Study H-858 December 13, 2012

Fourth Supplement to Memorandum 2012-48

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

The Commission has received more letters commenting on its tentative recommendation on *Nonresidential Subdivisions* (Aug. 2012). They are attached in the Exhibit, as follows:

Respectfully submitted,

Brian Hebert
Executive Director

EMAIL FROM SUSAN BOSTWICK
(12/10/12)

RE: CALIFORNIA LAW REVISION COMMISSION STAFF MEMORANDUM

Study H-858
December 7, 2012
Second Supplement to Memorandum 2012-48
Common Interest Development Law: Commercial and Industrial Subdivisions (Comments on Tentative Recommendation)
December 11.2012

TO BRIAN HEBERT, EXECUTIVE DIRECTOR

TO Steve Cohen

Dear Sirs:

Please read my letter before you make proposed changes to the Davis-Stirling Act. I understand that you have had little response to your commission's work regarding the Davis-Stirling Act proposed changes. I pray that this letter and other letters from R-Ranch Hornbrook owners will give you pause to see that all the information is not in and that a decision is not appropriate at this time.

I am a property owner--Share #0128--of R-Ranch Hornbrook. I have been given in the last two days the memorandums coming from your office.

I am very concerned about my property rights in our type of CID being abridged by the changes you propose in Davis Stirling.

I have read the letters of Ed Weber, fellow R-Ranch Owner, as well as letters former President of our R-Ranch POA Board of Directors, Art Bullock. I fully support their statements and conclusions in defense of retaining protection for Property Owners in our type of CID with the Davis-Stirling Act.

I have no legal background. I am simply one of the people, property owners, who will suffer if we do not have protection of the Davis-Stirling Act.

I want: open meetings, accountability, transparency in all actions by our Property Owners Association Board of Directors. We are a non-profit organization incorporated specifically to provide recreation for our share-holders. We have been subject to NO financial reports for 2012 with demands for reports being ignored by the Directors of the POA; higher assessments with no real explanations and there have been hidden agendas with closed meetings. We, the owners of R-Ranch-Hornbrook, need the Davis-Stirling Act.

We need to hold our POA Board of Directors accountable to the people, all the people who share ownership.

The legal firm of Duncan McPherson of Neumiller&Bearadslee, who have been lobbying your office to exempt our Property Owners Association from Davis-Sterling protection (in the actions of attorney Chris Stevens) has created a real threat with lawsuit after lawsuit against R-Ranch Hornbrook owners in an apparent attempt to bankrupt our property. They are solidly against having the Davis-Stirling Act apply to our property association. WHY?

I am very concerned that the greed and malfeasance of some of our own Board of Directors is destroying our property with the help of Duncan McPherson of Neumiller&Bearadslee and Chris Stevens, whom the POA Board has hired as a bankruptcy attorney.

Davis-Stirling is all we have to protect property owners in this type of CID from closed-door tactics and these type of predatory lawyers. Do not trample on the rights of property owners by exempting our CID from Davis Stirling. Please go back to the drawing boards and hear more from The People who will be most hurt by your current proposed changes in Davis-Stirling.

Best Regards,

Susan Bostwick
R-Ranch Owner Share # 0128
and Proxy for
Leland J. Soares
R-Ranch Owner Share # 0127

A Public Comment Response To MM12-48s2

December 11, 2012

Dear Brian Hebert, Steve Cohen, CLRC Staff, and CLRC Commission,

This document is a Public Comment response to MM12-48s2, released last week for a decision this week. Section § references are to the Civil Code, using the new numbering to be implemented in 2014.

Supplement 2 provides further evidence to support the only submission during the comment period, which explained that H-858 is being used improperly to surreptitiously remove Davis-Stirling rights.

MM12-48s2 does not resolve or address the major legal issues identified in the 2012Dec7 response to MM12-48s1. That response and Supplement 2 were sent about the same time, each without knowledge of the other. Page references herein are to MM12-48s2 unless expressly stated otherwise.

