Study H-856 November 18, 2011

Second Supplement to Memorandum 2011-34

Common Interest Developments: Commercial and Industrial Associations (Draft of Recommendation)

The Commission has received further comment on the staff draft recommendation from a group of attorneys and property managers who represent commercial and industrial CIDs (which we have referred to as the "stakeholder group"). The stakeholder group has been working with the Commission on this study since near its beginning. The group's latest submission is analyzed in this supplement, and is attached as an Exhibit.

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

DISCLOSURE OF MANAGING AGENT IN ARTICLES OF INCORPORATION

Section 6622(a) of the proposed law would continue Section 1363.5(a) of the Davis-Stirling Common Interest Development Act (Civ. Code §§ 1350-1378) (hereafter "Davis-Stirling Act"). Section 1363.5(a) requires, among other things, that the articles of incorporation of an incorporated CID include the name and address of the CID's managing agent, if any. Section 1363.5(a)(3). The stakeholder group suggests that this requirement not be continued in the proposed law. See Exhibit p. 1.

The group has offered the following reasons for making that change:

- A CID can change managing agents, in which case the information in the articles will be obsolete.
- The requirement is superfluous, because a CID is also required to name its managing agent in an annual disclosure filed with the Secretary of State under Section 1363.6.
- In a commercial or industrial CID, the person who acts as manager is often also an owner. It may not be clear whether an owner-

manager is a "managing agent" within the meaning of Section 1363.5.

Notably, the first two of those concerns do not involve any special characteristic of commercial or industrial CIDs, as distinguished from residential CIDs. To the extent that those concerns have merit, they apply equally to *all* CIDs. **For that reason, the staff recommends against addressing those issues in the context of this study.** The general point of this study is to identify differences between residential and nonresidential CIDs that justify different treatment. General concerns about all CIDs need to be addressed separately. We have noted those two concerns for possible future study.

The third concern does turn on a distinct characteristic of a commercial or industrial CID — the greater likelihood that an owner in a commercial or industrial CID will also serve as the CID's manager.

The stakeholder group is concerned that this practice could cause some confusion as to what is required by Section 1363.5. Specifically, it might not be clear whether an owner-manager is a "managing agent" for the purposes of that provision. The staff is not sure of the reason for this concern. There does not seem to be any logical or terminological conflict between a person being both an owner and a managing agent. If an owner performs the same duties that would be performed by a managing agent who serves under contract to the association, that owner would seem to be the managing agent.

In any event, if the experts in this area are concerned that the term could create confusion in practice, perhaps some clarifying language could be added to the comment, along these lines: "Nothing in paragraph (a)(3) precludes an owner of a separate interest from serving as the association's managing agent." **Should a change along those lines be made?**

DISCLOSURE OF NUMBER OF SEPARATE INTERESTS IN A CID

Section 6760 of the proposed law would continue Section 1363.6 of the Davis-Stirling Act. As indicated above, Section 1363.6 requires CIDs to file an annual informational disclosure with the Secretary of State. The disclosure must include the number of separate interests in the development. Section 1363.6(a)(10). (Effective January 1, 2012, Section 1363.6(a)(10) will be renumbered as Section 1363.6(a)(11). 2011 Cal. Stat. ch. 204 (AB 657 (Gordon)).)

The stakeholder group asserts that this particular disclosure should not be continued in the proposed law, or in the alternative that it should be revised. Exhibit p. 2. The concern is that disclosure of the number of separate interest would be meaningless in a "grid condominium." A grid condominium is a type of condominium where each separate interest is a fixed unit of space (e.g., a square foot column of space), rather than a "unit" bounded by fixed walls. This arrangement is used in some commercial developments, to facilitate flexible allocation and reallocation of space between owners, without the need for revision of the condominium plan.

The Commission has already considered and decided against implementing this suggestion. Instead, the Commission noted the issue for possible future study. See Memorandum 2010-30, pp. 22; Minutes (August 2011), pp. 3-4.

