Study H-856 August 3, 2011

Memorandum 2011-30

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

In this study, the Commission has been considering which provisions of the Davis-Stirling Common Interest Development Act (Civ. Code §§ 1350-1378) (hereafter "Davis-Stirling Act") should apply to an exclusively commercial or industrial common interest development ("CID").

At the June meeting, the Commission began but did not complete consideration of Memorandum 2011-21, which analyzed public comment received on a tentative recommendation distributed in the study, *Commercial and Industrial Common Interest Developments* (Feb. 2011) (hereafter "Tentative Recommendation"). At the upcoming meeting, the staff will complete the presentation of Memorandum 2011-21, and will then present the material in this memorandum, which completes the analysis of public comment received on the Tentative Recommendation to date.

All comments that the Commission has received on the Tentative Recommendation have come from a stakeholder working group comprised of attorneys and property managers who represent commercial or industrial CIDs (hereafter, "stakeholder group"). The comments received from this group are attached as an Exhibit to Memorandum 2011-21.

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

BACKGROUND

The Tentative Recommendation proposes the creation of a new statute that would govern only commercial and industrial CIDs, and would contain only those provisions of the Davis-Stirling Act that the Commission determines to be appropriate for those CIDs.

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.

The Commission has decided that the wording and structure of this statute should, to the extent possible, parallel the Commission's now final recommendation to clarify and recodify the Davis-Stirling Act (*Statutory Clarification and Simplification of CID Law* (February 2011). Legislation that would implement that recodification recommendation is presently pending in the Legislature. See Assembly Bills 805 (Torres) and 806 (Torres). This parallelism will allow the Commission to incorporate in the proposed law improvements that the recodification recommendation would make to existing language, and will assure that provisions common to both statutes are understood to have the same intended meaning.

ORGANIZATION OF MEMORANDUM

To facilitate analysis of the stakeholder group comments, the comments discussed in Memorandum 2011-21, as well as those discussed in this memorandum, are presented in three categories:

(1) Comments on issues that relate only to commercial and industrial CIDs.
(2) Comments on existing provisions of the Davis-Stirling Act that would apply to all CIDs under the proposed law.
(3) Comments on proposed new provisions that would apply to all CIDs under the proposed law.

Comments on defining the types of CIDs that would be governed by the proposed law (or by Civil Code Section 1373 if the proposed law is not enacted) are being considered by the Commission in a separate study, *Common Interest Development Law: Commercial and Industrial Subdivisions*. See Memorandum 2011-29.

ISSUES THAT RELATE ONLY TO COMMERCIAL AND INDUSTRIAL CIDS

Most of the comments from the stakeholder group that apply only to the commercial and industrial CIDs identify statutory provisions that the group believes should be deleted from the proposed law, based on considerations unique to commercial or industrial CIDs. The bulk of those comments were presented in Memorandum 2011-21, beginning on page 8. The Commission began consideration of those issues at its June 2011 meeting. It started to discuss

Section 6856(c), a mandatory attorney fee shifting provision, but did not complete that discussion.

This section of the memorandum provides further information on the attorney fee provision and introduces other new issues relating to commercial and industrial CIDs.

Attorney's Fees in Enforcement Action

The material that follows is intended to supplement the material on this issue presented in Memorandum 2011-21.

Prior Evaluation of Provision

When the Commission previously decided to continue Section 1354(c) in the proposed law, it did so in conjunction with an analysis of a category of provisions that all in some manner relate to a CID's governing documents. Memorandum 2009-32, pp. 30-40. In that analysis, Section 1354 (with the exception of its first sentence) was presented as a single provision falling within that category.

Section 1354 in its entirety reads as follows:

> 1354. (a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.
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> (b) A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association.
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> (c) In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs.

After analyzing the provisions in this category, the Commission concluded that all provisions, including Section 1354, should be continued in the proposed law, based on a number of different considerations. Memorandum 2009-32, pp. 32-33, 40; Minutes (August 2009), p. 5. However, in that analysis, the attorney fee shifting provision in Section 1354(c) was neither separately presented nor separately analyzed.

The stakeholder group has now effectively asked the Commission to reanalyze Section 1354(c) as a stand alone provision, applying its previously

relied upon methodology to only that provision to determine whether the provision should be continued in the proposed law.

Unless the Commission finds that the provision contained in Section 1354(c) needs to be continued in the proposed law in order to give meaning to one or more other provisions that the Commission has decided to continue, the staff sees no reason not to conduct this separate analysis.

Severability

The provision in Section 1354(c) appears to be functionally distinct and severable from the other provisions of the Davis-Stirling Act that the Commission has decided to continue in the proposed law. The other provisions that Section 1354(c) would most logically relate to would be the other provisions in Section 1354, and none of those provisions either reference or appear dependent on Section 1354(c) or its content.

The staff has also found no other provision in the proposed law that references Section 6856(c), the provision that would continue existing Section 1354(c).

Proper Categorization of Provision

In Memorandum 2011-21, the staff noted that Section 1354(c) might be seen as being integrally related to the enforcement of a CID's governing documents. Memorandum 2011-21, p. 15. This suggestion was based on the notion that attorney fee shifting provisions, in general, can facilitate the bringing of an action that otherwise might be unaffordable to the party filing the action.

But unlike several other attorney fee shifting provisions that the Legislature included in the Davis-Stirling Act, Section 1354(c) provides for a shifting of attorney's fees to *either* prevailing party in an enforcement action, rather than just to a prevailing *plaintiff*. *Cf.* Section 1363.09(b) (action to enforce voting or meeting rights), 1365.2(e)(3) (action based on improper records request), 1365.2(f) (action to enforce right to inspect and copy records). A closer consideration of this bilateral and symmetrical fee shifting provided for in Section 1354(c) suggests that the section was actually *not* intended to facilitate judicial enforcement of governing documents.

In *Covenant Mutual Ins. Co. v. Young*, 179 Cal. App. 3d 318, 225 Cal. Rptr. 861 (1986), a prevailing defendant in a breach of warranty action requested that the court grant the defendant statutory attorney fees, despite the fact that the

controlling statute, Civil Code Section 3318, provided for attorney fees only to a party seeking to enforce a warranty (i.e., a prevailing plaintiff). The defendant argued that equity compelled the requested award, as there existed no legal justification for failing to apply the provision in a reciprocal manner. In denying the request, the court discussed the different legislative rationales underlying fee shifting provisions that provide for attorney's fees only to a prevailing plaintiff (so-called unilateral fee shifting provisions), as compared those that provide for the shifting of fees to either prevailing party.

