Study H-858 January 24, 2013

Memorandum 2013-7

Commercial and Industrial Subdivisions (Public Comment)

At its December 2012 meeting, the Commission considered Memorandum 2012-48, discussing the Tentative Recommendation on *Nonresidential Subdivisions* (Aug. 2012) ("Tentative Recommendation"). The Commission also considered four supplements to the memorandum, which discussed public comments on the tentative recommendation. (Three more comment letters have since been received, from Kazuko Artus, Art Bullock, and Edward Weber.) For ease of reference, all of those comment letters are attached as an Exhibit to this memorandum, as follows:

The Commission has not yet made any decisions on issues raised in those materials. Instead, it directed the staff to prepare a memorandum for consideration at a future meeting, which would present a unified discussion of the issues. See Minutes (Dec. 2012), pp. 3-4. The Commission also directed the staff to prepare a brief overview of the conduct of this study to date. *Id*. This memorandum was prepared in compliance with those instructions.

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.

STUDY OVERVIEW

Origin of Study

Under existing Civil Code Section 1373, a common interest development ("CID") that is "limited to industrial or commercial uses" by zoning or by a recorded declaration of covenants, conditions, and restrictions ("CC&Rs"), is exempt from a number of provisions of the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act"). For convenience, this memorandum will refer to developments that are limited to such uses as "commercial" developments. This term should be understood to also include developments that permit "industrial" uses.

In 2008, the Commission began studying whether commercial CIDs should also be exempted from *other* provisions of the Davis-Stirling Act. The Commission approved a final recommendation on that topic in August 2012. See *Commercial and Industrial Common Interest Developments* (Aug. 2012).

The recommendation would create a new statute to govern commercial CIDs. That statute would include the "foundational" provisions of the Davis-Stirling Act (i.e., enabling provisions that are necessary for the definition and existence of any type of CID). The proposed statute would *not* include most of the "operational" provisions of the Davis-Stirling Act (i.e., procedural rules that regulate the operation of a CID's governing association). As a result, commercial CIDs would be exempted from a number of operational provisions that currently apply to them. *Id*.

Prior to approving that recommendation, the Commission considered a related question: whether to change the language used to describe commercial CIDs in the Davis-Stirling Act exemption, so that the exemption would encompass CIDs that permit the following types of uses:

- Use of a separate interest to operate a residential rental business.
- "Personal uses" that are "arguably neither residential nor commercial or industrial" (e.g., "boating, camping or other recreational uses, parking, storage or other nonresidential uses.")

See Memorandum 2011-21, pp. 4-7.

At that time, the staff advised that any study of the language used in the Davis-Stirling Act exemption should also examine Business and Professions Code Section 11010.3, a closely parallel provision that exempts commercial developments from the Subdivided Lands Act. See First Supplement to

Memorandum 2011-21, pp. 1-2. The Subdivided Lands Act is a consumer protection statute that requires the approval of a "public report" before the sale or lease of lots in a subdivision. See Tentative Recommendation at 1-3. The commercial development exemptions that govern the Davis-Stirling Act and Subdivided Lands Act have developed in tandem, with a clear intent that they use parallel language. See Memorandum 2011-29, pp. 12-16. A CID that contains five or more separate interests is also a "subdivision" subject to the Subdivided Lands Act. See Bus. & Prof. Code § 11004.5(a)-(d).

The Commission decided against making any change to the definition of the exempted class, in either exemption provision, as part of its then-pending recommendation on commercial CIDs. Instead, the Commission initiated a *separate* study of the matter. That study would examine the definitional language defining the application of the commercial development exemptions in both the Subdivided Lands Act and the Davis-Stirling Act. Minutes (July 2011), p. 4.

Scope of Study

As noted above, the current study is examining the scope of the commercial development exemptions in both the Subdivided Lands Act and the Davis-Stirling Act.

The study was launched in part to address a narrow technical issue: whether the exemptions should be revised to make clear that the operation of an apartment complex is a commercial use.

However, from the inception of the study, the Commission has also been considering a second issue: whether the existing exemptions should be broadened to apply to developments that permit "personal uses" of development property that are "arguably neither residential nor commercial or industrial." Memorandum 2011-21, pp. 4-7.

In the memorandum that formally commenced the study, the staff coined the term "nonresidential personal use subdivision" as a convenient way to refer to such developments. Memorandum 2011-29, p. 22. The memorandum gave three examples of the class:

(1) A marina in which the separate lots or interests are boat slips.
(2) A "storage condominium" in which the separate lots or interests are storage units.
(3) A "parking condominium" in which the separate lots or interests are parking spaces.

Id. The memorandum stated expressly that the list of examples was *not exclusive* ("there are yet other types of nonresidential personal-use subdivisions"). *Id*. at 25.

Because there could be a variety of nonresidential personal uses, the staff recommended that the Commission analyze all such uses as a group, based on their common nonresidential character:

> This illustrates the value of framing the exemption in terms of the presence or absence of residences, rather than trying to anticipate and affirmatively list every type of nonresidential use. It is too easy to overlook some unusual type of nonresidential use.

Id.

Mixed-Use Developments

The Commission has consistently expressed its intention that the proposed law only affect developments in which the owners are *entirely* limited to nonresidential uses of the property. If the owners are permitted to make *any* residential use of a development, it should not be considered a "nonresidential" development under the proposed law.

In other words, a development that permits any residential use by owners should not be exempt from the Subdivided Lands Act or portions of the Davis-Stirling Act. See, e.g., Memorandum 2011-29, p. 26 ("As with existing law, even a single residence would be sufficient to take a subdivision out of the exempted class.").

The Commission expressly reaffirmed that intention at its December 2012 meeting:

> The Commission reaffirmed its intention that the proposed law should have no effect on a common interest development or subdivision that permits *any* residential use by its owners.

Minutes (Dec. 2012), p. 4 (emphasis in original).

Much of the commentary discussed in Memorandum 2012-48 and its supplements focuses on whether the language used in the proposed legislation would affect developments in which owners may reside. **If so, the proposed law should be revised to avoid that unintended effect.**

Public Input

Over the course of this study, the Commission has benefited greatly from public input. There are two general ways that the Commission receives public input.

First, the Commission receives formal written comments, which the sender expects will be provided directly to the Commission and made part of the public record. Such comments are attached to a staff memorandum and, if time permits, analyzed in the body of that memorandum. The memorandum and attached letter are then distributed to the Commission (and the public) for consideration at a public meeting.

The second method is more informal. Individuals sometimes contact the Commission's staff directly by email, phone, or letter. The person initiating such informal contact does not expect that the information exchanged with the staff will be conveyed directly to the Commission or published as part of the official record. Instead, the point is usually to provide some background information that will round out the staff's understanding of the issues involved.

This sort of informal contact is useful, routine, and nondiscriminatory. The staff is open to informal communication with any person or group. For example, in this study, the staff has communicated informally with property owners (Edward Weber, Art Bullock, and Kazuko Artus), attorneys specializing in real property law (Duncan McPherson and Jeffrey Wagner), and with the Department of Real Estate (Assistant Real Estate Commissioner Chris W. Neri).

If informally-acquired information is provided to the Commission, it is conveyed at an open meeting or included in a staff memorandum, with an explanation of its origin. This ensures that the Commission's decisions are based on public input that has been expressed in a publicly-distributed document, for discussion at an open public meeting.

TENTATIVE RECOMMENDATION

The tentative recommendation would recast the scope of the existing commercial development exemptions, so that they would instead be based on a distinction between *residential* and *nonresidential* developments, thus:

Bus. & Prof. Code § 11002 (added). "Residential subdivision" and "nonresidential subdivision" defined

11002. (a) For the purposes of this section, "residential subdivision" means a subdivision in which residential use is permitted by both law and by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the subdivision 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 subdivision does not make the subdivision a "residential subdivision":

(1) The operation of a residential rental business within a lot, parcel, or separate interest, that contains three or more apartment units.

(2) The provision of living space to an agent or employee of a governing association or a business that is located within the subdivision, 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 lot, parcel, or separate interest. For the purposes of this paragraph "short-term residential occupation" means occupation for no more than 60 days out of each calendar year.

(c) For the purposes of Section 11010.3, "nonresidential subdivision" means any subdivision that is not a residential subdivision.

(d) For the purposes of this section, "separate interest" has the meaning provided in subdivision (*l*) of Section 1351 of the Civil Code.

Comment. Section 11002 is new. Subdivision (a) defines "residential subdivision" for the purposes of the section. Under the definition, if both the law and any recorded declaration of covenants, conditions, and restrictions permit any residential use within a subdivision, the subdivision is a "residential subdivision."

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 subdivision is not enough to make the subdivision a "residential subdivision."

Subdivision (b)(3) establishes an exception for "short-term residential 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 subdivision in which residential use is entirely precluded, by law or by a recorded declaration of covenants, conditions, and restrictions, is a "nonresidential subdivision."

> See also Section 11010.3 (exemption of nonresidential subdivision from provisions of this act).

See Tentative Recommendation at 15. The proposed law also contains a parallel provision for the Davis-Stirling Act exemption. *Id*. at 17; proposed Civ. Code § 1373.5.

One important aspect of that language (and all of the variants discussed below) is that it focuses on uses that are *permitted* by law and by the development's CC&Rs, rather than uses that actually occur. This provides a clear and stable basis for application of the exemptions, which would not depend on a factual analysis of a development's actual (and changeable) uses.

SEVERABILITY OF REFORMS

Before getting into the specific issues that were raised in Memorandum 2012-48 and its supplements, it is worth noting that the proposed law would make two distinct (and severable) reforms:

(1) Broaden the existing exemptions so that they apply to all "nonresidential" developments (rather than just applying to commercial developments).
(2) Clarify that the operation of a residential rental business is a "commercial" activity.

The first proposed reform has been criticized. Most of the remainder of this memorandum discusses concerns about whether and how to implement that reform. The second reform has not been controversial.

If, after considering the issues discussed in this memorandum, the Commission decides against pursuing the first reform, it could still recommend the second. The second reform could stand on its own feet and would provide beneficial clarification of the scope of the existing commercial development exemptions.

The staff is not recommending that course, but simply pointing out that it is a viable option.

POLICY CONCERNS

Most of the objections to the proposed law involve technical drafting concerns. They claim to identify ways in which the proposed law might be

construed to have an effect on developments which permit residential use by the owners. Those concerns are discussed in the next part of the memorandum.

Substantive policy objections to the proposed law are discussed immediately below.

