Study H-858 November 27, 2012

First Supplement to Memorandum 2012-48

Common Interest Development Law:
Commercial and Industrial Subdivisions
(Comments on Tentative Recommendation)

In Memorandum 2012-48, the staff indicated that the Commission had not received any public comment on its recent tentative recommendation on *Commercial and Industrial Subdivisions*. That is not correct. The Commission had in fact received one timely comment letter, from Edward P. Weber of Santa Rosa. (The staff had been communicating informally with Mr. Weber for some time and had overlooked the fact that his latest letter was intended for formal submission to the Commission.)

Mr. Weber's letter is attached to this supplement and discussed below.

EFFECT OF PROPOSED LAW ON RECREATIONAL CID

Background

Mr. Weber is a shareholder in "R-Ranch," a real property development that provides recreational amenities to its members. Mr. Weber argues that R-Ranch is a common interest development and is therefore governed by the Davis-Stirling Common Interest Development Act (hereafter "Davis-Stirling Act"). However, he also informs us that the status of R-Ranch is in dispute and has been the subject of litigation. See Exhibit pp. 1-2. **The staff takes no position on whether R-Ranch is a CID.**

In any event, Mr. Weber believes that the Davis-Stirling Act currently applies to R-Ranch and he objects to any change in the law that would limit the application of the Davis-Stirling Act to R-Ranch. He is apparently concerned that the reforms proposed in this study would have that effect, by classifying R-Ranch as "nonresidential."

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.

Short-Term Residential Use

In considering what types of property uses should be considered "residential" uses, the Commission proposed an exception for short-term residential uses. Specifically:

> [The] following uses are not considered to be residential uses and the fact that one or more of these uses is permitted within a common interest development does not make the common interest development a "residential common interest development":
>
> …
>
> (3) The short-term residential occupation of a boat, trailer, or motor vehicle that is located on but not permanently affixed to a separate interest. For the purposes of this paragraph "short-term occupation" means occupation for no more than 60 days out of each calendar year.

Proposed Civ. Code § 4203(b)(3).

In other words, if a development permits residential occupation of 60 or fewer days per year, that would not be considered a residential use under the proposed law. The fact that such use is permitted would not be enough, by itself, to make a development "residential."

Conversely, if a development permits residential occupation for more than 60 days per year, such occupation would be a residential use. A development that permits such lengthy residential stays would be a residential development and would therefore not be affected by the proposed law.

It is important to emphasize that the proposed law's classification of residential and nonresidential developments turns on *permissible* uses. If long-term residential stays are *permitted* in a development, under the law and the development's governing documents, then that development would be residential. It does not matter whether long-term residential occupation actually occurs, it is sufficient that such use is not prohibited.

In informal communications, Mr. Weber has indicated that R-Ranch permits owners to reside in its campgrounds and cabins for considerably more than 60 days per year (perhaps as much as 335 days in any given year). If that is correct, then the residential use that is permitted at R-Ranch would not fall within the exception for short-term residential occupation. It would simply be a permitted residential use, which would be sufficient to take R-Ranch out of the definition of "nonresidential" subdivisions. As a consequence, the proposed law should not

have any effect on R-Ranch (or any recreational development that permits residential stays of more than 60 days per year).

Related Issues

However, in examining the specific language set out above, the staff now sees a different problem. The exception in proposed Section 4203(b)(3) focuses on the occupation of a "boat, trailer, or motor vehicle." Read literally, that would not encompass other types of transitory residential occupation. For example, tent camping would not be included. Nor would stays within more permanent residential structures, such as cabins or sleeping rooms in a shared lodge.

That distinction does not seem to make sense in terms of the policy underlying proposed Section 4203(b)(3). The point of that provision is to make clear that *short-term* residential use does not make a CID residential. That time-based principle would seem to apply equally, regardless of the physical circumstances in which the residential use occurs. In other words, when defining short-term residential use, there seems to be no reason to distinguish between sleeping in a tent, a tent-trailer, a cabin, or a lodge.

Nor does there seem to be a good policy reason to limit the short-term residential use exception to use of a *separate interest*. It is possible that a recreational CID could have facilities in the common area that are available for short-term residential use. Again, if the principle underlying Section 4203(b) is based on the *duration* of short-term residential use, it shouldn't matter *where* within the CID that use occurs.

If the Commission agrees with the points made above, the language in proposed Section 4203(b) (and the parallel language in proposed Business and Professions Code Section 11002) could be broadened, along the following lines:

> [The] following uses are not considered to be residential uses and the fact that one or more of these uses is permitted within a common interest development does not make the common interest development a "residential common interest development":
>
> …
>
> (3) The short-term residential occupation of ~~a boat, trailer, or motor vehicle that is located on but not permanently affixed to a separate interest~~ space within the common interest development. For the purposes of this paragraph "short-term residential occupation" means residential occupation for no more than 60 days out of each calendar year.

