Study H-856 June 9, 2011

Second Supplement to Memorandum 2011-21

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

The Commission has received a letter from Jeffrey Wagner, a representative of the stakeholder group referenced in Memorandum 2011-21 and its First Supplement, commenting on issues discussed in those memoranda. A copy of the letter is attached as an Exhibit.

Respectfully submitted,

Steve Cohen
Staff Counsel

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

JEFFREY G. WAGNER
VIVIAN H. PARK

(925) 952-9021

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

June 8, 2011

Via Email scohen@clrc.ca.gov & bhebert@clrc.ca.gov

Steve Cohen
Brian Hebert
California Law Revision Commission
c/o UC Davis School of Law
400 Mark Hall Drive, Room 1128
Davis, CA 95616

Re: Memorandum 2011-21

Dear Steve and Brian:

Set forth below are responses from the stakeholder group to certain issues raised in CLRC's Memorandum 2011-21 dated June 1, 2011 (the "Memorandum") and in the First Supplement to the Memorandum dated June 7, 2011 (the "First Supplement") that we wanted to bring to your attention prior to the June 9th meeting.

Residential Rental as "Commercial Use"[Memorandum pp 4-7]: The Memorandum states that the "there are some provisions of the DSA that provide rights or privileges to non-owner occupants". A series of five DSA provision are included that purportedly apply to tenants as well as owners. Three of these provisions, 1353.5, 11353.6 and 1360.5, apply to owners only. We do not think there is any question that although the CC&Rs cannot prohibit an owner from having one pet, an owner that leases the unit can prohibit the tenant from having any pets under the lease agreement. Sections 1361.5 and 1364(d)-(e) do apply to owners and occupants but we do not think these very limited exceptions support a finding of a clear legislative intent to extend DSA rights to tenants. The Legislature has enacted numerous laws affecting the landlord-tenant relationship and protecting tenants rights but in our opinion, the DSA is not one of them.

We support the Memorandum's description that in analyzing this issue the focus should be on the owner's use of the property and not the activity within the separate interest.

Personal Use [Memorandum p 7]: The stakeholder group raised the issue of the treatment of certain uses that do not fit neatly into the category of either residential or commercial use, including boating, camping, parking or storage uses. The Memorandum focused entirely on whether these uses are "commercial". There was no analysis as to whether these uses are "residential". The Memorandum

concludes simply by default that because they are not "commercial" they must be "residential".

As described in the First Supplement, you received information from the stakeholder group regarding the California Department of Real Estate's (DRE) position on projects restricted to these types of uses. The DRE analyzes this from the "residential" standpoint and because these uses do not have any residential component, the DRE's position is that it has no jurisdiction over these projects under the Subdivided Lands Act ("SLA"). As noted, the "industrial or commercial use" language in Section 1373 is virtually identical to the "industrial or commercial use" language in Business and Professions Code §11010.3 exempting commercial and industrial projects from the SLA.

In our opinion, the DRE analysis is the correct analysis in determining whether these projects should be governed by the DSA or the Commercial Act. The DRE as a consumer protection agency has recognized that the protections afforded under the SLA to the purchasers of properties containing single-family detached homes, townhomes, condominiums and apartment units within a stock cooperative do not apply to these projects. The DSA was intended to protect the rights of owners of residences for obvious reasons. It is the owner's home and typically represents one of the largest investments the owner will make. The acquisition of a boat slip, storage space or parking space is not the purchase of a home and does not warrant either the additional protections under the DSA or the additional costs associated with compliance with the DSA requirements. In our opinion, the default should be to the "commercial" not the "residential" side.

Preferred Terminology [Memorandum p7: It is primarily to address the issue discussed above that the stakeholder group recommended revising the name to the "Non-Residential Common Interest Development Act". We would urge the commission to reconsider this recommendation.

Other Recommendations: We would also ask the Commission to reconsider the recommendation made by the group that were not accepted by the staff, including the Common Area in a planned development [Memorandum pp 17 -19]; Amendment of Condominium Plan [Memorandum pp 19 - 21] and the Limitation of Directors and Officers Liability [Memorandum pp 26 - 27]. The group feels these are significant issues affecting nonresidential projects and the law regulating these projects should address these issues. Unfortunately, time did not allow us to respond to the specific staff recommendations but we are prepared to do so if necessary.

First Supplement [p 4]: The First Supplement proposed a clarification to Section 6531 by adding a new Section 6531(b) to read as follows:

> "(b) For the purpose of this section, "commercial use" of a separate interest includes the rental of the separate interest."

Unfortunately this language does not address the issue raised by the stakeholder group. The undersigned has been involved in several projects, typically affordable housing projects, where a single building is developed for retail and apartment rental purposes. Because of the tax credit financing of these types of

projects, the property must be divided into condominiums so that each condominium can be separately financed. One condominium contains the retail space and the other multiple apartment units. In this situation there is a single separate interest (i.e., a single condominium unit) that contains multiple dwelling units or apartments. Although the unit is used for residential purposes, because it operated in effect as an apartment project, the stakeholder group feels this should be considered "commercial use" as previously noted.

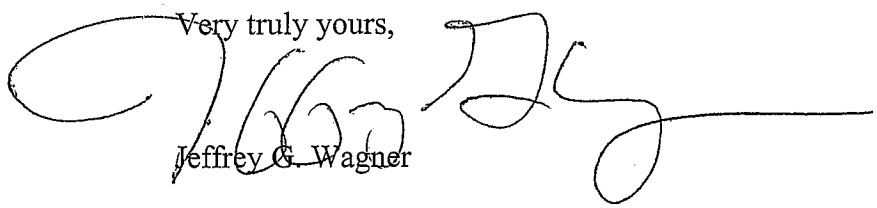
The language proposed in the First Supplement, which applies to any separate interest no matter how may dwelling units within the separate interest, could be interpreted by owners that rent individual units as authority that they are not subject to the DSA. Also the language is not clear on what happens if a separate interest that is rented is subsequently sold to a purchaser who occupies the unit.

We would suggest the revision to Section 6531(b) read as follows:

> "(b) For purposes of this section, a separate interest containing two or more dwelling units held primarily for rental purposes is a "commercial use."

Thank you for your consideration of the above.

Very truly yours,



Jeffrey G. Wagner

JW:ya

cc: CLRC Committee ("Stakeholder Group") Via Email