H-858 should not be approved in any of the 3 forms presented in the last 3 weeks, MM12-48, MM12-48s1, or MM12-48s2. All 3 variations share a long list of fundamental problems that will cause unnecessary lawsuits. Last minute Supplement 2 changes (MM12-48s2) make the previous problems worse.

1. H-858 introduces a new undefined word of 'nonresidential' which exists nowhere in current Davis-Stirling (DS). This label has never been a criterion for DS applicability or exceptions, and is unjustified now.

2. The word 'nonresidential' relies on a false dichotomy of residential vs. nonresidential developments, and will cause significant problems for current DS CIDs for whom neither label is accurate. As identified in earlier memoranda, this is a theoretical problem (still unresolved) because some CIDs are not standard housing developments, nor are they 'nonresidential'. The 2012Dec7 response to MM12-48s1 details this problem.

Supplements 1 and 2 show why this frame was avoided in current DS jurisdiction sections. Paragraph after paragraph introduces new complications, 'short-term residential use', 'temporary residential use', occupation of a common area hotel by Owners, 'common area lodge', 'overnight stays', the number of overnight stays required to be 'residential', 'incidental residential use', etc.. This is only the start of Pandora's box.

3. As before, nonresidential developments are 'defined' based on an undefined opposite, 'residential' uses. Establishing the allowance or prohibition of 'residential' uses has never been required of any DS CID. This dichotomy is irrelevant to the 3 special cases in H-858's scope, parking/storage condominiums and marinas.

4. H-858 is incorrectly drawn as exception legislation. Instead of defining exceptions as narrowly as possible to give relief to 3 special cases, H-858 uses broad language that would produce many more exceptions.

5. There are no facts in the record for the public or the Commission to know the number, even an estimate, of how many CIDs would lose DS rights in this suddenly broad exception language.

6. There are still no facts in the record to justify <u>any</u> exception, as detailed in the 2012Dec7 response.

7. Instead of narrowly defining 3 exceptions, Supplement 2 broadens the definition with vague language.

8. Instead of relying strictly on zoning law, as in the current DS, H-858 dramatically expands the burden by unnecessarily invoking all law.

9. Staff recommended replacing 'not permitted' in Supplement 1 with 'prohibit' in Supplement 2. MM12-48s2, pg 2. Staff had avoided that phrasing because 'prohibits' does not include indirect restrictions. Supplement 2's Comment explains that 'prohibits' includes 'restrictions that effectively preclude any residential use'.

This is another example of *the large print giveth and the small print taketh away.* It is improper to use comments to reframe a word in the law to mean anything other than its common meaning. Comments are not part of the law and cannot be considered by courts unless a particular word or phrase is ambiguous. False understanding is not improved understanding. It does not improve understanding of the law when the words of the law knowingly do not express the exact intent, as here.

H-858 should not be approved in its Supplement 2 form because it continues an improper dynamic of using outside-the-law Comments to significantly alter the common meaning of words in the law.

10. Words still do not match the music. Page 3 states "In general, the proposed law would provide that a development is "residential" if it permits <u>any</u> residential use." (quotes and emphasis in original).

This sentence is untrue. Nothing in the law establishes anything of the sort. As written, the text of the law does the exact opposite. If any law <u>prohibits</u> (directly or indirectly according to the Comment) residential use,

then it is nonresidential use. This criterion is still 'defined' in the negative. As my 2012Dec7 response detailed, there is a bewildering array of laws, from totally different frames of references, spread across the 27 state codes, the federal code, common law, and defining court cases. Current wording would allow an association or law firm wanting to remove DS rights to find even 1 such law, and claim that 31 key exceptions apply. Given that there are so many laws that directly or indirectly define 'reside' and 'residential' (an adjective form of 2 very different homonyms, 'residents' and 'residence'), the 'requirement' for an association to claim DS exemptions would be to find just one that, when stretched, could 'indirectly' preclude use. (See 2012Dec7 response for multiple examples.) The legal burden on Owners defending their DS rights would require them to foreclose on every law that might 'indirectly' 'preclude' 'residential use', with all these words undefined.