This revision would not require any change to the Comment. **Should such a revision be made?**

EFFECT OF PROPOSED LAW ON TIME-SHARE INTERESTS

Mr. Weber has also informally asked how the time limitation provision discussed above would affect time-shares.

The proposed law does not directly address that issue, because time-shares are regulated under their own statute, the Vacation Ownership and Time-share Act of 2004 ("Time-Share Act"). See Bus. & Prof. Code § 11210 *et seq*. The Time-Share Act already exempts time-shares from several of the provisions of the Davis-Stirling Act:

> Any time-share plan registered pursuant to this chapter to which the Davis-Stirling Common Interest Development Act (Chapter 1 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code) might otherwise apply is exempt from that act, except for Sections 1354, 1355, 1355.5, 1356, 1357, 1358, 1361, 1361.5, 1362, 1363.05, 1364, 1365.5, 1370, and 1371 of the Civil Code.

Bus. & Prof. Code § 11211.7(a). Moreover, if there is any inconsistency between the applicable provisions of the Davis-Stirling Act and the Time-Share Act, the Time-Share Act controls. Bus. & Prof. Code § 11211.7(b).

It seems unlikely that a time-share would prohibit owners from buying shares for more than 60 days occupation per year. In practice, most owners would probably not buy that many shares, but the staff sees no reason why a time-share's governing documents would prohibit that level of ownership. If that is correct, then the short-term occupation exception would not apply (because long-term occupation is permissible).

Nonetheless, it is *possible* that a time-share could include a short-term occupation limitation, in which case, the proposed law might classify the time-share as nonresidential. That would interfere with existing policy, because it would exempt the time-share from some Davis-Stirling Act provisions that the Legislature expressly decided should apply to time-shares (e.g., Civ. Code §§ 1365, 1365.5).

In order to avoid any unintended disruption of the existing time-share regulatory regime, the staff recommends that language be added to expressly preclude the application of the proposed law to residential time-shares. This could be accomplished by adding a subdivision along the following lines to

proposed Business and Professions Code Section 11002 and proposed Civil Code Section 4203:

> Notwithstanding the foregoing, "nonresidential subdivision" does not include time-share property that is governed by the Vacation Ownership and Time-Share Act of 2004.

Should such a change be made?

APPLICATION OF DAVIS-STIRLING ACT

Even if the proposed law in this study would not affect R-Ranch, Mr. Weber is concerned that the proposed law would set a precedent, making it easier for a future Legislature to exempt developments like R-Ranch from the application of the Davis-Stirling Act. He urges the Commission to forestall that possibility, by instead broadening the application of the Davis-Stirling Act to include a wider range of joint property ownership forms. See Exhibit pp. 3-4.

Such a reform is not within the scope of the current study. However, we have been maintaining a list of suggested reforms to the Davis-Stirling Act, which already includes suggestions relating to the scope of application of the Davis-Stirling Act. **The staff recommends that we add this new suggestion to the list.**

TECHNICAL DRAFTING ISSUES

The staff sees two technical changes that could be made to the proposed legislation. The first involves a drafting oversight that should be corrected. The second presents a possible simplification of the structure of the proposed legislation.

Drafting Oversight

Proposed Civil Code Section 4202(a) would replace a reference to commercial and industrial common interest developments with a reference to "nonresidential" common interest developments:

> 4202. (a) The following provisions do not apply to a nonresidential common interest development ~~that is limited to industrial or commercial uses by zoning or by a declaration of covenants, conditions, and restrictions that has been recorded in the official records of each county in which the common interest development is located~~:
>
> …

A parallel change should be made in subdivision (b) of that section, thus:

> (b) The Legislature finds that the provisions listed in subdivision (a) are appropriate to protect purchasers in residential common interest developments, however, the provisions may not be necessary to protect purchasers in ~~commercial or industrial~~ nonresidential developments since the application of those provisions could result in unnecessary burdens and costs for these types of developments.

That revision would not require any change to the associated Comment.

Structural Simplification

The proposed law defines "nonresidential" indirectly, by first defining "residential" and then providing that anything that is not "residential" is "nonresidential." See, e.g., proposed Civ. Code § 4203(a)-(b) ("residential common interest development" defined), (c) ("nonresidential common interest development" defined).