Slippery Slope

Some have expressed concern that any broadening of the existing exemption for commercial developments would somehow open the door to diminution of residential property owner rights. The concern seems to be that the Legislature, having once decided to narrow the application of the Davis-Stirling Act, will be inclined to enact further narrowing reforms in the future. For example, Kazuko Artus writes:

> I don't want the new law to create a slippery slope that might lead to the curtailment of the application of the Davis-Stirling Act to any CID project containing a separate interest available for human dwelling. Housing is a matter of state interest. The Legislature should not be induced to withdraw the protections of the Davis-Stirling Act from any person who owns a residential facility and who would be protected under the present Davis-Stirling Act or its successor to become operative in 2014.

See Exhibit p. 34. Edward Weber raises a similar concern: "I find a slippery slope I do not intend to slide down in naiveté." See Exhibit p. 3.

The staff finds it unlikely that enactment of the Commission's recommendation would encourage the Legislature to remove protections from residential property owners. The recommendation is expressly premised on the idea that residential property owners merit special regulatory protection. See Tentative Recommendation at 8-10 ("Policy Rationale for Regulation of Residential Property").

Need for Reform Questioned

Art Bullock states that a "hallmark of sound legislation is that it is based on facts, rather than special interest politics." See Exhibit p. 17. He then argues that there is no "record evidence" demonstrating the need for reform. *Id*. at 17-18.

While empirical data is sometimes useful, Commission studies typically do not rely on empirical research. Three reasons for this are relevant to this study:

(1) *In many cases, the Commission needs to anticipate and address problems before they occur.* Despite an absence of empirical data, the need for proactive reform to avoid predictable problems is often clear.

(2) *The Commission often works in areas that have received little attention.* The Commission may be conducting the first comprehensive study of a topic. In such cases, it is often necessary to proceed without the benefit of empirical research.

(3) *Empirical research is often unnecessary when analyzing statutory defects.* The key elements of such analysis (legislative intent, controlling law, defects in language, practical constraints, etc.) can often be identified and weighed through logical consideration of legislative history, statutory text, court decisions, and informed public comment.

The present study touches on all three of those factors:

(1) While defects in the framing of the current exemptions may already exist, the consequences of those defects could be worsened in the future. Recall that the Commission has recommended the creation of a separate statute for commercial CIDs. Any ambiguity in the application of that statute would be problematic. Having identified that potential future problem, it is appropriate for the Commission to study the matter.

(2) The problems that the Commission has identified in this study seem to flow from the piecemeal way in which the exemptions have been reformed over time. This study appears to be the first comprehensive analysis of the proper scope of the exemptions. Careful consideration of areas that have not yet been adequately examined by others is an important Commission function.

(3) The current study poses questions that can be answered without reliance on empirical data: Is the current definition of "commercial use" sufficiently clear? Is the scope of the exemption language suited to the legislative purpose of the exemptions? Is the reported practice of the Department of Real Estate — exempting all "nonresidential" property from the Subdivided Lands Act — consistent with the current language of the exemptions?

For the reasons discussed above, the staff does not believe that empirical data is necessary to justify or conduct the current study. Moreover, the Commission has no funding to conduct empirical research and the staff has no special expertise in conducting such research. That said, the Commission does make use of empirical data when it is available.

DRAFTING ISSUES

A number of technical drafting issues were raised in Memorandum 2012-48 and its supplements. Some were direct responses to points raised in public comment. Others were raised by the staff, after further reflection on the structure

and content of the proposed law. The most significant of those issues are discussed below, with suggested revisions to address them.

An aggregate draft, showing all of the revisions proposed below, follows in the next part of the memorandum. See pp. 20-22, below ("Aggregate Revision Draft").

Implied Presumption

In the tentative recommendation, the distinction between residential and nonresidential developments is expressed in two main provisions:

- First, the term "residential" development is defined to mean a development "in which residential use is permitted by both law and by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the subdivision is located." See proposed Bus. & Prof. Code § 11002(a), above.
- Next, the term "nonresidential" development is defined to mean any development that is not a residential development. See proposed Bus. & Prof. Code § 11002(c), above.

Art Bullock believes that this drafting approach would create problems, as he thinks it would require property owners in residential CIDs to affirmatively prove that residential use is permitted under the law and their recorded covenants, conditions, and restrictions ("CC&Rs") or risk losing the protections of the Davis-Stirling Act. See Exhibit p. 5. He sees this as being a special problem in older developments, which might not have recorded CC&Rs (arguably making it impossible to affirmatively prove that residential use is permitted by their CC&Rs). *Id*. at 7.

The Commission never expressed any intention of placing a burden of proof on those who wish to prove that a development is residential. Nor does the staff see any good policy reason to do so.

The staff recommends that the proposed law be revised to eliminate any implied evidentiary presumption that a development is nonresidential. This could probably be accomplished by restructuring the proposed law to define "nonresidential development" directly. That approach would also have the benefit of simplifying the structure of the proposed law, making it easier to read and understand.

To avoid any possible uncertainty on this issue, it might also make sense to add language expressly imposing a rebuttable presumption that a

development is residential. It would then be clear that the exemptions only apply if there is affirmative proof that a development is nonresidential.

As a general rule, a rebuttable presumption affecting the burden of proof is appropriate to promote public policy:

> A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

Evid. Code § 605. Here, such a presumption would further the public policy in favor of regulatory protection of residential property owners. It would help to suppress unwarranted claims that a residential development is actually nonresidential.

If the Commission wishes to implement the changes described above, it could do so by revising proposed Section 11002 as follows (with parallel changes in proposed Section 1373):

> 11002. (a) For the purposes of ~~this section~~ Section 11010.3, "~~residential~~ nonresidential subdivision" means a subdivision in which residential use by the owners is ~~permitted~~ prohibited by ~~both~~ law ~~and~~ or by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the subdivision is located.
>
> …
>
> For the purposes of this section, there is a rebuttable presumption affecting the burden of proof that a subdivision is not nonresidential.
>
> …
>
> ~~(c) For the purposes of Section 11010.3, "nonresidential subdivision" means any subdivision that is not a residential subdivision.~~
>
> …

Does the Commission wish to make those changes?

In discussing other drafting issues below, this memorandum will assume that the changes above have been made. In other words, the use of strike-out and underscore in the discussions that follow will show changes to the following language:

> 11002. (a) For the purposes of Section 11010.3, "nonresidential subdivision" means a subdivision in which residential use by the

> owners is prohibited by law or by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the subdivision is located.

This approach is being used solely as a means of simplifying the presentation of proposed revisions. The staff is not assuming that the Commission will approve the revisions described above.

Mixed-Use

As indicated above, the Commission intends that the proposed law only affect developments in which the owners are *entirely* limited to nonresidential uses. If *any* residential use by an owner is permitted in a development, it would not be a "nonresidential" development for the purposes of the proposed law.

Considering the importance of that principle, it may be prudent to add language emphasizing the absoluteness of the rule. For example, the following changes could be made:

> 11002. (a) For the purposes of Section 11010.3, "nonresidential subdivision" means a subdivision in which <u>all</u> residential use by the owners is prohibited <u>or otherwise precluded</u> by law or by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the subdivision is located.

The phrase "or otherwise precluded" is added to avoid any implication that an affirmative prohibition is required. It should be sufficient that the law or the CC&Rs, however phrased, effectively bars all "residential use" by the owners.

"Residential Use" Defined

Art Bullock points out that the proposed law does not define the term "residential." He sees that as a problem. See Exhibit p. 13 ("[The proposed law] does not define 'residential' or 'nonresidential', directly or indirectly. In fact, [the proposed law] suffers greatly because it does not do so."). He believes that the absence of a definition could lead to disputes and litigation. *Id*. The issue is discussed further below.

Existing Statutory Use of "Residential"

Before discussing possible statutory definitions for the term "residential," it is worth noting that there are two directly relevant provisions that already use the term "residential," without defining it:

- The existing law on certification of CID managers, defines "common interest development" as a "residential" CID. Bus. & Prof. Code § 11500(a). The term "residential" is not defined.
- The existing Davis-Stirling Act provision that limits the tort liability of directors in some circumstances, is expressly limited to a CID that is "exclusively residential." Civ. Code § 1365.7. Again, the term "residential" is not defined.

In addition, there are numerous other provisions throughout the codes that refer to "residential" property without defining the term. See, e.g., Bus. & Prof. Code § 10177; Code Civ. Proc. § 1161.2; Civ. Code § 1098.5; Fin. Code § 18437; Gov't Code § 25537; Health & Safety Code § 50775; Penal Code § 602.2; Pub. Res. Code § 25433.5. Thus, it seems fairly routine to use the term without definition, in reliance on its commonly understood meaning. What is the common meaning of the term? The Merriam-Webster online dictionary offers a number of closely-related definitions of the word "residential:"

> 1a: used as a residence or by residents
> b: providing living accommodations for students <a residential prep school>
> 2: restricted to or occupied by residences <a residential neighborhood>
> 3: of or relating to residence or residences
> 4: provided to patients residing in a facility <residential drug treatment>; also : being a facility providing such treatment <a residential treatment center>

See http://www.merriam-webster.com/dictionary/residential. (The staff is not citing Merriam-Webster to suggest that it is authoritative or immutable, but only to provide general information about the common understanding of the term "residential.")

The staff also searched the California Codes for sections that use and define some relevant variation of the term "residential property." In all of the provisions that the staff found, the term was defined as property that contains residences, dwellings, or residential structures. See, e.g., Bus. & Prof. Code §§ 5536.3, 11423; Civ. Code §§ 1101.3, 1675, 1695.1, 2924.6; Fin. Code § 5114.5; Gov't Code §§ 8169, 65008, 65973; Pub. Res. Code §§ 21159.23, 21159.24. This is generally consistent with Merriam-Webster's second definition of "residential" ("restricted to or occupied by residences").

A definition of "residential" that is based on the presence or absence of residences would seem to cover the great majority of residential developments,

without meaningful scope for ambiguity or dispute. "Residential" developments that do not contain residences are probably quite rare. There may be some questions about whether a second home is a person's "residence", or whether mobile structures like houseboats or mobilehomes are "residences." But those questions could be directly addressed through careful drafting.

The main problem with such a definition is that it would not clearly encompass an unusual type of development that is at the heart of much of the public comment that the Commission has received: a "recreational" development, where owners have the right to reside temporarily for recreational purposes. Edward Weber, Art Bullock, and Susan Bostwick own shares in such a development ("R-Ranch"), which Mr. Bullock describes as follows:

> Property Owners have had the right to use the property 365 days per year, eat all their meals there year-round, recreate there every day of the year, and sleep overnight up to 335 nights per year. Yet they are not allowed to establish this recreation property as a domicile or as their permanent residence.