Supplement 1 shifted burden. Supplement 2 shifts burden even more, making it so onerous, it would not be feasible to accomplish. There is no known list of all applicable federal and state codes, cases, and common law. It would takes weeks and tens of thousands of dollars to identify them, and weeks more to foreclose on the possibility that one of them, however obscure, might 'indirectly' 'preclude' 'residential use'.

11. Supplement 2 continues the major scope creep. None of the changes has anything to do with H-858's committed scope--marinas, parking condominiums, or storage condominiums. H-858 has morphed so much the 3 special cases that defined scope are no longer even mentioned. Even if these 3 special cases had shown by request and facts that regulatory relief was warranted, none of the language proposed would be necessary to grant them that relief. This relief has never been justified or even requested.

12. Supplement 2 continues the confusion where staff discuss 'short term residential occupation' to apparently mean overnight stays, without defining 'residential occupation' or explaining how it differs from 'residential use'. Supplement 2 text explanations of 'residential occupation' invoke 'residential use' (page 2), yet the law as written does not say that. Page 6 explicitly justifies changes in §4203(b)(1) based on activities 'that involve an overnight stay'. This operating definition of 'residential use' as 'overnight stays' is the legal definition for some laws in some jurisdictions, precisely because it based on operational facts rather than conclusions of law requiring court adjudication. Again the law as written differs significantly from text explanation.

13. Staff accepted recommendations of Duncan McPherson to further limit residential use criteria to the 'separate interests'. Staff justified their acceptance of this recommendation because staff did not believe that incidental residential use of the common area should affect the residential vs. nonresidential 'character' of the development. (pg 4, ¶3). Notice how the frame has morphed from narrow language covering special cases to a new, special-interest-driven issue, not in current DS, of whether a CID is residential or nonresidential.

> In effect, that drafting approach is premised on the notion that all use of the common area is incidental to the fundamental residential or nonresidential character of a development. The staff believes that is a reasonable assumption. Page 4, emphasis added.

That is not a reasonable assumption. It is based on the false premise that separate interests are physical places and not legal rights, as the 2012Dec7 response explained. In a stock cooperative, there is no requirement for separate interests to be a lot, parcel, unit, condominium, or apartment. The entire stock cooperative can be a common area, with the special interest being the right, even temporarily, to occupy a portion of the property, as in a lodge, bunkhouse on a ranch, RV space, etc. MM12-48s1 specifically included a common lodge as a possibility, yet Supplement 2 strangely throws that CID arrangement into an exception category.

This false premise is exacerbated by more incorrect statements.

> The owners of...separate interests in a CID...do not reside...in the common area. They do so in their separate interests. ... The common area may be essential to the use of the separate interests, but it is ancillary to that use. (emphasis added)

Such claims are contrary to the only real CID example in the record, that of R-Ranch in Hornbrook, CA. There, the entire development is common area, with each having a Davis-Stirling right to occupy a portion of the shared common area for long periods of time, though not as a permanent resident. The development was specifically designed this to obtain the economy of scale from sharing common area. See Attachment.

Supplement 2 perpetuates this incorrect frame, requiring Owners to reside in their separate interests (pg 4), without understanding or acknowledging that the attorney's recommended wording would have the unintended effect of removing Davis-Stirling rights from stock cooperatives and mixed use developments outside that narrow and statutory-incorrect frame.

The recommendation to insert the phrase 'in the separate interests', which staff accepted as 'straightforward' should be rejected because it is incorrect and would unintentionally remove DS rights from CIDs that rely on them now. The wording change has nothing to do with parking/storage condominiums and marinas.

14. Staff recommended against the striking of the limiting condition for declarations in §4203(a) (see pg 3), which would have relied solely on the definition in §4135.