As to the first category, the court explained:

> [Unilateral fee-shifting provisions] are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy…. The fact lawmakers offer a bounty for plaintiffs who sue to enforce a right the Legislature has chosen to favor in no sense implies it intends to offer this same bounty to defendants who show they have not violated the right. Indeed the more logical explanation is that the Legislature desires to encourage injured parties to seek redress — and thus simultaneously enforce public policy — in situations where they otherwise would not find it economical to sue.

Covenant, at 324-25.

On the other hand, the court noted that bilateral fee-shifting provisions are typically meant to *discourage* the filing of litigation:

> Indeed it is entirely possible bilateral fee-shifting would lead to fewer lawsuits and less effective enforcement than is experienced in the absence of any fee-shifting at all. Injured people contemplating a lawsuit would confront the prospect of having to pay the defendant's legal fees as well as their own in the event they lost. This would make the bet even less appealing where the potential recovery was modest or where the chances of winning were good but uncertain.
>
> ….
>
> Under the American rule, the prospective plaintiff does not risk payment of any legal fee — even his own lawyer's — if he loses. But if he loses under two-way fee-shifting he is faced with the risk he will have to pay his opponent's fees. Thus, claimants — especially "risk aversive" ones — are apt to be scared away from filing even highly promising claims by fears of an economic loss they don't have to worry about under the American rule or one way fee shifting.

Covenant, at 325-26, 328; see also *Flannery v. Prentice*, 26 Cal. 4th 572, 585, 28 P.3d 860, 110 Cal. Rptr. 2d 809 (2001).

These rationales suggest that Section 1354(c), rather than being intended to facilitate the enforcement of governing documents, is instead intended to *discourage* such litigation, in favor of promoting alternative dispute resolution.

In fact, prior to its last amendment in 2004, Section 1354 contained several other subdivisions requiring parties seeking to enforce a governing document to first submit their dispute to alternative dispute resolution. And while the 2004 amendment of the section (by a bill implementing a prior Commission recommendation, *Alternative Dispute Resolution in Common Interest Developments* (September 2003)), relocated most of these provisions to a new chapter in the Davis-Stirling Act (see Sections 1369.510 through 1369.590), a connection to the fee shifting provision in Section 1354(c) was maintained through a cross-reference in Section 1369.580.

A closer look at the nature of the fee shifting provided for by Section 1354(c), as well as the provision's legislative history, suggest that the staff may have miscategorized this provision when first presenting it to the Commission for analysis. Analyzing the provision as a stand alone provision suggests that the provision would be more accurately categorized as a provision primarily relating to the facilitation of alternative dispute resolution within a CID.

Foundational vs. Operational

At the same time the Commission analyzed the category of provisions relating to governing documents, it also did a categorical analysis of several other provisions in the Davis-Stirling Act relating to or promoting alternative dispute resolution (Sections 1363.810-1363.850, 1367.1(c)(1(A), 1367.1(c)(1)(B), 1367.1(c)(3), 1367.6, and 1369.510-1369.590), and concluded that none of the provisions in that category should be included in the proposed law. Memorandum 2009-32, pp. 72-74; Minutes (August 2009), p. 5.

That decision was based in part on the staff's characterization of these provisions as being primarily operational in nature, in that all address regular participation by a CID governing body in processes aimed at settling disputes with owners in the CID. Memorandum 2009-32, p. 73.

The staff believes that Section 1354(c), when examined as a stand alone provision, is also properly characterized as at least more operational than foundational. Like the other provisions in this category, it primarily concerns a

process that constitutes a "regular or routine function of a CID governing body." Memorandum 2009-32, p. 3.

Other Relevant Considerations

To the extent that the characterization of a provision as either foundational or operational has been less than clear, the Commission has also looked to other relevant considerations bearing on the ultimate question of whether the provision is needed by commercial or industrial CIDs.

In this instance, as the stakeholder group has noted, the fee shifting provision in Section 1354(c) appears to be much better suited to address disputes involving typically unrepresented homeowners, rather than business entities that are more likely to have both access to legal representation and a greater degree of business sophistication.

Relatively unsophisticated homeowners, as well as their neighbors that make up the homeowner's association, might be seen as needing some protection from both the divisiveness as well as unanticipated escalating costs that can arise from full scale litigation. On the other hand, business owners involved in what is effectively a joint enterprise are likely to be more capable of deciding for themselves the best forum and procedures to resolve whatever internal disputes might arise in the course of their relationship (including *contractually* providing for attorney fee shifting, if deemed appropriate).

Waivability of Provision

Finally, at the Commission's June meeting a question was raised whether Section 1354(c), if it was included in the proposed law, could be contractually waived by parties, or whether such a waiver would likely be barred as violating public policy.

As a general rule, Civil Code Section 3513 provides that while a private statutory protection can always be waived, a provision that implements an important public policy objective cannot. See also *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659, 247 P.3d 130, 121 Cal. Rptr. 3d 58 (2011).

Section 1354(c) does further a public policy objective, i.e., encouraging CIDs to use alternative dispute resolution procedures to resolve disputes over governing documents. However, the staff has been unable to locate any authority definitively answering whether that policy goal would be considered sufficiently important to render the provision unwaivable.

Fineberg v. Harney & Moore, 207 Cal. App. 3d 1049, 255 Cal. Rptr. 299 (1989) is the only appellate opinion the staff has found directly addressing the waivability of a statutory provision regulating attorney's fees. In that case, the court held that the provisions of Business and Professions Code Section 6146, a provision of the Medical Injury Compensation Reform Act of 1975 (MICRA) that limits attorney's fees to specified amounts, could *not* be waived, based on the overriding need to implement that Act. However, the policy objective underlying Section 6146 does not appear to be readily comparable to the policy objective underlying Section 1354(c).

Perhaps the best that can be said at this time is that, if Section 1354(c) were continued in the proposed law, there is arguable authority that would support a finding that the provision could not be contractually waived.

Recommendation

For all of the above reasons, the staff recommends that **proposed Section 6856(f), which would continue existing Section 1354(c), be deleted from the proposed law.**

Assignment of Financial Obligation of Owner

Another provision that the stakeholder group suggests should be deleted from the proposed law is proposed Section 6826(a). Memorandum 2011-21, Exhibit p. 52. Section 6826(a), which continues part of the first sentence of existing Section 1367.1(g) without substantive change, would restrict assignment by an association of its right to collect a payment or assessment from a CID owner, or to enforce or foreclose a lien against an owner. The stakeholder group offers no specific reason for the proposed deletion.