ELECTRIC VEHICLE CHARGING STATIONS

As indicated in Memorandum 2011-34, Section 1353.9 was added to the Davis-Stirling Act in 2011. 2011 Cal. Stat. ch. 121 (SB 209 (Corbett)). The section protects the right of CID owners to install electric vehicle charging stations on the grounds of their CID, provided that certain requirements are fulfilled. See discussion in Memorandum 2011-34, pp. 11-20.

The stakeholder group suggests that this new legislation should not be continued in the proposed law, or should be substantially revised. Exhibit p. 2. The underlying rationale for the suggestion is that, due to different parking arrangements in a nonresidential CID, the installation of a charging station by an individual owner in a nonresidential CID would in most cases be impractical and too expensive.

Even if that is true, the fact that such installations may not be cost effective for some or most owners in nonresidential CIDs would not appear to be a justification for denying *all* nonresidential CID owners the statutory protection that the Legislature has just enacted. The section imposes no burden on CIDs at all until an owner seeks to invoke the protections of the section. In those cases, the section serves its intended purpose. The staff sees no reason to deny the protections of the new law to commercial and industrial CID property owners, even if most of them do not take advantage of it.

TECHNICAL CORRECTION

Duncan McPherson has informally pointed out a technical issue in proposed Section 6714. That section, addressing improvements an owner may make to the owner's separate interest, includes a reference to a "dwelling."

The use of this term would be confusing as applied to a nonresidential CID. The staff therefore recommends that **the reference be revised to read "separate interest," and that the Commission Comment to Section 6714 be revised, as follows**:

> 6714. (a) Subject to the governing documents and applicable law, a member may do the following:
>
> (1) Make any improvement or alteration within the boundaries of the member's separate interest that does not impair the structural integrity or mechanical systems or lessen the support of any portions of the common interest development.
>
> (2) Modify the member's separate interest, at the member's expense, to facilitate access for persons who are blind, visually handicapped, deaf, or physically disabled, or to alter conditions which could be hazardous to these persons. These modifications may also include modifications of the route from the public way to the door of the separate interest for the purposes of this paragraph if the separate interest is on the ground floor or already accessible by an existing ramp or elevator. The right granted by this paragraph is subject to the following conditions:
>
> (A) The modifications shall be consistent with applicable building code requirements.
>
> (B) The modifications shall be consistent with the intent of otherwise applicable provisions of the governing documents pertaining to safety or aesthetics.
>
> (C) Modifications external to the ~~dwelling~~ separate interest shall not prevent reasonable passage by other residents, and shall be removed by the member when the separate interest is no longer occupied by persons requiring those modifications who are blind, visually handicapped, deaf, or physically disabled.
>
> (D) Any member who intends to modify a separate interest pursuant to this paragraph shall submit plans and specifications to the association for review to determine whether the modifications will comply with the provisions of this paragraph. The association shall not deny approval of the proposed modifications under this paragraph without good cause.
>
> (b) Any change in the exterior appearance of a separate interest shall be in accordance with the governing documents and applicable provisions of law.
>
> **Comment**. With respect to a commercial or industrial common interest development, Section 6714 continues Section 1360 without change, except as indicated below.

The following substantive change is made:

- The scope of the provision is broadened to apply to any separate interest, and not just a unit in a condominium project.

The following nonsubstantive changes are made:

- The word "dwelling" is replaced with "separate interest" in subdivision (a)(2)(C).
- The words "his or her" are not continued in subdivision (a)(2)(D).
- The word "owner" is replaced with "member" throughout. See Section 6554 ("member").

For further information, see Section 6500 Comment.

See also Sections 6528 ("association"), 6534 ("common interest development"), 6552 ("governing documents"), 6564 ("separate interest").