See Exhibit p. 12. The staff's understanding is that R-Ranch owners may camp in the open, occupy camping vehicles, or stay overnight in a small number of common cabins, for up to 210 days continuously (followed by a break of at least 30 days). See First Supplement to Memorandum 2012-48, p. 2.

It is not certain that the facilities provided in R-Ranch (or any similarly structured development) would be considered "residences." It is therefore not certain that the definitional concept discussed above would encompass such developments.

Should Exemptions Cover a Recreational Development Without Residences?

Before discussing how to frame a definition that would encompass such developments, it is worth first discussing whether the Commission sees the need to do so.

At the outset of this study, the Commission was considering whether the existing commercial development exemptions should be expanded to include all "nonresidential personal use" developments, *which the staff expressly identified as including recreational camping developments*. See Memorandum 2011-21, pp. 4-7. In other words, the Commission's intention was to evaluate whether a recreational CID should be subject to the commercial CID exemptions. The Commission has since received comment from Mr. Weber, Mr. Bullock, and Ms. Bostwick opposing any change to the treatment of recreational CIDs. They believe that the

Davis-Stirling Act applies to their property and wish to retain its protections. See Exhibit generally.

In the tentative recommendation, the Commission identified two main policy justifications for special regulation of residential developments, which may not apply to nonresidential personal use developments:

> (1) Residential property is a uniquely important investment, often being the largest financial investment that a person will make. Such an investment is deserving of special protection.
> (2) Residential property is typically the owner's home. There is a strong public policy interest in protecting the quality of living conditions within residential communities.

See Tentative Recommendation at 8-10 ("Policy Rationale for Regulation of Residential Property").

It seems unlikely that an ownership share in a recreational development will have the same financial importance as the investment that one makes in purchasing a home. Preservation of the value of such an investment will not be as crucial to a person's financial stability as preserving the value of one's home. For that reason, the first rationale for protective regulation of developments is not clearly applicable to a recreational development.

What of the second rationale? It arguably has some application. Although owners may not reside permanently in a recreational development, any development that permits long-term residential occupation will have some of the character of a residential community. Members will need to spend time together amicably, resolve disputes that arise regarding their shared rights and obligations, and cooperate to achieve effective and democratic self-governance. Those concerns will not be as acute as in a development comprised of full-time residences, but they will still be present to some extent. The same is not true of other types of nonresidential personal use developments (like a storage structure, parking structure, or marina).

Because there is some policy justification for regulatory protection of recreational CIDs that permit limited residential use by the owners, the staff recommends excluding such developments from the proposed nonresidential development exemptions.

If the Commission agrees, then the concept of "residential use" in the proposed law will need to be broad enough to encompass recreational camping and other "residential" uses that fall short of establishing permanent residences.

Mr. Bullock has suggested that "residential use" be defined as a use that involves an overnight stay. See Exhibit p. 13. The staff found no precedent for such language in the statutes, but that may just be a reflection of the fact that we are exploring a novel issue.

If the Commission is interested in pursuing that approach, language along the following lines might be appropriate:

> For the purposes of this section, "residential use" means any use that involves an overnight stay by an owner or an owner's guest.

The last clause would make clear that the statute is concerned with an owner's use of the property. If an owner is permitted to make an overnight stay in a development, "residential use" is permitted.

Incidental Residential Use

Proposed Business and Professions Code Section 11002(b) identifies three incidental residential uses and provides that, for the purposes of the proposed law, they are not to be considered "residential use." Consequently, the identified incidental uses would not be considered when determining whether a development is residential or nonresidential.

There are two sound rationales for these exceptions. First, the identified uses are so peripheral to the main uses of a development that they should not affect its classification under the proposed law. Second, two of the identified uses address persons other than owners (i.e., an owner's agents, employees, or customers).

The three incidental uses identified in the proposed law are as follows:

> (1) The operation of a residential rental business within a lot, parcel, or separate interest, that contains three or more apartment units.
>
> (2) The provision of living space to an agent or employee of a governing association or a business that is located within the subdivision, 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 lot, parcel, or separate interest. For the purposes of this paragraph "short-term residential occupation" means occupation for no more than 60 days out of each calendar year.

Proposed Bus. & Prof. Code § 11002(b).

In Memorandum 2012-48 and its supplements, the staff discussed making two types of changes to the scope of those exceptions:

(1) The exception for the operation of a residential rental business would be expanded to include any commercial activity that involves an overnight stay.
(2) The language limiting the exceptions to use of an owner's lot, parcel, or separate interest would be removed.

Those two changes are discussed in more detail below.

Residential Rental Business as Commercial Activity

The first exception set out above provides that the rental of apartments, as a business, is not a "residential" use of the owner's property. If an owner operates a business, the *owner's use* is commercial, and should be regulated as such, regardless of the type of service that the owner's business provides. See Tentative Recommendation at 13 ("Residential Rental Business as 'Commercial' Use").

On page 6 of the Second Supplement to Memorandum 2012-48, the staff recommended expanding the language used to describe the residential rental business exception, so that it would include any business that provides facilities for an overnight stay. This could be accomplished using language along these lines:

> (1) The operation of a residential rental business within a lot, parcel, or separate interest, that contains three or more apartment units, or the operation of any other type of commercial facility that provides space for the overnight stay of its clients, including, but not limited to, a hotel, skilled nursing facility, or assisted living facility.

The staff recommends that those revisions be made. The changes will help to ensure that the focus remains on the owner's commercial use of property, not on the nature of the services provided by the owner's business.

Separate Interests and Common Area

In the tentative recommendation, two of the proposed exceptions for incidental residential use are expressly limited to use of an owner's lot, parcel, or separate interest. See proposed Bus. & Prof. Code § 11002(b)(1) & (3). In most cases that would be appropriate, because an owner's residential use of property in a CID or subdivision will typically be limited to the owners' separate property. That is where the owners will typically reside.

However, there may be situations in which a CID permits residential use of the common area as well. For example, it is possible that a commercial CID might have caretaker housing located within its common area. It is also possible that the common area might contain a hotel, cabins, visitor boat slips, or other facilities that permit temporary overnight stays.

Because residential use of the common area is possible, the exceptions discussed above should encompass use of the common area. Otherwise, incidental residential use of the common area might be enough to take a development out of the exempted class, even if it is otherwise entirely limited to nonresidential uses.

For that reason, the staff recommends that the exceptions for incidental residential use not be limited to use of an owner's lot, parcel, or separate interest.

On a related point, the staff also recommends that the exception for short-term residential occupation be revised to delete the reference to "a boat, trailer, or motor vehicle." As discussed on page 3 of the First Supplement to Memorandum 2012-48, the staff sees no good reason to distinguish between short-term residential use of a boat or trailer and short-term residential use of a cabin, camp site, or other facility. It is the *duration* of the stay that defines the concept of "short-term" use, not the type of sleeping facilities.

The recommended changes could be implemented as follows (with strikeout and underscore showing changes from the language in the tentative recommendation):

> (1) The operation of a residential rental business ~~within a lot, parcel, or separate interest, that contains~~ comprised of three or more apartment units.
>
> (2) The provision of living space to an agent or employee of a governing association or a business that is located within the subdivision, 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 lot, parcel, or separate interest~~ Short-term overnight use by an owner. For the purposes of this paragraph "short-term ~~residential occupation~~ overnight use" means ~~occupation for~~ no more than 60 ~~days~~ overnight stays by an owner out of each calendar year. For the purposes of this paragraph, an overnight stay by an owner's guest is deemed to be an overnight stay by the owner.

Time-Shares

As discussed on pages 4-5 of the First Supplement to Memorandum 2012-48, Edward Weber had informally questioned whether the exception for short-term residential use (discussed above) might cover time-shares. That discussion is reiterated below.

The proposed law does not directly address the 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. Nonetheless, such a restriction is *possible*, and could result in the time-share being classified as nonresidential. That would interfere with existing policy, because it would exempt the time-share from some Davis-Stirling Act provisions that the Legislature has expressly decided should apply to time-shares.

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 time-shares. This could be accomplished by adding language along the following lines to proposed Business and Professions Code Section 11002 (and the parallel provision of the Davis-Stirling Act):

> Notwithstanding the foregoing, "nonresidential subdivision" does not include a subdivision that is governed by the Vacation Ownership and Time-Share Act of 2004, Chapter 2 (commencing with Section 11210) of Part 2 of Division 4 of the Business and Professions Code.

Because each of the revisions above is discussed in isolation, it may be difficult to envision how they would work in combination. To make the aggregate effect of all of the proposed revisions clearer, two versions of proposed Section 11002 are set out below. In the first, strikeout and underscore are used to show changes from the language of the tentative recommendation. In the second, the section is shown as it would read if revised, without any strikeout or underscore.

Proposed Bus. & Prof. Code § 11002 (with strikeout and underscore)

The draft below shows the aggregate effect of all revisions discussed in this memorandum, along with some other minor changes to harmonize and simplify the revisions. Strikeout and underscore show changes from the language used in the tentative recommendation.

> 11002. (a) For the purposes of ~~this section~~ Section 11010.3, "~~residential~~ nonresidential subdivision" means a subdivision in which all residential use by the owners is ~~permitted~~ prohibited or otherwise precluded by ~~both~~ law ~~and~~ or by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the subdivision 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 subdivision does not make the subdivision a "residential subdivision"~~ this section, "residential use" means any use that involves an overnight stay by an owner or an owner's guest.
>
> (c) Notwithstanding subdivision (b), "residential use" does not include any of the following:
>
> (1) The operation of a residential rental business ~~within a lot, parcel, or separate interest, that contains three or more apartment units,~~ comprised of three or more apartments, or the operation of any other type of commercial facility that provides space for the overnight stay of its clients, including, but not limited to, a hotel, skilled nursing facility, or assisted living facility.
>
> (2) The provision of ~~living~~ space ~~to~~ for the overnight stay of an agent or employee of a governing association or a business that is located within the subdivision, 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 lot, parcel, or separate interest~~ Short-term overnight use by an

owner. For the purposes of this paragraph "short-term ~~residential occupation~~ overnight use" means ~~occupation for~~ no more than 60 ~~days~~ overnight stays by an owner out of each calendar year. For the purposes of this paragraph, an overnight stay by an owner's guest is deemed to be an overnight stay by the owner.

(d) For the purposes of this section, there is a rebuttable presumption affecting the burden of proof that a subdivision is not nonresidential.

(e) Notwithstanding the foregoing, "nonresidential subdivision" does not include a subdivision that is governed by the Vacation Ownership and Time-Share Act of 2004, Chapter 2 (commencing with Section 11210) of Part 2 of Division 4 of the Business and Professions Code.

