

First Supplement to Memorandum 2011-21

**Common Interest Developments: Commercial and Industrial Associations
(Comments on Tentative Recommendation)**

Memorandum 2011-21 presents and analyzes public comment on the tentative recommendation on *Commercial and Industrial Common Interest Developments* (Feb. 2011) (hereafter "Tentative Recommendation"). The analyzed comment was submitted by a stakeholder working group comprised of attorneys and property managers that represent commercial or industrial CIDs (hereafter, "stakeholder group").

The staff has since had some informal communication with this group relating to the first issue analyzed in Memorandum 2011-21, whether the Commission should revise the application provisions of the proposed law. This communication will be summarized and discussed in this supplement.

Further review of this issue should also include a consideration of Business and Professions Code Section 11010.3. Section 11010.3 exempts exclusively commercial and industrial CIDs from the Subdivided Lands Act (Bus. & Prof. Code §§ 11000-11200), which generally requires a subdivider of land to obtain a public report from the Department of Real Estate disclosing specified information about the intended subdivision.

Unless otherwise indicated, all statutory references in this supplement are to the Civil Code.

BUSINESS AND PROFESSIONS CODE SECTION 11010.3

Except as otherwise provided, the Subdivided Lands Act requires a person intending to offer subdivided land for sale or lease to file an application for a public report with the Department of Real Estate that provides detailed information about the subdivision. Bus. & Prof. Code § 11010. The requirement is intended to protect purchasers of interests in the subdivision from fraud or

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.

misrepresentation during the initial construction and sale of units in the subdivision. See *Sproul & Rosenberry, Advising Common Interest Communities*, § 1.22.

Seemingly paralleling the decision of the Legislature to exempt exclusively commercial or industrial CIDs from certain provisions of the Davis-Stirling Act (by enacting Section 1373), the Legislature has exempted from the reporting requirements of the Subdivided Lands Act those subdivisions in which lots or other interests are

(a) limited to industrial or commercial uses by zoning or (b) limited to industrial or commercial uses by a declaration of covenants, conditions, and restrictions, which declaration has been recorded in the official records of the county or counties in which the subdivision is located.

Bus. & Prof. Code § 11010.3.

The language used in Section 11010.3 to describe the subdivisions that are exempted from the reporting requirements of the Subdivided Lands Act is substantively identical to the language used in Section 1373 to describe the CIDs that are exempted from several provisions of the Davis-Stirling Act:

1373. (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:

....

This parallelism is not coincidental. In 2004, in conjunction with a prior CID study, the Commission concluded that Sections 1373 and 11010.3 were intended to apply to the same types of developments, and recommended that the application language of Section 1373 be amended to more closely conform to the application language used in Business and Professions Code Section 11010.3. See Memorandum 2004-5, pp. 11-12.

In the proposed law, this application language from Section 1373 is continued verbatim in Section 6531, to describe the CIDs to which the proposed law would apply. In proposing that Section 1373 be amended to exempt those CIDs from *all* provisions of the Davis-Stirling Act, the Tentative Recommendation also recommends retaining that application language in Section 1373.

If the Commission were to revise this scope of application language in Sections 1373 and 6531, the parallelism between those sections and Business and

Professions Code Section 11010.3 would be undermined, unless a corresponding amendment was proposed to Section 11010.3.

However, such a corresponding amendment, which could affect the scope of application of the Subdivided Lands Act, may be beyond the purview of the instant study. When the Commission previously recommended conforming the language of Section 1373 and Business and Professions Code Section 11010.3, it did so by proposing to amend a section (Section 1373) in an act that the Commission was presently *studying* (the Davis-Stirling Act).

The Commission is *not* presently studying the Subdivided Lands Act, nor has it spent any significant time studying that act in the past. There is therefore some possibility that even what was intended as a nonsubstantive clarification of Section 11010.3 could cause an unintended consequence, based on a consideration relating solely to the Subdivided Lands Act of which the Commission is presently not aware.

The Commission should weigh this factor along with all others discussed in Memorandum 2011-21 in deciding whether any further revision should be made to either proposed Section 6531 or existing Section 1373 in conjunction with this study.

CLARIFICATION OF “COMMERCIAL USE”

If the Commission does decide to revise proposed Section 6531 in an attempt to clarify its meaning, the staff in Memorandum 2011-21 offered some possible language to clarify that the section would apply to “residential rental” CIDs in which the separate interests are leased to third parties for residential purposes:

6531. A “commercial or industrial common interest development” means 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. If the declaration provides that a separate interest may only be leased by the owner, the separate interest is deemed to be limited to commercial use for the purposes of this section.

The stakeholder group suggests that this offered language may be deficient in accomplishing its intended objective, in two respects:

- The requirement that the separate interest “may only be leased by the owner” implies that, to qualify as a commercial use, the owner must be precluded by the declaration from *selling* the separate interest.
- The word “leased” may be understood as not including a residential tenancy that is month-to-month, or based on any other rental agreement that would not be considered a lease.

If the Commission decides to make any clarification to Section 6531 at all, the staff agrees that the suggested language could be improved. A second attempt at that clarification that may satisfy the expressed concerns of the stakeholder group would be as follows:

6531. (a) A “commercial or industrial common interest development” means 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.

(b) For the purposes of this section, “commercial use” of a separate interest includes the rental of the separate interest.

Comment. Subdivision (b) makes clear that rental of a separate interest by the owner of the separate interest is a commercial use. For example, if a declaration provides that two of three separate interests must be used to operate retail stores and the third must be used as residential rental property, the common interest development would be limited to commercial uses for the purposes of this section.

Respectfully submitted,

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