Proposed Section 6826 in its entirety, which would continue the entire first sentence of Section 1367.1(g), provides as follows:

> 6826. (a) An association may not voluntarily assign or pledge the association's right to collect payments or assessments, or to enforce or foreclose a lien to a third party, except when the assignment or pledge is made to a financial institution or lender chartered or licensed under federal or state law, when acting within the scope of that charter or license, as security for a loan obtained by the association.
>
> (b) Nothing in subdivision (a) restricts the right or ability of an association to assign any unpaid obligations of a former member to a third party for purposes of collection.

Prior Analysis of Provision

When the Commission previously decided to continue Section 1367.1(g) in the proposed law, it did so in conjunction with a consideration of eighteen other provisions, almost all from Section 1367.1, relating to an association's collection of payments from a CID owner. Memorandum 2009-32, pp. 67-72.

Although the staff previously suggested that each of these provisions was more appropriately characterized as operational rather than foundational, the staff noted that many of the provisions might nevertheless be needed by commercial and industrial CIDs, in order to provide an assurance of financial stability to prospective purchasers. The staff's thinking was that, in the absence of a statutory framework regulating the means by which a CID ensures its financial survival, some purchasers might be nervous about a CID's ability to do so on its own, and ownership of a separate interest in a CID might become less attractive.

Further, if this latter premise was accepted as a basis for continuing *most* of these provisions, the bulk of the provisions (including Section 1367.1(g)) appeared to be sufficiently statutorily intertwined that discontinuing any individual provision might adversely impact the application of one or more of the continued provisions, or change its intended meaning.

The staff therefore recommended, and the Commission agreed, that virtually all of the provisions in this category, including Section 1367.1(g), should be continued in the proposed law. Memorandum 2009-32, p. 72; Minutes (August 2009), p. 5.

Severability

The stakeholder group now effectively asks the Commission to sever from that group of continued provisions the first portion of the first sentence of Section 1367.1(g), and individually analyze whether that severed portion should be continued in the proposed law.

In the absence of a statutory connection between an individual provision and other provisions that would be continued in the proposed law, the staff sees no reason why the statutory form that provision takes in the Davis-Stirling Act (e.g., a distinct statutory section, subdivision, paragraph, etc.) should preclude individualized consideration of whether the provision should be continued in the proposed law. However, taking another look at the provision that would be continued by Section 6826(a) on an individualized basis, the staff remains

concerned that failure to continue that provision in the proposed law could in fact change the meaning of other provisions from Section 1367.1 that would be continued by the proposed law.

For example, one portion of Section 6826(a) prohibits an association from assigning to a third party its right to enforce or foreclose a lien against one of its owners, except as security for a loan from a specified lender. At the same time, several other provisions from Section 1367.1(g) that would be continued in the proposed law impose procedural requirements on an association before enforcing a lien. See, e.g., Section 1367.1(a) (association must provide owner with a detailed notice at least 30 days before recording lien, provision continued by Section 6812), Section 1367.1(d) (before delinquency may constitute basis for lien, association must record notice of delinquent assessment with county recorder, a copy of which must thereafter be mailed to the owner within a specified time period, provision continued by Section 6814).

The staff is unable to conclude with sufficient certainty that the Legislature, when enacting these latter provisions, did not contemplate that it would be the CID's association, rather than an unrelated third party, that would be the entity seeking to enforce a lien against a delinquent owner. To illustrate, Section 1367.1(a) as worded requires a specified notice to be given 30 days prior to a recording of a lien *by the association*. That provision does not appear to obligate a third party recording a lien to provide the owner any advance notice at all.

And even if the lien enforcement procedural requirements in Section 1367.1 were to be construed as applying to any entity that had been assigned the association's right of enforcement, the discontinuation of the assignment provision would still have a material effect on the operation of those provisions. The board of an association is quite likely to scrupulously adhere to all statutory procedural requirements before clouding an owner's title and significantly affecting an owner's credit, both because of the association's status as a representative of the CID community, as well as in the interest of protecting the association's assets against a lawsuit for damages based on noncompliance. A third party assignee is likely to care very little about any impact its conduct might have on other owners in the community, and if it has no significant assets, may also not be substantially influenced by a possible lawsuit for damages.

Additional Problem with Deletion

Deletion of Section 6826(a) from the proposed law would also necessarily require deletion of Section *6826(b)*, a deletion that was not requested by the stakeholder group, and may not be desired by the entities that the stakeholder group represents.

Section 6826(b) provides that "*Nothing in subdivision (a)* restricts the right or ability of an association to assign any unpaid obligations of a former member to a third party for purposes of collection." (Emphasis added.)

As worded, Section 6826(b) only clarifies the contours of Section 6826(a), and does not *affirmatively* provide an association any right at all. If Section 6826(a) is deleted from the proposed law, Section 6826(b) would have no linguistic meaning, and its continuation in the proposed law as drafted would be hopelessly confusing. The section could instead be substantially revised, but any such revision would change the meaning of the provision.

Recommendation

The stakeholder group does not allege that continuing the provision in Section 6826(a) would create problems in a commercial or industrial CID. In fact, in previous comment to the Commission, the group did not request that the provision be deleted at all. First Supplement to Memorandum 2009-18, Exhibit pp. 5, 10. The staff suggests that whatever small potential improvement that might be realized by deleting the provision is outweighed by the possibility of creating one or more substantive changes to existing law.

The staff recommends that **the Commission continue to include Section 6826(a) in the proposed law.**

Incorporation of Discontinued Provision in a CID Governing Document

Another concern raised by the stakeholder group relevant only to the commercial or industrial CIDs relates to a scenario in which a governing document of a commercial or industrial CID requires compliance with a provision of the Davis-Stirling Act that would not be continued by the proposed law. Memorandum 2011-21, Exhibit p. 62.

For example, assume that a governing document of a commercial or industrial CID has been drafted to require elections to be held in compliance with Section 1363.03 of the Davis-Stirling Act, a section presently applicable to commercial and industrial CIDs, but which would be made inapplicable to these

CIDs by the proposed law. After enactment of the proposed law, that CID would no longer be required *by statute* to hold elections in compliance with Section 1363.03, but might continue to be required to do so by virtue of its governing document provision (likely depending on the provision's precise wording). In many cases, this continued application of the governing document provision may no longer be desired.

To remedy this problem, the stakeholder group suggests that a new provision be added to the proposed law that would automatically invalidate any provision in a governing document of a CID governed by the proposed law that either requires compliance with a Davis-Stirling Act provision not continued in the proposed law, or incorporates the statutory content of such a provision, unless the owners of the CID "elect otherwise." *Id.* In effect, such provisions would be automatically nullified by operation of law, requiring any commercial or industrial CID that did not desire such invalidation to re-adopt the invalidated provision.