~~(c) For the purposes of Section 11010.3, "nonresidential subdivision" means any subdivision that is not a residential subdivision.~~

~~(d) For the purposes of this section, "separate interest" has the meaning provided in subdivision (*l*) of Section 1351 of the Civil Code.~~

Proposed Bus. & Prof. Code § 11002 (without strikeout and underscore)

The draft below shows the aggregate effect of the revisions set out above, without strikeout or underscore, to make it easier to read.

11002. (a) For the purposes of Section 11010.3, "nonresidential subdivision" means a subdivision in which all residential use by the owners is prohibited or otherwise precluded by law or by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the subdivision is located.

(b) For the purposes of this section, "residential use" means any use that involves an overnight stay by an owner or an owner's guest.

(c) Notwithstanding subdivision (b), "residential use" does not include any of the following:

(1) The operation of a residential rental business comprised of three or more apartments, or the operation of any other type of commercial facility that provides space for the overnight stay of its clients, including, but not limited to, a hotel, skilled nursing facility, or assisted living facility.

(2) The provision of space for the overnight stay of an agent or employee of a governing association or a business that is located within the subdivision, 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) Short-term overnight use by an owner. For the purposes of this paragraph "short-term overnight use" means no more than 60 overnight stays by an owner out of each calendar year. For the

purposes of this paragraph, an overnight stay by an owner's guest is deemed to be an overnight stay by the owner.

(d) For the purposes of this section, there is a rebuttable presumption affecting the burden of proof that a subdivision is not nonresidential.

(e) Notwithstanding the foregoing, "nonresidential subdivision" does not include a subdivision that is governed by the Vacation Ownership and Time-Share Act of 2004, Chapter 2 (commencing with Section 11210) of Part 2 of Division 4 of the Business and Professions Code.

RELATED TECHNICAL ISSUE

When researching the Subdivided Lands Act, the staff discovered an apparent drafting error in Business and Professions Code Section 11010(b)(13). That provision requires that form notice be given when subdivision property is within an "airport influence area." The form notice language reads:

> NOTICE OF AIRPORT IN VICINITY
>
> This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

The last sentence of that notice appears to be defective. The staff recommended that the Commission correct the defect, if the appropriate language could be determined. See Memorandum 2011-29, p. 6.

The Davis-Stirling Act contains a similar notice requirement. Under Civil Code Section 1353, certain declarations must include notice when a CID is located within an airport influence area. The following form notice language is mandated:

> NOTICE OF AIRPORT IN VICINITY
>
> This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

A comparison of those two texts suggests that Section 11010(b)(17) should probably be revised to parallel Section 1353, as follows:

> NOTICE OF AIRPORT IN VICINITY
> This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

The staff has consulted informally with Department of Real Estate staff, who confirmed that this would be a helpful and appropriate revision. **The staff recommends that it be made.**

NEXT STEP

Once the Commission has resolved the issues discussed in this memorandum, the staff will prepare a draft of a final recommendation, implementing the Commission's decisions, for review at a future meeting. The staff will take care to ensure that the narrative precisely describes the policy and effect of the proposed law.

Respectfully submitted,

Brian Hebert
Executive Director

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September 12, 2012

Brian Hebert
Executive Director
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

A Public Comment Response To MM12-48s1

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

Thank you much for the work that you do year after year to improve legislation. It is much appreciated.

This is a public comment response to MM12-48s1, issued last week for a decision next week.

In his 2012Sep12 letter, Ed Weber timely and accurately described for you some fundamental problems with proposed law H-858 for the Davis-Stirling Act (DS). The 2012Nov27 Supplement (MM12-48s1) belatedly and briefly considered his suggested changes to recommendations now in MM12-48. MM12-48s1 addresses part of the problems that Ed Weber raised, though not the fundamental aspects of the problems.

After careful study of your supplemental response, the final recommendation, and the prior supporting public record documents, it appears you have misunderstood his issues, necessitating this explanation.

A major problem with H-858 is that after stating its intent to not alter Davis-Stirling scope, the law's text does so. As we know, under California's statutory construction principles, Courts must ignore intent outside the law if the words of the law clearly state otherwise. The explanation herein focuses on the actual words.

MM12-48s1 only begins to reflect the reality that there are many different and innovative forms of common interest developments (CIDs), some created decades before Davis-Stirling, to which DS applies. To prevent unintended scope restrictions, H-858 should accommodate the full range of DS CIDs.

An important criteria for proposed legislation is to avoid unintended consequences. Because of the misunderstanding and resulting lack of responsiveness, H-858 has major unintended consequences. H-858 will provoke needless lawsuits because the law's words do not match scope, intent, and explanations.

This letter articulates the unintended consequences by explaining more thoroughly the fundamental issues in the wording, and suggests specific fixes. The suggestions would stop the unintended impact while having no impact on special cases that factually need relief from DS regulations, which is the stated scope of H-858.

This extended analysis concludes that H-858 and its record has been flawed to the point that proceeding as currently framed would detract from CLRC's well-deserved reputation for integrity in democratic lawmaking.

The best alternative now is that articulated by Brian Hebert's last paragraph in last week's supplement (MM12-48s1) "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)."

H-858 is not ready for prime time. It would be unwise to proceed with review until remedial work is done.

Unless stated otherwise, section (§) references herein are to the Civil Code, using pre-2012Aug numbers (§1350-§1378) and new section numbers (§4000-§6150) scheduled to go into effect in 2014.

1. The core problem is that H-858 introduces a new frame of reference inconsistent with existing law and adds new jurisdictional requirements for all Davis-Stirling developments.

Of several objections raised by Ed Weber, his core objection seems to be H-858's new §4203(a) and (c).

> **§4203(a).** For the purposes of this section, "residential common interest development" means a common interest development in which residential use is permitted by both law and by any declaration of covenants, conditions, and restrictions that is recorded in each county in which the common interest development is located.
>
> **§4203(c).** For the purposes of Section 4202, "nonresidential common interest development" means any common interest development that is not a residential common interest development.

The gist of the combination of (a) and (c) is that for the first time, to get all DS protections, and avoid being excepted under §4202, all CIDs must now prove that 'residential use', undefined, is specifically permitted by 'law' and is also specifically permitted by CC&Rs.

If I understand his position correctly, as expressed in the public record and forwarded email trail of informal communication, Ed Weber makes 2 key points about this unusual combination. First, it removes DS protections from CIDs that H-858 memoranda claim to be outside the scope of the legislation.

Second, the inherent ambiguity in the wording of the new combination will lead aggressive attorneys to launch more lawsuits to remove Davis-Stirling protections, using Owner assessment money to sue Owners to remove Owner rights that are inconvenient to the corporation though critical to Property Owners.

2. The 2008 *Golden Rain Foundation* case clarifies several key points.

To fully understand these 2 points, your attention is invited to the recent Court of Appeal case, *Golden Rain Foundation v. Franz* (2008) 163 Cal.App.4th 1141 (modified and rehearing denied, review denied) *(GRF)*.

This instructive case concerned a stock cooperative CID. Court of Appeal described Leisure World as "a prominent senior citizen community". Golden Rain Foundation (GRF) "is a California nonprofit corporation formed in 1961" (24 years before DS was enacted in 1985). GRF has "9,000" "members". For many years, Leisure World explicitly operated under DS jurisdiction. For example, it sent annual letters, stating that it was required to send them by Davis-Stirling. The letters required that any member contemplating legal action against the corporation must follow DS Alternative Dispute Resolution requirements.

At some point, Leisure World members realized they were not getting basic information. They requested the relevant records under Davis-Stirling. The corporation refused to provide the records. Individuals filed in small claims court to get the records. They won judgments for the documents and money damages for their trouble. The Corporation then sued the individual members in Superior Court. It claimed the corporation was not subject to DS jurisdiction and thus had no responsibility to provide the requested documents.

As Defendants, members had to spend their time and money to hire attorneys to protect their Davis-Stirling rights. They found themselves opposed by more than GRF. They were also opposed by a series of corporations involved in the development, who later filed separate amicus briefs to support GRF.

Superior Court ordered GRF to produce the documents. The corporation did so. And kept suing.

In the lawsuit, the corporation took an 'everything-but-the-kitchen-sink' approach. It raised multiple arguments why DS did not apply. Superior Court tediously, and expensively, reviewed the long list of arguments. It concluded that Leisure World was a stock cooperative under DS, and that its 9,000 senior citizens/members had DS rights. Corporation appealed. Court of Appeal tediously, and expensively, reviewed the long list of arguments. It affirmed the Superior Court decisions. It too found that Leisure World satisfied all DS criteria for a stock cooperative. Thus Davis-Stirling applied.

Court of Appeal's description of the legal dynamics is relevant to Ed Weber's explanation.

> "GRF and its amici curiae offer a multitude of arguments why the declaration of trust cannot be a declaration pursuant to section 1353. None are convincing." *GRF, supra,* 1152.
>
> "GRF exalts form over substance." *GRF, supra,* 1149.
>
> "GRF unpersuasively contends it does not manage Leisure World{.}" *GRF, supra,* 1149.
>
> "GRF...relies upon a host of practice guides, treatises, and regulations suggesting that declarations typically contain CC&R's. That may be so. But the plain language of section 1353 does not require pre-1986 declarations to contain CC&R's." *GRF, supra,* 1153.
>
> "Next, GRF contends that reading section 1353 as permitting pre-1986 declarations to lack CC&R's will wreak havoc by suddenly transforming property across the state into common interest developments. Not so." *GRF, supra,* 1154.
>
> "GRF contends the declaration...was recorded to satisfy...FHA and other lenders, not with the intention of creating a common interest development. ... Davis-Stirling...conditions {CID} status on the recording of a declaration, not the subjective intention behind the recordation." *GRF, supra,* 1154.
>
> "GRF and its amici curiae contend the declaration...conflicts with...Davis-Stirling provisions{.} ... The amici curiae also claim the Davis-Stirling Act allows {CID} members to amend their declaration, whereas Leisure World residents...have no amendment rights{.} ... There is no conflict." *GRF, supra,* 1154.

Notice the pattern of legal dynamics.

After years of DS operations, members wanted basic records and won a small claims judgment to get them.

After the corporation released the records per court order, it continued to sue, using members' money to sue the members who got the records.

Owners were paying both sides of a lawsuit whose focus was to remove their Davis-Stirling rights.

Let's keep this case and discussion in context.

The Davis-Stirling Act is social justice legislation to protect property rights.

It exists because of major property rights abuses and injustices to Homeowners and Property Owners.

Davis-Stirling was designed to correct those abuses and injustices.

Since enactment in 1985, DS has repeatedly been expanded to specify basic requirements like open meetings, records transparency, insurance, reserves, fair elections, annual budgets in advance, notices, etc.