While that approach works, it is somewhat convoluted. Before finalizing its recommendation, the Commission might want to consider simplifying the drafting structure of Business and Professions Code Section 11002 and Civil Code Section 4203. For example, proposed Section 4203 could be revised along these lines:

> 4203. (a) For the purposes of this section, "~~residential~~ nonresidential common interest development" means a common interest development in which residential use is not permitted by ~~both~~ law ~~and~~ or by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the common interest development is located.
>
> (b) For the purposes of subdivision (a), the following uses are not considered to be residential uses ~~and the fact that one or more of these uses is permitted within a common interest development does not make the common interest development a "residential common interest development"~~:
>
> (1) The operation of a residential rental business within a separate interest that contains three or more apartment units.
>
> (2) The provision of living space to an agent or employee of the association or a business that is located within the common interest development, as an incident of agency or employment. For the purposes of this paragraph, "agent or employee" includes, but is not limited to, a property manager, caretaker, or security guard.
>
> (3) The short-term residential occupation of a boat, trailer, or motor vehicle that is located on but not permanently affixed to a separate interest. For the purposes of this paragraph "short-term

occupation" means occupation for no more than 60 days out of each calendar year.

~~(c) For the purposes of Section 4202, "nonresidential common interest development" means any common interest development that is not a residential common interest development.~~

If such a change is made, the corresponding Comments for Sections 4203 and 11002 would need to be adjusted. For example:

Comment. Section 4203 is new. Subdivision (a) defines "~~residential~~ nonresidential common interest development" for the purposes of the section. Under the definition, if ~~both~~ either the law ~~and any~~ or a recorded declaration of covenants, conditions, and restrictions does not permit any residential use within a common interest development, the common interest development is a "~~residential~~ nonresidential common interest development."

Subdivision (b) states specific exceptions to the general rule provided in subdivision (a). The fact that one or more of the uses listed in subdivision (b) is permitted within a common interest development ~~is not enough to make the common interest development a "residential common interest development."~~ would not affect the classification of the common interest development as "nonresidential."

Subdivision (b)(3) establishes an exception for "short-term occupation," which is defined as 60 days out of each calendar year. For a similar short-term occupation rule, see Section 51.3(d) (60 day per year exception to age restrictions on occupants of senior housing).

~~Under subdivision (c), any common interest development in which residential use is entirely precluded, by law or by a recorded declaration of covenants, conditions, and restrictions, is a "nonresidential common interest development."~~

See also Section 4202 (exemption of nonresidential common interest development from specified provisions of this act).

Should proposed Business and Professions Code Section 11002 and proposed Civil Code Section 4203 be revised along those lines?

NEXT STEP

Having considered the issues set out above, the Commission will need to decide whether it is ready to approve a final recommendation. If it does, the staff would look for an author to introduce implementing legislation in 2013 (which would be coordinated with any legislation implementing the Commission's recommendation on *Commercial and Industrial Common Interest Developments* (Aug. 2012)).

The alternative would be to postpone approving a recommendation, in order to provide more time to consider the issues raised above (and any new issues that might surface in future public comment and deliberations). This could delay the introduction of implementing legislation.

Respectfully submitted,

Brian Hebert
Executive Director

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September 12, 2012

Brian Hebert
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California Law Revision Commission

Dear Brian,

let me begin by re-stating my interest and viewpoint on how important the protections of DSA are to me and the more than 10,000 shareholders of R-Ranch properties in CA.

The original R-Ranch of which I am one of 2500 shareholders, is 5300 acres of gloriously wild vacationland, including a few acres of fully developed campsites for owners only, and Klamath River frontage, located along I-5 in Hornbrook CA, just 20 miles below the Oregon border. We have about 10 permanent residences on the property and about 70 bunkhouse rooms; but the majority of owners use the ranch as a personal campground since its founding in 1971. At any given time each summer, as many as 400 ranch owners/shareholders may be residing in their own mobile vacation residence on their R-Ranch properties, occupying one of the fully equipped (water + electric) campsites that have been developed and are maintained for the exclusive use of owners and guests. R-Ranch offers no accommodation to the public. My 40 ft fifth wheel trailer never leaves the ranch and spends most of the time in a reserved space in storage.

Self governance under DSA is simply vital to our community interest and operations. I am so diligent in this matter because we titleholders/association members are under constant attack and challenge to our DSA status by opportunistic law firms and their clients who appear to have an interest in subverting the "non-profit vacation property" nature of our ranch. Rumors of billions in rich minerals beneath our mountains and the desire of some real estate speculators to commercialize our operation against the will of ownership have already cost us hundreds of thousands of dollars defending owner interests in court, indebting ourselves through legal fees to attorneys. It is the lack of clarity in the law that is destroying my investment in this unique residential property..