Analysis

This suggested new provision is not essential to solve the problem described by the stakeholder group. To the extent that continued operation of a governing document provision incorporating a formerly applicable provision of the Davis-Stirling Act presents a problem for a CID, it could solve the problem by amending the governing document to delete the provision.

However, such amendment would constitute an administrative burden on each CID that found itself with the described problem. If it could be ascertained that in most or all scenarios in which such a governing document provision exists, the CID would desire to be freed from application of the governing document provision, a statutory cure would be quite helpful. Although such a provision would not fit precisely within previously expressed contours of this study (i.e., determining which provisions of the Davis-Stirling Act should no longer be applicable to commercial or industrial CIDs), the study is generally about freeing commercial and industrial CIDs from unwanted and unneeded regulation, and such a provision does relate to achieving that objective.

On the other hand, there may be several instances in which a CID that has included in a governing document a reference to a statutory provision not continued in the proposed law would not *want* that governing document provision voided. The new provision suggested by the stakeholder group would

place the same administrative burden on these CIDs to have to restore the statutorily voided provision.

For example, a CID whose governing documents state that elections are to be governed by the procedures set forth in Section 1363.03 may, having made appropriate accommodations, be quite comfortable being governed by those procedures, and prefer to have its governing documents continue to reflect that governance.

Other statutory references might constitute a convenient shorthand way of declaring an affirmative choice made available by a statutory provision. For example, Section 1363.07 provides that an association's grant of exclusive use of common area to a single owner generally requires a vote of 67% of the CID owners, unless the CID's governing documents specify a different percentage. A CID which had considered this issue and decided that 67% seemed about right might want to memorialize that choice in a governing document provision, but rather than restating the 67% requirement, might decide it is sufficient to simply state that grants of exclusive use are to be determined "as provided in Section 1363.07."

What would appear to be the clearest example of a statutory reference representing the desire of a CID — although perhaps relatively uncommon — would be the incorporation of a Davis-Stirling Act provision from which the CID is statutorily *exempted* by Section 1373. For example, a commercial or industrial CID might wish to voluntarily adopt the statutory limitations on assessments set forth in Section 1366(b), despite the fact that the Legislature chose not to impose those limits on commercial and industrial CIDs across the board. Section 1373(a)(6).

One way that the Commission might approach this issue would be to attempt to determine what would be the better default rule. Who should have the burden of amending governing documents – associations that want to be released from ambiguous provisions incorporating formerly applicable law, or those that would want to preserve the status quo?

If the Commission believes that a significant majority of commercial and industrial CIDs would want to be released from all governing document provisions that reference formerly applicable provisions of the Davis-Stirling Act, then it might be appropriate to add a default provision to that effect. The burden of amending governing documents would then shift to those associations

that want to preserve provisions referencing formerly applicable provisions of law.

But if the Commission is unsure of the most likely preference of commercial and industrial CIDs, or if the Commission believes that most associations would choose to preserve such provisions, then it would be prudent to leave the proposed law unchanged. The burden would then fall on those who wish to be released from such provisions to delete the offensive provisions.

It seems likely that many associations amend their governing documents to add cross-references to Davis-Stirling Act provisions solely as a reminder, to acknowledge the existence of governing law on a particular issue. If that law is later made inapplicable, would the association nevertheless prefer to continue operating under those former requirements? In all likelihood, many would not. The premise of this study is that some of the regulatory provisions of the Davis-Stirling Act are unhelpful or affirmatively burdensome for commercial and industrial CIDs. To the extent that is true, such CIDs would probably want to escape from the unhelpful regulatory burdens. It may well be that *most* commercial and industrial CIDs would feel this way.

On the other hand, another premise of the study is that commercial and industrial CIDs should be free to make their own choices as to operational issues, without legislative interference. A statutory provision globally nullifying certain types of governing document provisions, thereby requiring affirmative action in order to reestablish them, could undercut association self-governance.

Possible Draft Language

The staff is unsure of which approach would do the most good and the least harm. If the Commission decides that the described problem needs to be solved by the CIDs that view these declaration provisions as problematic, then no addition to the proposed law is needed.

On the other hand, if the Commission decides it would be appropriate to recommend that the Legislature address the problem, proposed legislation along the following lines might do so:

(The proposed law is anticipated to become law on January 1, 2013, although it would not become operative until January 1, 2014.)

§ 6507 (NEW). Voiding of governing document provision

6507. (a) A governing document provision is void if both of the following circumstances exist:

(1) The provision was adopted prior to January 1, 2013.

(2) The provision expressly references a provision of the Davis-Stirling Common Interest Development Act that is not continued in the act that added this section.

(b) Nothing in this section precludes an association, on or after January 1, 2013, from adopting a governing document provision that expressly references a provision of the Davis-Stirling Common Interest Development Act.

In the staff's view, the stakeholder group's suggestion that such a rule should also apply to a governing document provision that incorporates some or all of the *substantive content* of a Davis-Stirling Act provision (without expressly incorporating the provision by reference) would be too difficult to implement. It would invite difficult line-drawing disputes about whether a provision is similar enough to the Davis-Stirling Act's requirements to trigger nullification.

Should a provision along the lines discussed above be added to the proposed law?

EXISTING PROVISIONS THAT APPLY TO ALL CIDS

The next category of revisions suggested by the stakeholder group are suggested improvements to provisions that appear in both the proposed legislation and the pending recodification legislation, and constitute continuations of existing Davis-Stirling Act provisions. The suggested revisions are summarized below.

The issues discussed in this section do not involve the question of what provisions should apply to commercial or industrial CIDs. Rather, they are proposals for minor stylistic and substantive improvements to CID law generally. Thus, they do not fall within the scope of the present study.

If it were possible to make minor improvements of the types proposed easily, as mere incidental changes to the proposed law, it would be worth considering doing so. However, the proposed changes would affect language that is common to both the proposed law and the pending recodification language. To make the proposed changes in the proposed law would either result in inconsistency between the two bodies of law, or would require an amendment of the pending legislation to reconcile the two bodies of law. Either result would be problematic.

As a general matter, the staff recommends against making the suggested changes in the proposed laws. Instead, they should be noted for possible

future study (in many cases, they have already been noted for possible future study).

Most of the issues in this section of the memorandum are quite straightforward and probably do not require discussion at a meeting. **In order to conserve meeting time, the staff only intends to discuss the items with the "☞" symbol in the heading. However, the staff will be prepared to discuss any of the issues, if a Commissioner or member of the public believes that discussion is warranted.**

"Common Interest Development"

Proposed Section 6534, continuing relevant language from existing Section 1351(c) verbatim, defines a "common interest development." The stakeholder group suggests that the introductory language of that section be modified as follows:

> 6534. "Common interest development" means any of the following, or a combination thereof:
> (a) A community apartment project.
> (b) A condominium project.
> (c) A planned development.
> (d) A stock cooperative.