Those who financially benefit from reducing those rights have repeatedly argued to reduce DS scope.

Now more than triple its original size, DS continues to articulate fundamental protections for the roughly 25% of the California population protected by it.

For *GRF,* does any Commissioner or staff member think the majority of the 9,000 senior citizens/members directed their board to use Owner money to sue Owners to remove Owners' property rights under DS?

For this case and many others, Ed Weber has correctly described the dynamics involved in the corporation's aggressive legal pursuit to remove individuals' long-established Davis-Stirling rights.

How do those dynamics and this case affect proposed §4203? Let's connect the dots.

§4203(a) requires that <u>every</u> DS CID prove that its CC&Rs specifically allow residential use. Else, that CID is reclassified as a nonresidential CID and is automatically exempt from key provisions in 31 DS sections.

How can the 9,000 Leisure World senior citizens/members meet that burden of proof? They have no CC&Rs.

In Court, GRF argued it was not subject to DS because there were no CC&Rs. Court of Appeal read the law, and held the obvious--DS does not require CC&Rs. **"{§}1353 does not require a pre-1986 declaration to contain CC&R's or much of anything else, as already shown."** *GRF, supra,* 1152. (emphasis added).

GRF and its amici curiae partners will probably be delighted with the proposed §4203(a). Having lost its attempt to remove DS rights because DS does not require CC&Rs in pre-1986 developments, GRF would now have a DS law requiring CC&Rs for all CIDs, or else 31 key DS provisions no longer apply.

DS applies to developments formed before the law was enacted. *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361. Some of these developments were formed decades before DS. Some have no CC&Rs. Under H-858, all these developments would instantly lose DS protection, and be reclassified as 'nonresidential development'--even if they have been a residential development for 100 years.

Current H-858 should not be pursued because among other things, it requires CC&Rs in pre-1986 CIDs.

3. Where did this dramatic word change originate?

Those who know DS cases in the appellate courts may find the H-858 record out of touch with those cases.

Unlike the appellate cases, the record for H-858 and the closely related H-856 are dominated by the perspective and claims of those who would legally and financially benefit by removing DS protections.

Noticeably absent in the record is the voice of the tens of thousands of people who would lose Davis-Stirling rights under H-858's new jurisdictional requirements--with one exception, Ed Weber.

The silence is apparently because staff descriptions of H-856 and H-858 have repeatedly--and incorrectly--claimed the revisions do not apply to residential CIDs.

H-856's scope memorandum MM08-63, released 2008Dec2, in the only first-page sentence in bold type, stated that **"The study will not propose any revision to any aspect of CID law affecting residential CIDs."**

The final recommendation of H-858, issued 2 weeks ago on 2012Nov20, reported the same on pg 1-2.

"The Commission has not received any public comment in response to the tentative recommendation. This is not too surprising, as...many of the groups that have actively participated in the Commission's

prior study of common interest development law are primarily interested in the effect of that law on residential Property Owners. **This study would have no effect on any subdivision that contains a residence, and so is likely to be of little concern to residential stakeholders.**" (emphasis added).

Seven days after Final Recommendation MM12-48, CLRC corrected itself and acknowledged that it had received a timely submission from Ed Weber. Though Ed Weber's public comments were submitted almost 2 months before the close of the public comment period, they fell through the cracks and had not been responded to. The possibly rushed MM12-48s1 response did not reflect an understanding of Ed Weber's points and did not change any proposed wording to accommodate Ed Weber's warnings and constructive suggestions. MM12-48s1 did propose other changes noticed in the process of responding to Ed Weber.

Issues raised by Ed Weber were larger than MM12-48s1 acknowledged, and deserved a more complete response. Ed Weber wrote with extensive experience on the legal issues involved and the corporate attorney vs. property owner dynamic that he sees as driving H-858 and its discussion. The MM12-48s1 response inaccurately concluded the new law does not affect recreation developments, so no change was warranted.

Possibly staff discounted Ed Weber's position as extreme. He seems to see the new ambiguity in H-858 as a 'Full Employment For Corporate Attorneys Act'. He expects the expense to be borne by unsuspecting Property Owners. He expects attorneys to seize new wording to file and provoke unnecessary lawsuits, and deprive Property Owners of well-established and cherished DS property rights. He sees H-858's wording as driven by a fundamental conflict between the financial interests of corporate attorneys and Property Owners. He expects H-858 to injure the people DS was designed to protect. In making his points, he voiced the passion of countless Property Owners who ardently protect their rights and their land.

If this description of his position is correct, the evidence supports his view, for several reasons.

4. As exception legislation, H-858 is improperly structured.

Exceptions to broad social legislation are narrowly drawn, to prevent opening a wide crack where those disliking the law can escape its requirements.

H-858's history and predecessors started that way, then morphed into its opposite.

At first the DS exception was for shopping centers and property zoned industrial. MM11-29 pg 20.

Then the exception was expanded to include property zoned commercial.

Then the exception was expanded to include property limited to commercial and industrial uses by CC&Rs.

Current §1373/§4202 occurred at that point. It follows the normal exception-legislation pattern, is narrowly drawn, and restricts exceptions to CIDs restricted by zoning or CC&Rs to commercial or industrial uses.

H-856's scope memorandum used a phrase, 'nonresidential developments', which does not exist in current DS. This new phrase was merely "a shorthand for the more detailed language of {§}1373(a)" MM08-63, pg 7.

Thus the phrase 'nonresidential developments' at first meant nothing more than the current narrowly-drawn exception conditions for zoning/CC&R limitations to industrial or commercial uses.

H-858 was launched in 2011 when the "Commercial Stakeholder Group" claimed 3 more types of CIDs needed relief, though they did not satisfy the narrowly-drawn exceptions. MM11-29, pg 2.

(1) A "parking condominium" where parking spaces were the separate lots or interests.
(2) A "storage condominium" where storage spaces were the separate lots or interests.
(3) A marina where boat slips were the separate lots or interests.

At that point, staff began using another new phrase, "nonresidential personal use subdivisions" (emphasis added) to describe these 3 special cases, which were not Commercial & Industrial (C&I) developments.

Thus at the time of H-858's scope memorandum MM11-29, H-858 was still dedicated to narrowly drawn exceptions--C&I CIDs, plus 3 special cases– parking/storage condominiums, and marinas.

After that, under the false assurance that the new language does not affect residential CIDs, the record pattern of narrowly-drawn exceptions totally shifted frame and morphed into its opposite.

Instead of narrowly defining the exceptions, the new frame narrowed the main body of law, and threw everything else into a catch-all exception category of 'all-other'. This is the language of §4203(a) and (c).

This problem was compounded by defining 'residential CIDs' with circular logic, an ambiguous tautology.

Not content with more narrowly conceived 'residential developments', proponents then added more jurisdictional requirements never before required by DS CIDs--CC&Rs and the 'law' (not just zoning laws) must specifically permit 'residential use'. That requirement was also undefined.

Not content with even that increased narrowness of DS jurisdiction and expanded exceptions, H-858 language added 3 more narrowing conditions that limited DS jurisdiction even more, under §4203(b).

5. H-858 approach changed from scope to proposal.

Note the total change of approach from scope to proposal. The object being narrowed shifted from exceptions needing relief to narrowing the main body of DS jurisdiction, and throwing everything else into a suddenly greatly expanded exception category.

This is strange. Some would say such a shift was unethical. It certainly was outside the committed scope.

Ed Weber, who apparently read past the cover letter, called 'foul', and properly so.

This change of approach is a disturbing and unjustified shift . It would be unwise for the Commission to proceed with H-858's improperly-drawn exception language. Its approach, and unjustified shift from "narrow exceptions" to "narrowed DS jurisdiction with everything else excepted", would be a dangerous precedent.

6. H-858 may be the most insidious example of scope creep ever placed before CLRC.

Significant scope creep occurred in 5 areas of H-858, as detailed herein: (1) subject matter, (2) the number of CIDs affected, (3) the laws needed to establish exceptions, (4) expanding definitions for a new category of 'nonresidential' (see above), and (5) justifications used for exceptions.

Scope creep in subject matter. H-858's original scope was to determine if 3 more special-case CID types should be exempted from DS restrictions as costly and unnecessary for the special cases. MM11-29, pg 22.

The final recommendation's cover sheet (MM12-48) incorrectly stated "In a nutshell, the Commission provisionally recommended that the existing exemptions be broadened slightly, to apply to all "nonresidential" subdivisions." (emphasis added) The law as written was not 'broadened slightly'. Because it shifted from narrowly-drawn exceptions to narrowed DS jurisdiction, exception scope broadened dramatically.

Dramatic scope creep occurred despite a separate study of DS scope, which H-858 prematurely pre-empts.

Scope creep in number of CIDs affected. Reflecting 'all-other' vagueness, nowhere in the record is there any estimate of how many CIDs would for the first time be excepted from DS requirements. Nothing in the record provides the public and Commission a reasonable estimate of how much broader the scope creep affects, though it is clearly much more than parking/storage condominiums and marinas. How many CIDs would be newly excepted? 3? 10? 100? 1,000? 10,000? The order of magnitude is not shown.

Scope creep in laws involved in the exceptions. Similar scope creep occurred in the laws involved in justifying the exception outside governing documents. Currently only zoning laws can produce the exception.

H-858 then expanded to any law limiting use to industrial or commercial. Then it morphed into its opposite, shifting the burden to prove that residential use is permitted by 'law' and CC&Rs, else the CID automatically becomes nonresidential and all exemptions apply--even for housing developments.

What started as a narrow justification for exceptions (zoning laws) became a requirement that unless a CID met a new burden of proof that residential use (undefined) was permitted by (all) law, it was nonresidential.

Scope creep in justifications. Scope creep also occurred in justifications for exceptions. The statutory justification for §1373(b)/§4202(b) is that certain specified regulations were an unnecessary cost burden. Advocates of exceptions claimed that 90% of the purchasers of C&I CIDs were well-resourced, sophisticated corporations with accountants and attorneys, who did not need protections. MM08-63, pg 06.

As the word 'nonresidential' was redefined and enlarged, the justification for excepted CIDs expanded. The

original H-858 scope was to consider exceptions to 3 new special cases for the following reason. "A parking space, storage unit, or boat slip is unlikely to be a person's largest financial investment, deserving of special regulatory protection. Nor is it likely to be the person's home, requiring regulation to ensure fair and participatory self-governance and informal dispute resolution opportunities." MM11-29, p24.

Now the broad list of 'all-other' exceptions is justified based on claims that the original DS was intended only for housing developments, so everything else should be excepted. MM12-48, pg 8-11.