> That could be problematic. The staff is not certain that the "declaration" (as defined in Section 4135) is the only type of recorded document that can express use restrictions. It is at least possible that both a "declaration" and a separate recorded "declaration of covenants, conditions and restrictions" might exist and be enforceable.

Staff correctly recommended against striking this language, which would have expanded the exception category even more. This expansion has been the consistent effect of each round of proposed changes in H-858 that departed from the current §4202.

Staff's reason for rejecting this language was legally sound, though based on uncertainty (see above). The more certain legal basis for the conclusion was explained separately in my 2012Dec10 response to MM12-49s1, which proposed changes to §4205, the trumping hierarchy for 4 categories of governing documents. That submission showed how declarations can be many documents other than CC&Rs. That submission also showed, quoting chapter and verse, how DS allows restrictions in other governing documents.

15. Staff accepted the Duncan McPherson's recommendation to add more limitations for 'residential space'. Supplement 2 thus introduced yet another undefined, lawsuit-provoking phrase which has nothing to do with current DS. Again, the text says it means overnight stays. This new phrase extended exceptions for CIDs with hotels, skilled nursing facilities, and assisted living facilities.

Are we still talking about storage condominiums, parking condominiums, and marinas?

Change after change has the effect of removing DS rights from those who rely on them now, without any record evidence of their existence or numbers, any request for relief from any of them. or any facts in the record that this sudden expansion of excepted CIDs is warranted, relevant, or even requested.

16. Supplement 2 correctly summarized (pg 9) that the 'technical' revisions in Supplements 1 and 2 "are not trivial". They are indeed significant.

17. Supplement 2 incorrectly summarized (pg 10) that Supplements 1 and 2 revisions "would not make any significant substantive change". The changes do make major substantive changes, all of which remove DS rights from an unstated, ever growing, number of current DS CIDs.

18. Staff incorrectly asserted (pg 10) that the revisions are "technical tinkering.". "Nor do they {the revisions} require any rethinking of the policy justification for the proposed law. They are in accord with that policy rationale." Staff asserted that it could make "minor conforming changes" to the narrative after approval.

Let's be clear. This is not 'technical tinkering'. This is scope creep run amuck, and is far from the committed scope of H-858. Given the continued, and worsening, mismatch between the words and the music, it would be inappropriate for the Commission to allow post-approval changes.

19. H-858 should not be approved because it fails CLRC requirement for a bright-line test for exceptions. Each round of changes adds more new and undefined words that will predictably cause lawsuits.

20. Supplement 2 worsens the improper characteristics of H-858 documented in the 2012Dec7 response. If the Commission decides to proceed, the list of 15 specific guidance instructions in the 2012Dec7 response would protect CLRC's well-deserved reputation for fact-based legislation with a sound public process and balanced legal analysis, all of which H-858 and its 2 supplements have needlessly sacrificed.

21. All 3 variations of H-858 should be rejected for the reasons detailed in the 2012Dec7 response. Supplement 2 worsens the problems. It would knowingly cause lawsuits to remove DS protections from those the Act is designed to serve, falsely assured by cover letters that H-858 does not affect them.

Respectfully submitted,

Art Bullock
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Attachment Regarding R-Ranch POA

Following a request from Brian Hebert, I provided staff a copy of the 15-page Court of Appeal decision that explicitly held that R-Ranch is a CID. Some relevant quotes are included here for the Commission. Emphasis is added.