Respectfully submitted,

Steve Cohen
Staff Counsel

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ESTABLISHED 1903

56330-24953

Duncan R. McPherson
Attorney at Law

509 WEST WEBER AVENUE
FIFTH FLOOR
STOCKTON, CA 95203

POST OFFICE BOX 20
STOCKTON, CA 95201-3020

(209) 948-8200
(209) 948-4910 FAX

FROM MODESTO:
(209) 577-8200
(209) 577-4910 FAX

via email [bhebert@clrc.ca.gov]
and via U.S. Mail

November 9, 2011

Brian Hebert
Executive Secretary
California Law Revision Commission
c/o University of California at Davis School of Law
400 Mrak Hall Drive
Davis, California 95616

Re: Memoranda 2011-34 and 2011-35 Comments
by Non-Residential Stakeholder Group

Dear Brian:

Our stakeholder group was able to get together by telephone last week to discuss the two memoranda after the various members were able to review the memoranda and I wanted to relay our comments to you and to Steve Cohen prior to the CLRC Meeting on November 29, 2011. As I had previously told you we are pleased with the conclusions reached in Memorandum 2011-35 regarding the basis of the distinction between residential and non-residential common interest development (CID) projects and the real underlying reasons for the additional regulation of the operations of residential projects. We also are pleased with the language of the proposed code sections drawing the distinction between residential and non-residential for the proposals will both draw a clear line between what is considered residential and what is not and preserve current status of the Department of Real Estate jurisdiction. If there are going to be two separate acts then it is imperative that there be a clear understandable line between what is considered residential and what is not.

With Regard to Memorandum 2011-34 our group is generally in agreement with the conclusions but has a small number of matters to bring to your attention.

1. **Sections 1363.5 and 6622. Page 4**. We think that it would be better policy to not have the articles of incorporation contain the name of the association manager. The managers change frequently in CIDs and the manager is often changed at the time when projects are no longer under the control of the original developer. Having the name of a manager who is no longer managing a project enshrined in the articles of incorporation is not a good policy. It is not a good policy in a residential project and even less so in commercial project where the manager position is often filled by one of the major owners. The policy of disclosing the manager's name is better served in the ongoing Secretary of State filings where current information can be easily placed in the filing.

2. **Section 6760**. We think that it would be better not to require the state registry for commercial projects to include the number of separate interests. The problem is with commercial condominiums which can contain bar or grid systems to allow changes in the size and configuration of units. Sometimes a project can have thousands of grids perhaps as small as one foot square. Even where this is not done some buildings are subdivided into units of from a few hundred square feet to over a thousand square feet with the ownership of a single business typically involving owning a series of these smaller units for a single operating business. Each of these is technically a condominium unit. Some other measure needs to be in the commercial act to prevent an association from having to disclose this entirely misleading information. Perhaps in this case the separate interests could be defined to be what is used as a single operating unit and not technical separate interests.

3. **Senate Bill 209**. Our group is not concerned about the use of vehicle charging stations but SB 209 as a method of achieving this goal is impractical and generally unworkable even though its goals may be laudable. The problem of course is not legal issues but the practical and expense issues with bringing power and especially high voltage power to a parking area in a commercial development and having that power separately metered. In residential complexes where the houses or condominium units contain individual garages or adjacent exclusive use parking this may work. We are not aware of why any residential project would oppose chargers with or without the law if the station is in garage or parking are which is part of a unit or lot or in exclusive use common area. However outside of those areas unless the project developer or the association installs systems, the cost of bringing metered power to an outside parking space is impractical and too costly and no one in the groups representing owners associations expects SB 209 to be useable due to the cost factors. The situation in non-residential CIDs makes this even harder on a practical basis. Generally there is no exclusive use parking and parking is in lots surrounding or off to the side of a building. Employee parking may be even more isolated and located away from the closer-in parking reserved for customers and clients. The other common situation is that parking is in a stacked garage. The idea of having a single owner pay to extend power to these areas is not practical. A huge amount of time was spent on analysis of this issue but from a practical basis SB 209 makes little sense in a commercial setting. What does make sense is the efforts of local jurisdictions to require wiring for charging systems when new projects are built based on the specific designs and use of the commercial buildings. We would strongly suggest leaving this language out of the non-residential legislation or confining the language to allow an owner to install charging systems in separate interests and exclusive use common areas. While none of us is opposed to making it easy to use electric vehicles this legislation in its present form is just not a practical method for doing so in a commercial setting.

Very truly yours,

DUNCAN R. McPHERSON

DRM:clm
cc: Steve Cohen, Staff Counsel
Members of Stakeholder's Group