Current H-858 should not be pursued because its scope creep was unjustified.

7. What started--and is still advertised--as a slight broadening of exceptions for marinas and parking/storage condominiums morphed into a major assault on DS jurisdiction.

Let's be clear.

What started--and is still advertised--as a slight broadening of exceptions for parking/storage condominiums and marinas is now a major assault on the jurisdictional basis of Davis-Stirling.

The assault was not made as a direct attack on DS scope in a study so labeled.

It was done as a Chancellorsville flanking maneuver, with damaged constituencies falsely assured that the scope and results of the proposed legislation would not affect them.

As a matter of legislative history, just after DS was enacted in 1985, courts interpreted the obvious DS language as applying to any CID that met explicit statutory criteria, without regard to residential status. Commercial and industrial CIDs immediately tried to get their CIDs entirely removed from DS. That effort failed when members who needed the protections and received the rights opposed losing them.

Now, outside transparent debate of DS scope, those who financially benefit by removing DS rights have dramatically expanded exceptions, and shifted the legal burden to prove that the exceptions do NOT apply.

H-858 would make DS another example where *the large print giveth, and the small print taketh away*. The start of DS would grant jurisdiction, while the bottom would exempt a long list of 31 key sections.

Similarly, the cover sheet assures, "This study would have no effect on any subdivision that contains a residence". Yet the law itself has a major effect, and adds new jurisdictional hurdles required to AVOID the exception. The fundamental reframe to residential vs. nonresidential added new, unacknowledged requirements even for residential developments (not just subdivisions).

Reframing a law from justifying an exception to justifying that you're <u>not</u> excepted shifts the burden of proof.

When you add an adjective like 'residential', it does much more than modify. It increases the restrictions, increases the burden of proof, and potentially doubles the costs and frequency of lawsuits.

Current H-858 should not be pursued because it is an unacknowledged assault on DS jurisdiction.

8. The H-858 frame changed from 'developments' to 'subdivisions'.

It is important to note the change of frames from 'developments' to 'subdivisions'. Text switching between these 2 non-synonyms creates incorrect and misleading messages in the law and accompanying text.

The Business & Professional Code "Subdivided Lands Act" is based on subdivisions. Davis-Stirling is not.

Subdivisions require 5 or more plots of land (the subdivided land). Davis-Stirling does not.

DS requires a common interest development with a separate interest for 1 of 4 types of CIDs. Some DS CIDs are subdivisions. Some are not. DS jurisdiction does not require separate plots or parcels. It only requires a separate interest. Only 1 of the 4 types of DS developments requires subdivided land.

H-858's title and frame are 'Nonresidential Subdivisions'. Both words--and the incorrect frame behind them--should be removed as inapplicable to DS.

9. Under DS, a separate interest need not be a plot of land.

Note the wording of the Final Recommendation in §4203(b), before MM12-48s1 suggestions: "located on

but not permanently affixed to a separate interest". Those of us who have spent hundreds of hours to explain and litigate DS wording may find that phrase incomprehensible. Separate interests are legal rights, not physical locations. Separate interests are not a place for a vehicle to be located on or affixed to. This wording perpetuates the legal confusion that DS requires a subdivision with separate plots of land. It does not. Only 1 of 4 types of DS CIDs requires a separate plot. A second type requires ownership of a separate condo unit, though not a parcel. A third type does not require ownership of either, only the right to lease an apartment. A fourth type, stock cooperative, requires even less. It only requires the separate interest to be the right to occupy some space somewhere on the property. The latter 3 do not require a subdivision.

H-858 was written as if DS required a separate interest to be a parcel of land that you can put a vehicle on. Such a frame only fits 1 (if that) of the 4 statutory types of DS developments.

H-858 should not proceed in its current form because it is based improperly on only 1 of 4 DS CID types.

10. The H-858 frame changed from special case exceptions to residential vs. nonresidential.

Also note the frame change from special case exceptions to residential vs. nonresidential.

Davis-Stirling does not require any of its 4 types of covered developments to be residential.

No DS CID has ever been required to show it was for 'residential' use to qualify for DS protections.

H-858 unnecessarily introduces new requirements and legal hurdles for all DS CIDs to prove residential use, yet the requirements are buried in an ostensibly irrelevant proposal to extend exceptions for storage units, parking lots, and boat slips. Affected Owners are apparently unaware of how H-858 would affect them.

DS jurisdiction does not require a CID to be either a 'residential development' or a 'Commercial & Industrial Development'. Nor is there an assumption that these 2 types comprise the DS CID universe.

Introduction of this new and improper frame of residential vs. nonresidential frame led to further confusion between 'residential use' and 'transitory residential use': "The point of that provision {§4203(b)(3)} is to make clear that short-term residential use does not make a CID residential." MM12-48s1 pg 3.

The residential vs. nonresidential frame then led to further confusion in requiring governing documents and the 'law' to show rights for residential use. This is new, broad, and destructive to some DS CIDs. Because 'residential' use is ambiguous, such a legal proof, which has never been required, would be fraught with unrecognized and unintended legal problems, as explained herein.

The best practical way to solve the 'residential' quagmire is to never enter it. Note that this is exactly what the current DS does. DS defines 4 types of developments that it covers, and defines all 4 without ever using the words 'residence' or 'residential' or 'nonresidential'.

H-858 jumps with both feet into the quagmire by requiring that a CID be for 'residential use' and disallows certain 'residential occupation'. These are new restrictions, outside the current law, and totally unnecessary. As with tax laws and zoning restrictions, it will lead to countless unnecessary lawsuits over the new phrase.

The solution to this unneeded quagmire is similar to MM12-48s21's recommended §4203(b) revision, shown on page 3 though not on pg 6-7, to change occupancy of a 'boat/trailer/vehicle' to 'space within the development'. This change is closer to DS wording in §1351(l), which specifies that the separate interest in a stock cooperative is the right to "occupancy in a portion of the real property".

Note the lack of restrictions in 1351(l). There is no requirement that your occupancy be on a separate lot or parcel. There is no requirement that your occupancy be in a boat/trailer/vehicle. There is no requirement that the occupancy be year-round. It is precisely this flexibility that allows dramatic economies of scale in vacation and recreational developments. You share the golf course, swimming pool, fishing rivers, hunting forests, tennis courts, horseback riding trails, and scenic views, with the right to temporary exclusive occupancy of some space like a lodge room, RV, or ranch bunkhouse, somewhere in the development. The exclusive occupancy is a place to sleep and call 'your own'. The length of time is irrelevant.

Current H-858 needs to be reworked to accommodate all DS CIDs, and not exclude stock cooperatives.

H-858 introduces a new category of developments foreign to existing law without adequate reason to do so. By promulgating the myth that DS need only apply to residential developments, H-858 would remove DS

protections for thousands of people in DS CIDs that fit neither of the 2 new awkward and vague definitions.

Further, H-858 explanatory text does not acknowledge the existence and importance of the huge block of DS CIDs such as vacation developments, recreation developments, 'second-home' developments, and mixed use developments. In some developments, Owners share the common areas and stay on the property, often for months, though NOT as a time-share. Nor does the text properly acknowledge the Ed Weber example, where Property Owners have had the right to use the property 365 days per year, eat all their meals there year-round, recreate there every day of the year, and sleep overnight up to 335 nights per year. Yet they are not allowed to establish this recreation property as a domicile or as their permanent residence.

Consider vacation developments. By sharing common areas for part of the year, beautiful rural property can be developed and made available at affordable prices to those who would like a beautiful vacation spot. Do they live there? Not in the legal sense of 'domicile'. They register to vote 'at home'. They return to their 'residence' after vacation. Are they covered by current DS? Yes. Would they be covered by H-858? Attorneys and stakeholders benefiting from the removal would argue no, because H-858 requires 'residential use' without defining it. Given they have a 'residence' elsewhere, this is vacation property, thus not 'residential'.

Tens of thousands of people will be justifiably irate when they discover their existing DS protections were removed by a statute scoped and advertised as only applying to marinas and parking/storage condominiums.

Current H-858 should not be pursued because its reframe of all DS CIDs as residential vs. nonresidential is outside the current law, incongruent with it, unnecessary to providing relief to parking/storage condominiums and marinas, and removes DS protections in many existing DS CIDs not represented in the discussion.

11. The repetitive discussion of original intent is incorrect, misplaced, and hides the underlying dynamic--lobbying for policy change to reduce DS scope.

Memoranda seem to justify scope creep by claiming CLRC is attempting to bring DS into line with original intent. Memoranda seem to take the position that DS was never intended to apply to anything other than housing developments, so all other CIDs should be excepted from the law, even now, 27 years after the law was enacted and adjudicated to apply outside housing developments.

Staff based their conclusion on a handful of writings from the enacting period, which claimed that DS was intended to only apply to residential subdivisions.

None of the writings, however, are from legislators named Davis or Stirling.

This same discussion has occurred for decades, and ends with the same result--**it was <u>not</u> the legislature's original intent to limit Davis-Stirling to residential developments.**

Statutory construction principles require that <u>legislative intent must be determined from the words of the law</u> itself. If the words are clear, the analysis stops there. If there is an ambiguity, with an unclear or double meaning, interpreters consider legislative discussion to determine what was meant, with the analysis narrowly limited to that necessary to resolve the particular ambiguity found <u>in the law's words</u>.

There is no H-858 argument that any DS jurisdictional word is ambiguous. So the repetitive revisiting of claimed 'original intent' is unwarranted, and simply becomes a lobbying mantra to reduce DS protections.

Consideration of 'legislative intent' is not for discussions of 'what we wanted and didn't get', or 'what some *legislator thought they were getting and didn't*', *or 'what our stakeholder group lost and want back'.*

Repetitive discussion of this failed claim of legislative intent is in fact a lobbying effort to reduce DS scope.

The actual debate is not a debate over original legislative intent. That debate was settled years ago.

The actual debate is a current public policy discussion of expansion or reduction of DS protections.

That debate should not circumvented through the backdoor of exception legislation.

It should be on the front porch, with openness and transparency, with all parties invited for tea.

12. H-858 words and music do not match.

As described herein, the law and its description are frequently at odds in the record for H-858 and H-856.

MM12-48s1, released last week continues this mismatch. Page 6 states "The proposed law defines "nonresidential" indirectly, by first defining "residential" and then providing that anything that is not "residential" is "nonresidential"." This sentence is untrue. H-858 does not define 'residential' or 'nonresidential', directly or indirectly. In fact, H-858 suffers greatly because it does not do so.

Because H-858 does not define 'residential', its meaning would be the everyday meaning (and/or legal meaning) of 'reside' and its inflected forms, 'residents', 'residence', 'residential', etc.. That spells lawsuits.