> The defendants take great pains to assert that R-Ranch is not a common interest development. At the same time, the defendants complain the Board of Directors failed to follow the statutory and regulatory procedures required to make changes in a common interest development. However, the statutes and regulations apply to property owners' associations in common interest developments. (See Cal. Code Regs., tit. 10, §2792.8, providing for the creation of an organization (called the "Association") of owners in a common interest development.) ... {T}he Board of Directors complied with the regulations applicable to common interest developments. ...
>
> While the CC&Rs are enforceable as equitable servitudes (Civ. Code, §1354), there apparently is no authority for enforcement of a resolution made to enforce the CC&Rs as an equitable servitude. Nonetheless, that does not mean the resolution at issue here is unenforceable. The CC&Rs were clearly enforceable as equitable servitudes. The trial court did not err in deeming the Resolution a reasonable and enforceable interpretation of the CC&Rs. (See *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 378; Civ. Code. §1354, subd. (a).) Accordingly, the judgment enforcing the Resolution must be affirmed{.} *R-Ranch POA v. Lemke* (1996) Court Of Appeal, Third Appellate District, C020577, Superior Court No. 48680, Unpublished 15-page decision filed 1996Aug28, pages 8-9, 14.

R-Ranch POA v. Lemke (1996), though unpublished, is controlling law for this corporation on this issue.

Separately from *R-Ranch POA v. Lemke* (1996), without referencing it, the statement of decision in *Weber v. R-Ranch POA* (2009) held that Ed Weber was correct in asserting that R-Ranch is a Davis-Stirling CID.

> **2. Factual Background.** R-Ranch Property Owners Association...is a California mutual benefit corporation. It operates pursuant to...the Davis-Stirling Act, Civil Code §1350 *et seq.*
>
> It is also undisputed that the Association is subject to the Davis-Stirling Common Interest Development Act, Civil Code 1350 *et seq.* In the event of a conflict between the Association's CC&Rs and the Davis-Stirling Common Interest Development Act, the Act prevails as a matter of law. *Thaler v. Household Finance Corporation* (2000) 80 Cal.App.4th 1093. ¶ Clearly the Association must adopt operating rules and procedures that are in accordance with Davis-Stirling.
>
> **6. Conclusion.** ... Plaintiff {Ed Weber} is correct in stating that the Association operates pursuant to the Davis-Stirling Act". *Weber v. R-Ranch POA* (2009) Siskiyou County Superior Court SC CV CV 08-1618.

Both documents cited above are public record documents.

It is unusual for legislation to focus strongly on one case. This has occurred here because of the following. See the 2012Dec7 response to MM12-48s1 for more details.

1. R-Ranch POA is the only actual CID mentioned in the record for H-858, which is exception legislation.

2. That CID case shows harm, not benefit, from H-858. The submitter, Ed Weber, asserted that "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." MM12-48s1, Exh. pg 1.

3. Staff improperly 'disposed of' that case based on an attorney firm's claim that R-Ranch "is not a CID..., since the owners have no designated separate lot or space within the project." MM10-37s1, Exh 1.

4. That attorney firm is aware of the separate Court of Appeal holding that R-Ranch is a CID, and did not place into the record or provide staff the Court of Appeal holding, cited above.

5. That attorney firm was involved in the Superior Court case holding that R-Ranch is indeed a DS CID, and did not place in the record the contrary court opinion received by Ed Weber, who alleged harm here.

6. The record shows the improperly 'disposed-of' case is one of a class of CIDs with similar documentation.

7. H-858 does not address or acknowledge the harmful impact that H-858 would have on the only case in the record, and by extension, to other DS CIDs similarly situated.

8. There is no justification, or even request, from any current DS CID that it needs to be excepted because the regulations do not apply to them or benefit their members, or cause undue hardship.

9. There is no justification, or even claim, in the record that the 31 exempted sections do anything more than require transparency and sound, basic business practices.

10. Repeated iterations of proposed H-858 wording have created more and more exceptions, with impact undocumented, that would remove DS rights.

11. Wording changes have been developed in email exchanges off the record, preventing transparency of argument and context. These off-record exchanges are the modern equivalent of back room discussions.

12. These off-the-record exchanges transfer the burden to CLRC staff to summarize the argument and context, and decide what elements to filter for the public record.