Memorandum 2011-21, Exhibit p. 12. The group indicates that some CIDs are now organized as a combination of a planned development and condominium project.

The Commission has already noted this issue for possible future consideration in a separate CID study of formation related issues. Memorandum 2010-47, p. 8.

"Condominium"

Proposed Section 6542 defines a "condominium project" as a "real property development consisting of condominiums." Section 6542(b), continuing the relevant language of existing Section 1351(f) verbatim, then defines a "condominium."

The stakeholder group suggests that Section 6542(b) should be revised as follows:

> (b) A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest ~~in space~~ consisting of a three dimensional space called a

> unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof. ….

Memorandum 2011-21, Exhibit p. 13.

The Commission should note this proposal for consideration as part of a separate study of CID formation issues.

"Declaration"

The proposed legislation would continue the existing definition of the term "declaration:"

> 6546. "Declaration" means the document, however denominated, that contains the information required by Section 6614.

Proposed Section 6614 then defines the required content of a declaration.

The stakeholder group suggests that the definition be revised to mean "a recorded document which establishes equitable servitudes that governs the operation of a common interest development." Memorandum 2011-21, Exhibit p. 13.

The Commission has already discussed possible problems with the definition of "declaration" and the provision governing its contents and noted the issue for possible future consideration in a separate CID study of formation related issues. See Memorandum 2010-47, p. 14.

"Exclusive Use Common Area"

Proposed Section 6550, which would continue existing Section 1351(i) without substantive change, defines the term "exclusive use common area." Subdivision (c) of Section 6550, which continues Section 1351(i)(2), provides as follows:

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

The stakeholder group suggests, with no further explanation, that this subdivision is "too limited in scope," and should either be redrafted or deleted from the proposed law. Memorandum 2011-21, Exhibit p. 14.

The staff is unaware of the nature of any problem posed by this language, and does not know what language the stakeholder group would add to cure any problem. To the extent the stakeholder group seeks future consideration by the Commission of a revision of this section, further comment explaining the need for the revision would be helpful.

☞ "Governing Documents"

Proposed Section 6552**,** which would continue existing Section 1351(j) without substantive change, defines the term "governing documents."

The stakeholder group proposes the following revisions to Section 6552:

> 6552. "Governing documents" means, except as otherwise provided in the declaration, the declaration and any other documents designated by the declaration, such as bylaws, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association.

Memorandum 2011-21, Exhibit p. 15. The group suggests that a CID should be permitted to specify for itself what documents (other than the declaration) are "governing documents." The point seems to be to allow a CID to make clear that certain unusual document types are "governing documents" (e.g., a master declaration, senior ground lease, or reciprocal easement agreement.

The staff believes it would be problematic to allow each CID to determine for itself what constitutes "governing documents." The term is used in statutes to describe the scope and effect of various regulatory requirements. If a CID could decide which documents are "governing documents" it could insulate specific documents from requirements that the Legislature intended to apply to *all* governing documents.

If the point is to make clear that certain documents are governing documents, that could perhaps be accomplished by adding guidance in the Comment, in the proposed law and in the parallel provision of the recodification recommendation, along the following lines:

> **Comment**. With respect to a commercial or industrial common interest development, Section 6552 continues Section 1351(j) without change, except as indicated below.
>
> …
>
> Documents that govern the operation of a common interest development or an association may include, but are not limited to,

master declarations, senior ground leases, or reciprocal easement agreements.

For further information, see Section 6500 Comment.

….

Should such a change be made?

"Common Area"

Proposed Section 6532, which would continue existing Section 1351(b) without substantive change, defines the term "common area."

The stakeholder group suggests that the section be revised as follows:

> 6532. (a) "Common area" means the ~~entire~~ common interest development except the separate interests ~~therein~~. The estate in the common area may be a fee, a life estate, an estate for years, or any combination of the foregoing.
>
> (b) ~~Notwithstanding subdivision (a), in~~ In a planned development ~~described in subdivision (b) of Section 6562, the common area may consist of~~ , mutual or reciprocal easement rights appurtenant to the separate interests are considered common area for purposes of subdivision (b) of Section 6562.

Memorandum 2011-21, Exhibit p. 11.

The issues surrounding the nature of "common area" are highly significant and technically complex. Changes should not be made to the definition of "common area" without careful study and thorough public input.

The staff recommends that the issues be noted for possible future study of CID formation issues.

"Planned Development"

Proposed Section 6562, which would continue existing Section 1351(k) without substantive change, defines a "planned development." The stakeholder group also proposes two revisions to this section:

> 6562. "Planned development" means a real property development (other than a community apartment project, a condominium project, or a stock cooperative) having either or both of the following features:
>
> (a) Common area that is owned either by an association or in common by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of some or all of the common area.
>
> (b) Common area and an association that maintains the common area ~~with the power to levy assessments that may become~~

~~a lien upon the separate interests~~ and has the power to collect assessments and impose liens upon the separate interests in accordance with Article 2 (commencing with Section 6808) of Chapter 6.

Memorandum 2011-21, Exhibit p. 15.

The issues involving the definition of "planned development" are highly significant and technically complex. Changes should not be made to the definition without careful study and thorough public input.

The staff recommends that the issue be noted for possible future study of CID formation issues.

Creation of a CID

Proposed Section 6580, which would continue existing Section 1352 without substantive change, provides that a CID is created when (1) "a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed," and (2) specified documents are recorded.

The stakeholder group suggests that Section 6580 should clarify that the conveyance *to a third party* of a security interest referring to an owner's separate interest (e.g., a deed of trust or mortgage), does not constitute the conveyance required by Section 6580. Memorandum 2011-21, Exhibit p. 17.

This issue has already been considered by the Commission. See Memorandum 2010-29, pp. 20-21. The Commission decided against making the proposed change. **However, the issue could be noted for possible reconsideration as part of a study of formation related issues.**

☞Amendment of Declaration

Proposed Section 6616, which would continue the first sentence of existing Section 1355(b) without substantive change, provides that a declaration that does not itself provide for its amendment at all times is authorized by statute to be amended at any time.

The stakeholder group suggests that language be added to Section 6616 indicating that such an amendment must be "in accordance with" Section 6620, the section of the proposed law that specifies the general procedure for amendment of a declaration. Memorandum 2011-21, Exhibit p. 23.