Predictably §4202 will provoke litigation because it does not do what that sentence claimed. After asserting this sentence, staff concluded that "While that approach works, it is somewhat convoluted." (pg 6).

§4203(a) only 'defines' 'residential CID', and does so improperly, as a tautology, using the words of the phrase to 'define' the phrase, creating an almost useless circular 'definition': ""Residential common interest development" means a common interest development in which residential use is permitted..."

Current DS does not require any proof of residential use or residential rights. If Ed Weber's warnings are correct, attorneys pushing to remove DS rights would seize that wording to initiate new lawsuits, claiming that the new word "non-residential" requires such a proof, then litigating what exactly 'residential' means.

H-858 should be redone to continue to protect all DS CIDs, residential or not, where Property Owners have a common interest and a separate interest as required by 1 of 4 types of CIDs.

13. H-858's 'residential' insert has an unusual and informative origin.

To resolve the puzzlement why such a well-known, previously-avoided problem word like 'residential' was unnecessarily introduced as a jurisdictional DS requirement, prior memoranda were reviewed.

MM11-35 clarified that insertion of 'residential' in §4203(b) was a 'minor clarifying revision' 'informally suggested' by Duncan McPherson. It is neither clarifying nor minor. This 'minor clarification' is actually a 'major confusion' predictably leading to a series of court cases to clarify the obvious obfuscation.

It is important to note that the approach to the phrase 'residential occupation' was as a temporary residence. MM12-33 stated that "The point of the revision is to make clear that "occupation" does not refer to the mere presence of a boat, trailer, or other vehicle on subdivision property. Rather, "occupation" refers to the use of the vehicle as a temporary residence." MM12-33, pg 5. The operating definition of a temporary residence is a place where you sleep overnight. Because it relies on a simple fact without unnecessary legal complications, 'where you sleep at night' is in fact the legal definition of 'residence' in some courts for some laws, irrespective of whether that residence is temporary, permanent, or semi-permanent.

CLRC apparently means intends this common everyday meaning. "{W}hen 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." MM12-48sa, pg 3. Often, 'reside' reduces to where you sleep overnight. CLRC adopts that meaning implicitly on page 2, last paragraph, where residential use is defined based on overnight stays rather than the legal complexities of domicile, place of voting, place you return to, zoning laws, multiple residences, etc. If 'residential use' is simply the right to sleep overnight, as in many legal definitions, H-858 would be clearer if it simply said that, and avoided the unnecessary lawsuits to define 'residential'.

To avoid unnecessary lawsuits, H-858 should replace 'residential' with 'overnight sleeping', 'overnight stays', or similar phrase defined by facts rather than conclusions of law requiring court adjudication.

14. H-858 improperly relies on extrapolation from 2 of 4 types of DS CIDs.

H-858 relies in large part on MM08-63s2, Exh1, pg 1. "Commercial CIDs are either planned developments, condominium projects, or some combination of these two types of CIDs." This means that Commercial CIDs are only 2 of the 4 types of DS CIDs. Planned developments, require "a separately owned parcel, lot, area or space". §1351(l)(3)/§4185(a)(3). Condo projects require "a separately owned unit". §1351(l)(2)/§4185(a)(2).

H-858 and its record reflect the view that DS requires a separately own parcel, lot, or unit. It does not. The

2 types of Commercial CIDs do. Looking beyond Commercial CIDs to the other 2 types of DS developments, the error becomes apparent. Apartment CIDs only require "the exclusive right to occupy an apartment" without any requirement to own a parcel, lot, or unit. §1351(l)(1)/§4185(a)(1). Stock cooperatives require only "the exclusive right to occupy a portion of the real property" §1351(l)(4)/§4185(a)(4). In stock cooperatives the "portion" may be part of the shared common area. Current DS allows innovative CIDs to invoke DS protections if members have the right to temporarily occupy shared areas like a lodge room or RV space.

Note that none of the 4 types mention any residential requirement. You could own a vacant lot too small to build on. Or use the condo or apartment as storage space with no requirement or even right to use it as a 'residence'. Stock cooperatives, the most flexible type, only require a right to occupy a portion of the property, and that occupancy can be temporary.

H-858's redo should include analysis of CIDs that do not fit the limitations of commercial CIDs.

15. What exactly is 'residential use'? What is the legal definition of 'residential'?

To understand why Ed Weber expected more lawsuits to remove DS protections through the undefined phrase 'residential use', consider the DS case, *Aharoni v. Malibou Lake Mountain Club, Ltd* (2007). This case is very instructive for CLRC to anticipate H-858's unintended consequences.

Aharoni addressed the meaning of "substantially all" in the DS §1351(m) stock cooperative requirement. Plaintiffs asserting DS protection showed that 75% of the Owners had separate interest licenses that satisfied DS requirements. They cited several cases, and a federal case interpreting "substantially all", as supporting their conclusion that 75% satisfied the DS phrase "substantially all". Court of Appeal found those cases were "not helpful". Instead, it relied on IRS code mentioning 85%, and references in state Finance Code and Penal Code. They relied in part on Revenue and Taxation Code §6010.3, which defined "substantially all" in the sale of art to be 80%. After this extensive consideration, Court of Appeal declined to specify what percentage satisfied the DS phrase "substantially all". It only held that 75% did not.

Thus, after all the court work, the ambiguity in the original wording remained. The best that could be taken from the years of litigation was that 'substantially all' must be some percentage greater than 75%.

Then, the Court designated the case as unpublished. This means the case cannot be used in court outside limited exceptions. Thus, even the limited "75% is not substantially all" holding is not governing law.

After hundreds of thousands of dollars of litigation and opportunity costs, and high social costs to taxpayers to adjudicate this unnecessarily ambiguous statutory phrase, the many thousands of people it applies to are left with the same conclusion--"We don't know what 'substantially all' means."

Does any Commissioner or staff think that a development required DS protection if they had 80% Owners with a right to occupancy, and a development with 75% did not?

For years, CLRC has worked hard to prevent the situation where Davis-Stirling must be interpreted based on the Corporations Code. Would you prefer the Revenue and Taxation Code?

Does any Commissioner or staff member think that it benefits DS-protected Owners to have a DS phrase interpreted based on an obscure provision in the Revenue and Taxation Code for the sale of art?

All those costs and confusion could be eliminated with a fact-based replacement (%) for 'substantially all'.

The proposed new requirement of 'residential' and 'residential use' is an order of magnitude worse than 'substantially all'. 'Reside' and inflected forms like 'residents', 'residence', and 'residential' have no single established legal definition. Under California statutory construction principles, the interpreting court must use the ordinary, everyday (dictionary) definition unless a legal definition is indicated. The proposed legislation repeats the 'substantially all' scenario by not defining 'residential' in any fact-based way. Nor does it refer to any legal definition in any other location to guide Owners, their board of directors, and the interpreting court.

There is no established English dictionary definition. There are several, which in application are inconsistent.

There is no established law dictionary definition. There are several, which in application are inconsistent.

There is no established California Code definition. There are several, which in application are inconsistent.

The 'law' of §4203(a) encompasses all these inconsistencies.

In some jurisdictions, Voter Registration Laws, designed to encourage more voting, allow a definition of 'residence' to include the street address of the utility grate upon which a homeless person sleeps for warmth. This is a 'residence', even if that unmarked 'address' is not a mailing address or property address, and even if the 'residential use' of that address is illegal per zoning law, health law, and municipal code.

Election candidate laws, covering the same elections with a different purpose, use a different legal standard to establish a potential candidate's residence. Federal and state laws governing the same election use different legal authorities to decide who can vote where based on 'residence'.

Taxation laws, designed to maximize government revenue, use a different legal authority and frame of reference. Zoning laws use a different standard and legal authority for 'residential zones'. Environmental laws limits how close a 'residence' can be to a hazardous-material contaminated border zone. FHA uses its own definitions to regulate home loans. Laws for home offices use another. Ditto for housing discrimination laws. Ditto for disability laws to ensure accessible housing. Ditto for professional license codes.

Courts trying to define words like 'residence' find a bewildering array of complications like 'tax home', the place you return to, the place you register to vote, the place you get mail (including a post office box), the place you pay utilities, a place that satisfies housing laws, a place that satisfies zoning laws for a 'residential zone', the place where you sleep overnight, the address you use on legal documents, or simply a statement of where you 'reside'. The analysis is further complicated by the legal reality that you can have multiple residences, and are not limited to only one--except for voting laws. Courts have reached an broader array of results on the words 'reside', 'residents', 'residence', and 'residential' than they have for 'substantially all'.

To determine for yourself whether the Memorandum's position that inserting the word 'residential' is a 'minor clarification', do the following experiment. Ask 20 attorneys who represent CIDs what legal authority they expect Court of Appeal to use to interpret 'residential'. Don't be surprised if you get 20 different answers--all of which they are prepared to litigate.

If Ed Weber's position is that inserting the new word 'residential' invokes jurisdiction of the Full Employment For Attorneys Act, the evidence would support his view.

Alternately answer the question yourself with a few minutes. Search California's 27 codes to find which ones invoke or define 'reside', 'resident', residence', or 'residential'. You'll be amazed at the breadth of legislative standards and frames of reference. Then search California's cases, and if you dare, federal cases and other states' cases on CIDs, to determine the appropriate legal authority for this particular context. You'll find thousands of cases. Even after reviewing them all, you have at best a small probability of guessing in advance which authority Court of Appeal would use. This is because H-858 does not define the word, reference another law that does, or provide enough context to guide impartial and predictable interpretation.

Ask yourself: Did any, or would any, attorney that you know predict that when faced with the need to interpret the ambiguous Davis-Stirling phrase 'substantially all', Court of Appeal would reject as 'not helpful' the federal case interpreting that specific phrase, and instead rely as legal authority on an obscure and unrelated section of the Revenue & Taxation Code for the sale of art?

Now, into this environment, insert H-858.

Imagine you are standing in front of a room of upset Property Owners demanding to know exactly what the new jurisdictional requirement of 'residential use' in 'law' and CC&Rs means, and "Will this new law take away our property rights?" Other than empty assurances to calm the angry masses, what would your legal answer be? And what are the odds that Court of Appeal would use your answer as their preferred legal authority?

Laws like H-858 prevent proper advice from attorneys to CIDs because in the final analysis, the real answer is "We don't know.". Boards are immobilized. Although they've succesfully relied on DS protections for 27 years to move their community ahead, they suddenly don't know if the new law dropped them.

- We're a vacation property where snowbirds can vacation most of the year--are we 'residential use'?
- We're a second-home property--can you have 2 residences?
- We're a recreation development where people can live here up to 11 months in a year though they

maintain a 'residence' somewhere else--would an opposing attorney argue that we're not 'residential'?