13. These iterations originated with the same firm, which has a history of working to remove DS rights.

14. Six days before the Commission was scheduled to vote for Final Approval, MM12-48s2 altered H-858 legislation to require Owners to reside "in their separate interests". This language, inserted just before the Commission's meeting, introduces a new phrase and frame that would deny rights to an undefined number of stock cooperatives, vacation CIDs relying on shared lodge rooms, recreation CIDs relying on shared RV space, mixed use CIDs, etc.. For stock cooperatives, DS only requires as a separate interest the right to occupy of portion of the property. The new wording introduces new legal requirements that have nothing to do with parking/storage condominiums and marinas, and would adversely affect stock cooperatives and the only CID mentioned in the record, R-Ranch.

15. Ed Weber's letter, the only Public Record submission during the comment period, stated that "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". "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." MM12-48s1, Exh pg2. Ed Weber concluded that "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". MM12-48s1, Exh pg 3.

16. Ed Weber's position, uncontested in the record, is apparently that H-858 exception legislation is being misused to remove Davis-Stirling rights from thousands of people without their knowledge, and further that it is being written specifically to remove DS rights at R-Ranch, after Court of Appeal and Superior Court decisions unanimously holding that R-Ranch is a CID. If that is an accurate statement of Ed Weber's position, the H-858 record would support it.

A Public Comment Response To MM12-48s3

Dear Brian Hebert, Steve Cohen, CLRC staff, and CLRC Commission,

This is a Public Comment response to MM12-48s3 ('Supplement 3' or 'Supp. 3' herein), received yesterday.

Page 2 claimed that "structural revisions proposed in {Supplements 1 and 2} would seem to address" the issues. They do not. Supp. 1 and 2 worsen and do not resolve--or even acknowledge--the fundamental issues. The major issues are outside any individual case, and apply to a wide variety of current CIDs.

1. Supplement 3 claimed "One of the key principles in this study is that the proposal to broaden the scope of existing exemptions to the Davis-Stirling Act and the Subdivided Lands Act would have no effect on a development that permits any residential use whatsoever."

As before, this 'disclaimer' is on page 1, which misleads those who do not read past it to the law itself.

It is still untrue. Supp. 3 provides everything attorneys need to remove DS rights from many housing CIDs.

The law is worded almost exactly opposite to the claimed statement. The law is worded so if there is a prohibition ('defined' in the comments as 'indirect' 'preclusion') of 'residential use', undefined, then it's exempted.

For example, if new environmental regulations mean that one section of the housing development 'doesn't perc' (you know, Section E on the back side of the hill), attorneys could argue the development is now 'nonresidential' and exempted from 31 DS sections requiring transparency and sound business practices.

They could choose your proffered definition, now in the record from an online dictionary, that 'residential' means 'used as a residence', where 'residence' means 'a building used as a home': Since the lots don't perc, they're not buildable as a home. Thus, a law exists that 'prohibits' 'residential use'.

DS covers housing developments with empty lots, if there a common interest and a separate interest as defined by statute. There's no requirement for the lots to be built, or even buildable. There's no requirement that they be residential, however defined. H-858 as written, though not as explained, would allow an attorney to claim that if one housing section is unbuildable, then the entire development is nonresidential.

If a city ordinance, county ordinance, etc. prevented building on lots 'too close' to the freeway, or a noisy factory, or the sewage treatment plant, or near a recently-identified contaminated property, or on too steep a slope, an attorney so inclined would claim that 'residential use is prohibited by law'.

The problem is exacerbated by Supplement 2, which unnecessarily inserted the phrase 'of the separate interests' into §4203. This allows an attorney to argue that if a law prohibits ('indirectly' 'precludes') residing on 2 lots, they have found a law that 'prohibits residential use of the separate interests'.

Page 1-2 claimed that "{I}f a CID has even a single residential owner, it would not fall within the exemptions and would be fully covered by the Davis-Stirling Act and Subdivided Lands Act."

There is no such sentence anywhere in H-858. The law as written allows that if 2 lots are not buildable for any reason, the entire CID is reclassified as nonresidential, even if there are already 10,000 homes there.