The staff does not see the need for the proposed cross-reference. Section 6616 only governs the *authority* to amend a specified type of declaration. It seems clear that the *procedure* for such an amendment is provided elsewhere, in Section 6620.

If the Commission sees any ambiguity on that point, it could add a cross-reference to the Comment to proposed Section 6616 (and the parallel provision of the recodification recommendation) along these lines: "For the procedure to amend a declaration, see Section 6620."

Should such a change be made?

Content of Articles of Incorporation

Proposed Section 6622(c), continuing the relevant language of existing Section 1363.5 without substantive change, requires a CID's articles of incorporation to contain (1) a statement that the corporation is an association formed to manage a CID, (2) the address of the corporate office of the association, and (3) the name and address of the association's managing agent, if any.

The stakeholder group suggests, without explanation, that the requirement that the articles provide the name and address of the association's managing agent "is probably not appropriate." Memorandum 2011-21, Exhibit p. 26.

To the extent the stakeholder group desires future consideration of this suggestion by the Commission, the submission of a supporting rationale for any suggested revision of this provision would be helpful.

Lien For Work Performed In Condominium

Proposed Section 6658, which would continue existing Section 1369 without substantive change, contains provisions relating to the recording of a lien for work performed in a condominium project.

While not suggesting any revision to this section, the stakeholder group inquires whether (1) Section 6658 is consistent with current mechanics lien law, and (2) the section makes clear that work on common area in a condominium cannot serve as the basis for a lien on a separate interest. Memorandum 2011-21, Exhibit p. 30.

While this issue is right in the Commission's "wheelhouse" (involving the intersection of two topics that the Commission has studied extensively), it is beyond the scope of the current study.

The staff recommends that it be noted for possible future study.

State Registry Information

Proposed Section 6762, continuing the relevant language of existing Section 1363.6 without substantive change, requires CIDs to provide specified information to the Secretary of State. The stakeholder group suggests that two of the items specified, an identification of the CID association president and a statement of the number of separate interests in the CID, should not be required. Memorandum 2011-21, Exhibit p. 44.

At an informal working group meeting on April 30, representatives of the stakeholder group explained there may be little point in disclosing the number of separate interests in some condominiums. The group described "grid condominiums" in which each separate condominium unit is a fixed unit of space (a square foot). This arrangement facilitates the flexible development and modification of units within the building's envelope, allowing businesses to grow or shrink, without recording a new condominium plan (they simply sell each other the requisite number of "units").

This is an interesting issue, but it is beyond the scope of the current study. **The staff recommends that it be noted for possible future study.**

Identification of Recipient of Assessment Payment

Proposed Section 6810(b), which would continue a portion of existing Section 1367.1(b) without substantive change, provides:

> When an owner makes a payment [to an association], the owner may request a receipt and the association shall provide it. The receipt shall indicate the date of payment and the person who received it.

The stakeholder group suggests that the provision no longer require that the receipt identify the person that received the owner's payment. Memorandum 2011-21, Exhibit p. 47.

The staff does not understand the rationale for this proposed change. In any event, it appears to be beyond the scope of the current study. **It should be noted for possible future study.**

PROPOSED NEW PROVISIONS THAT WOULD APPLY TO ALL CIDS

The stakeholder group has also suggested revisions to *new* provisions that the Commission has proposed to include in both the proposed law and the pending recodification legislation. Those suggestions are summarized below.

Again, because the recodification legislation is now pending in the Legislature, implementation of any of these suggestions would necessarily require either inconsistency between the two bodies of law or a conforming amendment of the pending legislation. That weighs heavily against making the suggested changes in the proposed law.

However, because the relevant provisions would be new, it is worth considering whether the commenters have identified any substantive defects in those provisions that would justify changes to both the proposed law and the pending recodification legislation.

Most of the issues in this section of the memorandum are quite straightforward and probably do not require discussion at a meeting. **In order to conserve meeting time, the staff only intends to discuss the items with the "☞" symbol in the heading. However, the staff will be prepared to discuss any of the issues, if a Commissioner or member of the public believes that discussion is warranted.**

"Express Mail"

The proposed law would include two new provisions relating to delivery of a document by "express mail." See Sections 6512(b)(1) (delivery to an association), 6514(a)(1) (individual notice). The stakeholder group questions whether the term "express mail" should be used in the proposed law. Memorandum 2011-21, Exhibit p. 8.

The concern of the stakeholder group is unclear. "Express mail" is a generally recognized mail service provided by the United States Postal Service. Further, if the concern is the absence of a definition of the term in the proposed law, the staff notes that the term appears without definition in many other existing code sections, and has apparently not caused any confusion or problem. See e.g. Code Civ. Proc. §§ 437c(a), 1005(b), 1013(c).

If the concern is that express mail would be costly, the staff does not see the problem. In each of the provisions of the proposed law that refer to express mail, use of express mail is *optional*. Less expensive methods, including first class mail, are also permitted.

The staff does not see any substantive problem that would be caused by use of the term "express mail" in the referenced sections and recommends against deleting the term.

"Member" vs. "Owner"

Proposed Section 6554, a new section that has no counterpart in the existing Davis-Stirling Act, defines a "member" of a CID to mean "an owner of a separate interest" in a CID. The proposed legislation includes no definition of the term "owner." Neither term is defined in the existing Davis-Stirling Act.

The proposed definition of "member" in Section 6554 is premised on the notion that the terms "member" and "owner" are used interchangeably in the Davis-Stirling Act, with the same meaning (largely because membership in the association is a necessary incident of ownership of a separate interest). The proposed definition codifies that principle, so as to avoid any dispute over whether the use of one term or the other in a particular provision is intended to convey a different meaning.

The stakeholder group suggests that the two terms be uncoupled, with the term "*owner*" defined as "an owner of a separate interest," and the term "member" defined as "a member of the association." Memorandum 2011-21, Exhibit p. 15.

The Commission has discussed this issue more than once, in the course of the recodification study. See, e.g., Memorandum 2010-47, p. 23; Memorandum 2010-57, pp. 3-4. **The staff sees no reason to revisit it in this study.** If the stakeholder group can offer new arguments for why the change should be made, they could be considered as part of a cleanup proposal following the enactment of the pending recodification legislation.

Approval by a Majority of Members

Proposed Section 6522 is a rule of construction. It states what is meant when a provision in the proposed law requires that an action be approved by a majority of a CID's members.

The stakeholder group suggests the following revision to the section:

> 6522. If a provision of this act requires that an action be approved by a majority of all members, the action shall be approved or ratified by ~~an affirmative vote of~~ a majority of the total votes entitled to be cast.

