who is subject to architectural review and approval requirements pursuant to recorded CC&Rs to hijack the stated review and approval process in an attempt to impose the owner's will on the Association by having matters that are clearly within the regulatory jurisdiction of the Design Review Committee determined *ab initio* by a third party.

I am confident that I am correct in that assessment of interface between the Act's dispute resolution procedures and routine procedures set forth in private covenants for managing association/owner relations (such as approval of improvement projects) and that a court would side with the Association if the matter was ever litigated. However, given the current jumble of conflicting and often inconsistent statutory dispute resolution procedures, bad people, aided by lawyers with too much time on their hands in this bad economy can make a field day of delays out of what should be a simple architectural review and approval process pursuant to recorded covenants.

It has taken me three pages to make my point, but the fact of the matter is that the current state of affairs regarding dispute resolution under the Davis-Stirling Act gives unscrupulous owners and their counsel ample means to game the system, often at great expense to the community and its owner residents.

Sincerely,

SPROUL TROST LLP

Curtis C. Sproul

cc: Sandy Bonato, Mary Howell, Gary Kessler