2. The situation for vacation, recreation, and mixed use CIDs is even worse. Supp. 3 defined 'residence' as '...living or regularly staying...in some place...'. An attorney so inclined would argue that vacation CIDs and recreation CIDs do not allow 'living or regularly staying', so they have found a law removing DS rights.

After using this definition and its obvious 'stated limitations', Supp. 3 incorrectly concluded that "There are no stated limitations on the nature of the act". Page 2.

We've already been down this expensive road for 'substantially all'. (Supp. 3, Exh pg 10). Do we need to go down this same road for 'regularly staying' or 'residential use'?

Consider mixed use CIDs. Because Supp. 2 and 3 shifted from allowing residential use to prohibiting residential use, a law might be found that 'indirectly' 'precludes' use of some part of the development (2 separate interests). Attorneys so inclined would use that to declare the entire development nonresidential.

3. For some unstated reason, Supplement 3 added a new option, to redefine 'commercial' exceptions. Like the reframing of the current DS wording of 'right to occupy' into 'residential use', this new 'independent'

option morphs the current DS wording of 'limited to...commercial uses by zoning or by a declaration' into 'the operation of any other type of commercial facility that provides residential space...". This new option should also be rejected as relying on undefined 'residential space', and the lack of justification or request for relief.

4. Supp. 3 stated that "Mr. Bullock believes that the term "residential use" should be defined".

Perhaps staff missed Conclusions suggested if the Commission, over objection, decides to proceed.

8. Remove all wording for the false dichotomy of 'residential' vs. 'nonresidential' developments, none of which exists in any current jurisdictional definition of Davis-Stirling CIDs.
9. Remove all references to 'residential use'....

After making this inaccurate statement, Supp. 3 claimed that defining 'residential' in the law itself was not necessary because "The common understanding of the term seems fairly clear.". An online dictionary was used to support this position. For some reason, Supp. 3 used a different online dictionary than that used for H-855, on the same agenda. How does staff decide which online dictionary to use?

When faced with the vague DS stock cooperatives phrase, "substantially all", Court of Appeal did not use an online dictionary (*Aharoni*, Supp. 3, Exh. pg 10-11). A hand-picked online dictionary could (on a given day) define 'substantially' as 'mainly' or 'mostly'. Nor did Court of Appeal rely on Webster's Third New International Unabridged Dictionary, which defines 'substantially' as 'in a substantial manner', where 'substantial' is '2c: considerable in amount...' or '4a:being that specified to a large degree or in the main'. In fact, Court of Appeal did not rely on <u>any</u> dictionary definition. Instead it relied on <u>legal</u> definitions in unrelated code.

'Residential' and its root words are frequently used in federal and state code and cases, so Court of Appeal would probably not use any dictionary definition. As in *Aharoni,* IRS code and California Taxation & Revenue Code are replete with references to words like 'reside', 'resident', 'residence', 'home', 'tax home', etc..

Explanations based on an online dictionary contradict other text, and in the final analysis, are for naught.

The best solution here is not relying on an online dictionary, or patching a definition together at the last minute. The best solution for 'nonresidential', 'residential use', 'residential occupation', and 'residential space' is to drop entirely the words, the phrases, the false dichotomy, and the frame that produced them. They are not in current DS jurisdiction definitions. None are needed for marinas and parking/storage condominiums.

The best way to prevent lawsuits over vague phrases is to not use them.

5. Supp. 3 stated that "Mr. Bullock urges the Commission to defer any final decision". Supp. 3 Exh pg 1-18 is more accurately summarized as the following.

H-858 should be withdrawn from the agenda, and if not, the Commission should reject it or shelve it (tap 'RESET') (Exh. pg 18) for several reasons.