Memorandum 2011-21, Exhibit p. 10. At the April 20 working group meeting with the staff, representatives of the group suggested that the reference in the section to "an affirmative vote" may be ambiguous, as it is not clear whether the reference modifies "majority" or "total votes."

The staff does not see the ambiguity. The section appears to clearly indicate that "approval of an action by a majority of all members" requires an "affirmative" vote (i.e., a positive or "aye" vote) from a majority (i.e., the next whole number greater than half) of the total number of votes that are entitled to be cast in the election relating to the action.

Similar language is used in several existing sections of the Corporations Code. See, e.g., Corp. Code § 5512(a) ("the affirmative vote of the majority of the voting power represented at the meeting"), Corp. Code § 7512(a) (same), Corp. Code § 9412(a) (same), Corp. Code § 12224 ("the affirmative vote of a majority of the votes represented and voting at a duly held meeting").

Absent further support offered for the suggested revision, the staff recommends that **this revision not be made to the proposed law.**

Hierarchy of Governing Documents

Section 6600 of the proposed legislation would add an express statutory hierarchy of governing documents for the purpose of resolving conflicts between governing document provisions:

> 6600. (a) The governing documents may not include a provision that is inconsistent with the law. To the extent of any inconsistency between the governing documents and the law, the law controls.
>
> (b) The articles of incorporation may not include a provision that is inconsistent with the declaration. To the extent of any inconsistency between the articles of incorporation and the declaration, the declaration controls.
>
> (c) The bylaws may not include a provision that is inconsistent with the declaration or the articles of incorporation. To the extent of any inconsistency between the bylaws and the articles of incorporation or declaration, the articles of incorporation or declaration control.
>
> (d) The operating rules may not include a provision that is inconsistent with the declaration, articles of incorporation, or bylaws. To the extent of any inconsistency between the operating rules and the bylaws, articles of incorporation, or declaration, the bylaws, articles of incorporation, or declaration control.

The stakeholder group makes multiple comments relating to this section.

Linguistic Revisions

First, the group suggests that the language of subdivision (a) should be revised as follows:

(a) ~~The governing documents may not include a provision that is inconsistent with the law.~~ To the extent ~~of any inconsistency between~~ the governing documents ~~and~~ conflict with the law, the law controls.

Memorandum 2011-21, Exhibit p. 18. Although not indicated by the stakeholder group, these proposed changes would appear to be equally relevant to the three other subdivisions in the section, as the language pattern in each is identical.

The staff is unsure of the reason for the proposed deletion of the first sentence. It may be that the stakeholder group sees that sentence as superfluous, given that the second sentence establishes the law's supremacy over the terms of the declaration.

However, the first sentence does serve an independent purpose. It makes clear that illegal provisions should not be included in the governing documents. They should not be added to a governing document when it is first drafted or amended, and ideally they should be deleted from an already existing governing document. Although this provision has no enforcement mechanism, it does provide guidance to associations, to keep illegal provisions out of their governing documents.

The staff does not see any substantive problem with the first sentence that would require its deletion.

The revision suggested to the second sentence of the subdivision appears to be a purely stylistic preference, which would not warrant changing the language in the proposed law and the pending legislation.

The staff recommends against making the proposed changes.

Articles of Incorporation

The stakeholder group makes two comments on subdivision (b) of Section 6600, which relates to a CID's articles of incorporation.

First, the group suggests that Section 6600(b) be revised as follows:

The articles of incorporation ~~may not include a provision that is inconsistent with the declaration. To the extent of any inconsistency between the articles of incorporation and the declaration, the declaration controls~~ shall include provisions in compliance with Corporations Code Section 7130 and may include any other provisions permitted by Sections 7131 and 7132 of the Corporations Code which are not inconsistent with the declaration and in the event of any inconsistency the declaration shall control.

See Memorandum 2011-21, Exhibit p. 18.

The staff does not believe that these proposed revisions would cure any substantive problem with the language of proposed Section 6600(b), for two reasons. First, the provision is not intended to define the proper content of the articles of incorporation. Proposed Section 6622 addresses that issue. If a change of the type proposed is needed, it should be made there. Second, such a change does not appear to be needed. Corporations Code Sections 7130-7132 are self-executing. They do not need to be referenced in the proposed law. (Note that they *are* referenced in the Comment to proposed Section 6622, which should be sufficient to educate readers about the relevant provisions of the Corporations Code.)

The staff recommends against making the suggested revisions to Section 6600(b).

The stakeholder group also expresses concern that Section 6600(b) appears to allow a CID to circumvent or trump a provision of its articles of incorporation, by amending its declaration. Memorandum 2011-21, Exhibit p. 18. As examples of the perceived problem, the group questions whether a CID association should be permitted to change provisions in articles of incorporation such as the name of the CID, or the specification of voting classes, through an amendment to its declaration.

The staff does not see the problem. The declaration seems inherently superior to the articles. It is the founding document of a CID, that is recorded with title to every separate interest. It establishes restrictions on the property that bind all owners, present and future. The association is merely an instrumentality created to enforce and effectuate the declaration and manage the CID that was created pursuant to the declaration. If there is a conflict between the declaration and the articles, it seems clear that the declaration should control and the articles should be amended to conform. The apparent alternative, that the declaration should yield to the articles, would have the tail wagging the dog.

Note too that it is generally more difficult to amend the declaration than it is to amend the articles. Thus there is little risk that a declaration amendment will be used as a way to circumvent more rigorous or democratic procedural requirements. In fact, the opposite is true. Amendment of the articles should not be used as a way of getting around the need for a declaration amendment.

The relationship between the declaration and the articles was carefully considered by the Commission when it drafted the hierarchy provision. **The staff**

does not see any problem relating to this relationship that requires amending the provision.

Correction of Statutory Reference in Declaration

Proposed Section 6610, another new provision, would allow a CID to correct a statutory reference in a governing document to a provision of the Davis-Stirling Act by board resolution, if the referenced provision was continued in a new provision of the proposed law:

> 6610. (a) Notwithstanding any other provision of law or provision of the governing documents, if the governing documents include a reference to a provision of the Davis Stirling Common Interest Development Act that was continued in a new provision by the act that added this section, the board may amend the governing documents, solely to correct the cross-reference, by adopting a board resolution that shows the correction.
>
> (b) A declaration that is corrected under this section may be restated in corrected form and recorded, provided that a copy of the board resolution authorizing the corrections is recorded along with the restated declaration.

The intent of the Commission in adding Section 6610 was to allow CIDs to avoid the expense and effort otherwise required to formally amend a governing document, simply to correct an obsolete statutory cross-reference.