For decades, the law firm of McCarthy & Rubright, formerly representing my association and still today representing the R-Ranch in Platina CA, has successfully defended R-Ranch properties as within the definition of a CID protected by Davis-Stirling. Superior Court in Siskiyou County has continuously affirmed such status in the face of numerous challenging legal actions.

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Nonetheless, approximately 2 years ago, the law firm of Duncan McPherson et al, Neumiller & Beardslee, was retained by an R-Ranch board of directors, newly elected in a controversial process that ended up in court, to replace the McCarthy firm. Clifford Stevens, the principal of Neumiller & Beardslee in ranch representation, and a bankruptcy specialist, immediately asserted to members that we shareholders are not under the protections of DSA, and he set about spending extraordinary amounts of our reserve funds to challenge our own primary protections under California law. To wit, the matter is confounding Siskiyou County courts right now, as various new assertions are being made in active cases before the bench. I feel we are being deliberately bankrupted to be seized by this firm for fees.

Thus, I must continue to press you as the Executive of CLRC, to make certain to protect, rather than abandon, the inclusion of properties fitting the definitions of R-Ranch in any changed language of the Act and the developments to which it applies.

It has been disconcerting and ethically questionable to now discover an attorney-member of the CLRC so-called "Stakeholders Group" whose suggestions may be an attempt to write the R-Ranches out of the DSA law and enable other purposing of our properties. You must not allow this to continue lest the CLRC finds itself entwined in this all-too-obvious "big dog eats little dog" effort to subvert the best interests of thousands of California citizens who have purchased their interests in R-Ranch under the DRE designation as CID with the guaranteed protections of DSA. I also must take offense at designating a group of paid attorneys as stakeholders when it is we, the association members/investors, who are the actual stakeholders. The attorneys take our money and eat steak!

I pray you take my words to heart and shore up the DSA protections on which we rely. As early as 1994, the California DRE, itself, insisted that our owned-in-common R-Ranch properties, founded in 1971, properly fall under the definition of a subdivision "Common Interest Development," and thus the agency demanded that we file and maintain a public report. The DRE made their determination based on the nature of R-Ranch's "common property ownership interests in a common area run by an owner's association for the benefit of property owners, whose ownership certifies each shareholder's automatic membership in said association upon said purchase of an undivided interest." From that time forward, the R-Ranch properties have operated as directed, attempting to follow the DSA law. Indeed, our ranch in Hornbrook CA even voted by membership ballot to write DSA into our own Bylaws, where it is quoted today.

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Where this leaves us is in a place where the CLRC appears to not have considered in the proposed revisions to DSA you have put forth in H-858 Tentative recommendations; that is, I find no changes proposed which are based upon insuring the best interests of the California citizens in need of protection. Rather, I find a slippery slope I do not intend to slide down in naiveté.

Thus, I have a new recommendation for the commission to consider: that is, to re-examine the language extant in defining a CID, and to draft a rewrite which is inclusive of those most in need of protection from the law... the property owners at financial risk. Before I begin discussing my recommendation for changes in defining language, let me add that I am 69 years old, and that I believe the majority of R-Ranch owners are older Californians like me who deserve the peace of resolution herein, rather than the apparent opportunism and legal conflict that has been driving the discussion to the unconscionable benefit of profiteers, some of whom are trying to influence the CLRC directly with malice.

I surely take ownership of my own inexperience in authoring law, although I worked very closely with the Assembly Transportation Committee through Assembly Member Bill Filante years ago in developing ridesharing law. I have no legal degrees; I hold a degree in Journalism, however, which, I trust, allows me to write with clarity and directness.

I have reviewed many sources to present the draft language below for your consideration. I will be pleased to appear as a witness before the commission at your request. Here is my proposed change in language:

<u>Weber draft#1 Alternative Definition of a Community Interest Development</u>

It is the intent of the California Legislature to extend the protections of the Davis-Stirling Act to any and every California property owner who demonstrates a need for such protections. Therefore, in the best interest of the citizens of California, a Common Interest Development is declared to be any nonprofit corporation, validated by a federal, state or local government agency, purposed to manage and maintain property held in common by any group of California citizens, for any purpose of residence, full or part time. The corporation defined herein is declared to exist at the pleasure of said property owners, who control its activities by simple majority ballot; and that the governing corporation exists solely as a mechanism to provide and supply services determined as necessary by members, to maintain common areas, to enforce CC&Rs and governing documents, and to collect assessment fees as approved by its members/title-holders.

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Please consider that we share the goal of assuring the actualization of state law as it is intended, to protect and guarantee safety to the citizens of California. It is towards that goal that I have actively participated with CLRC in the refinement of CID law, and I appreciate your indulgence of my commitment and your appreciation of my faith in this process.

Sincerely,

Edward P. Weber