1. No fact-finding justifies H-858 exceptions. No record facts justify or even request relief.
2. H-858 as proposed has almost nothing to do with H-858's committed scope, which was to extend exemptions to parking/storage condominiums and marinas.
3. The word 'nonresidential' morphed from its scope definition as only applying to those 3 special cases to a broad group of exceptions without showing which and how many CIDs lose DS protections.
4. The extended discussion that DS was not intended to apply to anything other than housing developments, so all other CIDs should receive exemptions, is not based on any principled application of statutory construction, which shows the contrary. The analysis justifying H-858 is legally incorrect.
5. The public process failed because constituencies who normally comment on CID legislation were misled by inaccurate cover pages. The law significantly affects housing CIDs, which have been falsely assured that H-858 does not affect them. The law that produced the highest dropout rate in American history is called "No Child Left Behind". Thousands will be justifiably angry when they discover that the law removing basic property rights in housing developments is called "Nonresidential Subdivisions".
6. Last-minute supplement changes are fundamental, substantive, worsen the problems, and short-cut the needed public vetting process.
7. There is no discussion of stock cooperatives, vacation CIDs, mixed use developments, etc.. The frame used by H-858 drafters is much narrower than the 4 types of CIDs currently covered by DS.
8. The admitted 'theoretical problem' that there are CIDs that are neither 'residential' nor 'nonresi-

dential' (as normally defined) was never resolved.

9. There is no justification for going beyond the current code of 'right to occupy a portion of the property' to overlay undefined requirements for 'residential use'.

10. H-858 failed its own requirement for a bright line test for exceptions.

11. H-858 failed CLRC's requirement that legislation be as simple and as direct as feasible, for the millions of people who use and rely on Davis-Stirling code.

12. Overall, H-858 problems are so fundamental that they would damage CLRC's track-record and well-deserved reputation for fact-based legislation, sound legal analysis, and balanced public interests.

Conclusion

Supplement 3 worsens the problems, is legally incorrect, and is out of touch with appellate cases and the reality of how Davis-Stirling rights are violated. Supp. 3 says that "{T}hose who wish to characterize a CID as nonresidential would need to prove the existence of a prohibition." Page 2.

The reality, as shown by Leisure World (Supp. 3, Exh. pg 2-3), is that the corporation simply starts violating Davis-Stirling rights and shifts the burden to Owners to figure that out and file a lawsuit to get their rights back.

Those falsely assured that H-858 does not affect housing CIDs would awaken to a very different reality.

The conversation would go something like this--without the association proving anything in advance.

Hey George, where's Harry? Haven't seen him recently.

Neither have I. He seems to be gone.

Our swimming pool is on its last legs, and I wanted to ask him how much we have in the reserve. I didn't get a reserve statement this year.

We don't do reserve statements any more.

Why not?

Because our attorney said we're exempted from those Davis-Stirling requirements because of a new law. We've been reclassified as nonresidential.

George, I've gone to every meeting this year, and there's never been a vote for anything like that.

It was done in executive session.

How come?

The attorney said it might cause a lawsuit, so it was an exception to required open board meetings.

Which directors voted for that?

We don't have to tell you.

George, I've known you for years. How much money is the reserve account?

Between you and me, it's empty.

What are you talking about? Our reserve had more a million dollars the last time I checked.

Not any more. Someone cleared it out.

What do you mean, 'cleared it out'? There's been no notice to members of a reserve fund transfer. I lost my pension at work when the company misspent our pension fund, so I watch for that.

We don't have to notify you of reserve transfers any more.

George, it's only fair to tell Owners when a bucket load of money is taken from our reserve.

Maybe so. We don't do it because we don't have to. It's paperwork.

And what do you mean, some <u>one</u>? It takes 2 signatures to withdraw money from our reserve.

Not any more. We have a special exemption from those Davis-Stirling requirements as well, so now we only require one signature to withdraw any amount of money from the reserve.

Says who?

Can't tell you, that's board confidential. Attorney said it's covered by attorney-client privilege.

Who is the one signature?

Harry.

Respectfully submitted,

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