The stakeholder group suggests that the section only apply when a former provision is *substantially* continued in a new provision. Memorandum 2011-21, Exhibit p. 22. The staff is unsure of the intended meaning of the proposed change. Perhaps the point is to make clear that perfect fidelity is not required between the former section and the new section that continues it?

Similar issues were considered by the Commission in connection with the recodification study:

> The [State Bar Real Property Law Section Working Group] suggests that the scope of subdivision (a) could be clearer. They ask, "what is the meaning of 'continued in a new provision?'" The group suggests adding "without change" or "without substantive change" to the end of that clause. *Id*.
>
> Requiring continuation "without change" would clearly be too restrictive. Many provisions continued in the proposed law would include nonsubstantive drafting changes. The existence of those purely technical changes should not preclude use of the simplified procedure for correction of statutory references.
>
> Even requiring continuation "without substantive change" might be too restrictive. Bear in mind that governing documents

> cannot trump or modify statutory requirements. To the extent that a governing document includes a reference to a statutory provision, it is probably just to acknowledge the statute's existence and authority on a particular point.
>
> For example, suppose that an association's bylaws provide that the association shall provide members with advance notice of a board meeting "as required by Section 1363.05(f) of the Civil Code." That provision would be continued in proposed Section 4920.
>
> Plainly, it would be helpful if the association could use the simplified procedure to change the reference from Section 1363.05(f) to Section 4920.
>
> Should the association be barred from doing so if Section 4920 makes a substantive change to Section 1363.05(f)? It would make a minor substantive change. The current provision specifies a fixed period for advance notice of a meeting "unless the bylaws provide for a longer period of notice." Proposed Section 4920 would modify that rule, so that the statutory period would yield to a longer period stated in *any* type of governing document (not just the bylaws).
>
> Should that minor change bar the association from using the simplified procedure to update the reference in its governing documents? **The staff does not see the point of such a restriction.** Regardless of whether Section 4920 includes a substantive change, the association is still bound by it. An advisory statement that notice must be given pursuant to Section 4920 remains just as true and useful regardless of whether the substantive requirements of that provision have changed. **In the absence of any further comment on this point, the staff recommends against making either of the suggested revisions.**

Memorandum 2010-48, pp. 13-14 (emphasis in original).

Cross-references to statutory requirements exist as mere reminders of self-executing legal requirements (because the governing documents cannot modify or trump the law). That is why it is appropriate to allow simplified methods to update those cross-references. Such changes are necessarily technical.

In most cases the relationship between a former provision and new provision that "continues" it will be straightforward and the question of whether the former provision is "continued" in a new provision will be easily answered. If there are cases where the answer is less clear, then the simplified procedure need not be used. It is optional.

The staff does not see a problem with the proposed language that would be cured by limiting it to provisions that are "substantially" continued in the new law.

Amendment Procedure

Proposed Section 6620 sets forth statutory procedures for amending a declaration. Subdivision (b) of the section would add a new procedural rule, which has been generalized from related rules found in existing Sections 1355(b) and 1357.

The stakeholder group suggests that the rule in Section 6620(b) should be revised as follows:

> (b) If the declaration does not specify the ~~percentage of members who must~~ vote or consent required to approve an amendment of the declaration, an amendment may be approved by a majority of all members, pursuant to Section 6522.

Memorandum 2011-21, Exhibit p. 25. As explanation, the group notes that a CID declaration might state that a "majority" of members must approve an amendment of the declaration, and points out that a "majority" is not a "percentage." While one can argue the technical merits of this critique, there seems to be no real scope for misunderstanding of the language of the proposed law.

This same revision was suggested to the Commission in the context of the recodification study, and the Commission at that time found the revision unnecessary. Memorandum 2010-48, pp. 21-22; Minutes (October 2010), p. 4.

The staff does not see a need to revisit the issue in this study.

Invalidation of Existing Document by Proposed Law

Proposed Section 6505, another new provision, relates to the validity of documents prepared or actions taken prior to the operative date of the proposed law. The provision is based on a concern expressed by commenters in the recodification study, that a change made by the new law should not invalidate prior actions that were lawful under the former law. See Memorandum 2010-58, pp. 18, 21. For example, a minor change in the statutory form for a reserve study should not invalidate a prior reserve study that was proper under the former law.

Revision Suggested by Stakeholder Group

The stakeholder group suggests that the text of Section 6505 should be revised as follows:

> 6505. Nothing in the act that added this part shall be construed to invalidate ~~a~~ any provision in any governing document prepared or action taken before January 1, 2014, if the ~~document~~ provision or action was proper under the law governing common interest developments at the time that the document was prepared or the action was taken.

Memorandum 2011-21, Exhibit p. 7.

However, limiting the documents referenced in the section to *governing* documents appears both unnecessary and contrary to the Commission's objective in adding the section. The "documents" intended to be referenced by the section were in fact *not* governing documents — the intended reference was to statutory notices and forms, prepared in compliance with applicable law at the time of preparation, but rendered noncompliant by some aspect of the proposed law.

The staff recommends that **this revision not be made to the proposed law.**

☞ *Application of Section 6505 to Governing Documents*

The fact that the stakeholder group read Section 6505 as applying to governing documents is problematic.

The provision should not apply to governing documents. To the extent a governing document is inconsistent with any provision of law, including any new requirement of the proposed law, it should yield to the law. That is the principle expressed in proposed Section 6600 (discussed above).

If Section 6505 can be read as applying to governing documents, then perhaps the section is not clear enough. That could be addressed in one of two ways:

First, the language of the section itself could be revised. For example:

> 6505. Nothing in the act that added this part shall be construed to invalidate a document prepared or action taken before January 1, 2014, if the document or action was proper under the law governing common interest developments at the time that the document was prepared or the action was taken. For the purposes of this section, "document" does not include a governing document.

As discussed before, making such a change to language that is common to the proposed law and the pending recodification language would either introduce a problematic inconsistency between the two bodies of law or it would require a conforming amendment of the pending legislation. It would be best to avoid either of those alternatives, if possible.

Alternatively, the Comment to proposed Section 6505 (and the parallel provision of the recodification recommendation) could be revised along the following lines:

> **Comment**. Section 6505 is new. It makes clear that any changes to former law made by enactment of this act shall not be construed to retroactively invalidate documents prepared or actions taken prior to the operative date of the act.
>
> The term "documents" is used to describe notices, forms, and other procedural or transactional instruments. It is not meant to include the governing documents of the association. Governing documents must conform to the law. See Section 6600.

Should language be added to address this issue? If so, should language be added to the statute or the Comment?

Respectfully submitted,

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