- We're mixed use--which use controls?
- If a law says you can only be a resident after living here for x months, does DS does not apply until then?
- Our development is mostly empty lots where you can't live until a house is built. In this economic climate, nobody expects the houses to ever be built--would an attorney argue that we're not residential by 'law'?
- We're a new development where nobody lives (yet) and we have the right to live here only after we jump through a bunch of hoops like building permits and environmental approvals. Does H-858 mean we aren't residential because the 'law' doesn't allow us to live here--yet? If the 'law' says we're residential if X or after Y, does that mean we don't have DS protections unless X is done and only after Y is done?
- Our development is mostly empty lots. With new environmental restrictions, most of our empty lots "don't perc" and will never be buildable as a residences--would an aggressive attorney argue we aren't a DS CID?

H-858 should not proceed until this urgently needed analysis is in the law and accompanying documents.

16. H-858 fails CLRC's articulated standard to be as simple and direct as is legally feasible.

H-858 should not proceed because it fails to satisfy CLRC's standard for simplicity and directness.

{T}hose suggestions run counter to another broad theme..., that the proposed law should not be made too complex for easy use by nonlawyers. If a non-lawyer needs to read {DS} to determine whether electronic notice delivery is permitted, the answer should be as simple and direct as legally feasible. MM10-29s1.

17. H-858 fails CLRC's articulated standard for a bright-line test for exceptions.

Other than to provoke lawsuits, why would any drafter of high-integrity legislation choose to introduce previously-avoided, litigation-prone words like 'residential' to be a new undefined jurisdictional requirement?

Add to this confusion the double-meaning of 'residential'. 'Residential' is the adjective form of 2 homonyms, 'residents' and 'residence'. 'Residents' is people. 'Residence' is place. Ed Weber might expect attorneys eager to remove DS protection to seize this double-meaning homonym to argue that 'residential use' is not allowed by law for illegal immigrants, foreigners wanting California vacation property, etc.

Strangely, the obviously ambiguous, lawsuit-prone word 'residential' was added after setting the explicit standard that any exception requirement be a "bright-line test". H-858's scope memorandum MM11-29 required that "For the reasons stated above, it is important that the exemption language provide a bright line standard. Any ambiguity could lead to costly errors, litigation, and even potential criminal liability."

H-858 removes the current bright-line test of §1373/§4201, which has no asserted ambiguity and is narrow, and replaces it with a broad, fuzzy test so ambiguous different Courts of Appeal could use different authorities. It might take years before anyone could be sure what the controlling legal test was for 'residential use'.

All these complications are totally unnecessary for H-858's scope--to determine potential exception language for parking/storage condominiums and marinas.

How far we have come from the stated scope of exception language for 3 special cases.

H-858 should not proceed because it failed its own requirement to only use a bright-line test for exceptions.

18. What Davis-Stirling rights would be lost under H-858?

How many DS provisions do not apply to excepted CIDs? 28 full sections and 3 partial sections.

Are there important rights in those 31 sections? Yes.

What rights and protections would people lose under H-858? Here's a partial list.

1. The right to assessments that are no more than the costs necessary to defray the costs. §5600.
2. The right to no assessment increase unless the board complied with financial statement laws. §5605.
3. The right to not have a 20% increase in regular assessments without members' majority vote. §5605.
4. The right to not have a special assessment >5% of the expenses without majority vote. §5605.

5. The right to 30-day notice of a rule change, and the association's responsibility to provide it. §4360.
6. The right to require rule changes to be reasonable, in writing, consistent with governing documents, adopted in good faith, and within the board's authority to pass. §4350.
7. The right for 5% of the Owners to call a special vote to reverse an unwanted rule change. §4365.
8. The association's responsibility to disclose specified real estate documents and information. §4530.
9. 'Grandfathering' of the right to lease a separate interest if bought before the right was removed. §4740.
10. The right to receive from the association 30-90 days before the end of the fiscal year the annual budget, the statement of the financial reserve, the board's reserve funding plan, a statement of any loans longer than 1 year, a summary of insurance coverage, a statement of the association policies, etc. §5300.
11. The right to receive year-end financial statements, prepared by a Board Of Accountancy licensee, and the association's responsibility to provide it within 120 days of the close of the fiscal year. §5300.
12. The responsibility for the association to review quarterly the income and expense statement, revenues and expenses compared to budget, recent financial statements, and reserve accounts. §5500.
13. The requirement for designated signatures of 2 directors, or director plus an officer, to withdraw money from the reserve. §5510.
14. The right to a notice of any reserve funds transfer. §5520.
15. The right to a reserve study every 3 years of the need and costs to repair or replace assets. §5550.
16. The right to petition court to intervene in special situations to amend a governing document. §4275.
17. And much more.

19. Do record facts support the conclusion?

A hallmark of sound legislation is that it is based on facts, rather than special interest politics.

Commendably, CLRC proposals begin with a fact-finding study to determine if the factual need for legislation justifies the social costs to draft it, pass it, and adjudicate it.

Proposed H-858 is exception legislation.

It extends exemptions to DS regulations to more CIDs.

Record evidence should contain facts from injured parties requesting relief from undue hardship.

Example 1: "I'm John Doe, from XYZ development. We waste $x,000 each year to satisfy Civ. §13xx, and yet those DS 'protections' mean nothing in our special case--except added costs. It doesn't benefit our members, only attorneys, accountants, and the post office. Please provide relief for special cases like us."

Example 2: "I'm Jane Doe, from ABC Association. We're forced to satisfy Civ. §13xx, even though it costs $x,000 each year and makes no sense in our special situation because __. I'm part of an email group of 5 similar associations with our same special circumstances, and we all have the same problem. This legislation isn't helping us, and the bureaucratic paperwork costs us big $$$. We're drowning in red tape. HELP!"

How many letters are in the record showing facts that request or justify regulatory relief? 0.

How many facts are in the record showing that current DS provisions are a burden to the special cases? 0.

Is there any record evidence from any individual under DS that it does not benefit them? No.

Is there any record evidence from any DS association that it does not benefit their members? No.

Is there any record evidence from any DS association that DS is an undue hardship or financial burden? No.

Is there any record evidence from any DS association of the actual costs for any of the 31 exempted sections for which relief would be warranted? No.

Is there any record evidence from any marina association or member that they need regulatory relief? No.

Is there any record evidence from any parking association or member that they need regulatory relief? No.

Is there any record evidence from any storage association or member that they need regulatory relief? No.

Is there any record evidence that any of the 31 sections are inapplicable to the 3 special cases? No.

Is there any record evidence, for example, that it is unreasonable for marinas, for example, to have required insurance to protect members from catastrophes like storms, earthquakes, and tsunamis? No.

Is there any record evidence that it is unreasonable for members of a "parking condominium" to be protected by the 2-signature requirement to withdraw money from the reserve account, to reduce the risk of a criminal manager or director stealing the money and skipping town? No.

Is there any record evidence that it is unreasonable for a "storage condominium" association to disclose real estate documents, annual reserves, and quarterly financial statements? No.

Is there any record evidence that it is unreasonable for members of any special case to have the right to reverse unwanted rules by majority vote of the members? No.

Is there any record evidence that it is unreasonable for associations to have a reserve fund to replace roofs and repair depreciable property? No.

Is there any record evidence that any of the 31 exempted sections are anything more than sound business practices that every association member should be entitled to as a matter of law? No.

Is there any record evidence, even from the '90% well-resourced and sophisticated corporations' for whom exceptions were previously granted, that the 31 exempted sections were anything other sound business practices that a sophisticated corporate member would require? No.

Strangely, there are no facts in the record that any of the special cases existed, in what numbers, and why, if they existed, they need relief from the basic, sound business practice provisions of DS.

Instead, this record shows only self-serving conclusory statements of need without any evidence whatsoever to support its conclusion to increase exceptions. There is no evidence--or even request--for relief.

Equally strangely, there are no facts that the special cases satisfied requirements used to justify the prior exceptions--CID members that were well-resourced and sophisticated corporations needing so DS 'help'.

In fact, the record supports the opposite conclusion.

Staff termed the 3 special cases 'nonresidential personal use developments'. Are 90% of the parking spaces, storage units, and boat slips owned by sophisticated corporations who need no DS 'help'? Probably not. In fact, the same members of DS housing CIDs would likely own those boat slips, storage units, and parking spaces, and need the same DS requirements for sound business practices.

Thus the 'fact-finding' record fails the test to justify adding any of these 3 newly-claimed 'special cases'.

In short, the fact-finding record does not support expanding the exceptions at all.

If this legislation were based on facts, it would have been shelved long ago as lacking factual support.

If Ed Weber's position is that these 3 'special cases' were used as an excuse to reframe DS law and remove current Davis-Stirling protections from those who need it, the record would support his position.

20. Record facts for the only CID actually addressed showed harm from H-858, not benefit.

To illustrate his points, Ed Weber described his DS CID, R-Ranch in Hornbrook. R-Ranch is a 5,000+ acre recreation development in northern California, in Siskiyou County, just below the Oregon border. Ed Weber argued that H-858 would lead to more lawsuits to remove DS protections by the same firm, Neumiller & Beardslee, whose attorney Duncan McPherson has most actively pushed the legislation in the H-858 record.

Key background for Ed Weber's points in MM12-48s1 is the prior MM10-37s1 for the closely related H-856.

The staff received an email from Duncan McPherson (attached), commenting on Memorandum 2010-37.

In {MM10-37}, the staff raised the issue of whether the word "nonresidential" is the best adjective to use in describing a common interest development ("CID") that would be governed by the proposed law (i.e., a CID that is limited to commercial or industrial uses).

That issue was prompted by a letter from an owner of an interest in "R- Ranch," a property development used solely for recreational purposes. Such a development would appear to be "nonresidential," despite the fact that it is not limited to commercial or industrial uses.

Mr. McPherson writes to explain that R-Ranch is not a CID at all. Ownership of the entire development is held in undivided shares. No owner has a separate interest. See Exhibit.

This new information does not change the theoretical problem described in Memorandum 2010-37. There could be CIDs that are "nonresidential," but are also not industrial or commercial. For example, if the owners of R-Ranch each owned a separate interest lot in the development, with the remainder owned as common area, it would be a CID.

However, Mr. McPherson's comment does seem to dispose of the only known example of this problem.

The attached letter exhibit claimed that R-Ranch "is not a CID..., since the owners have no designated separate lot or space within the project." As occurred throughout the record, this view reflects only 1 type of DS CID, and is improperly extrapolated. It is also incorrect.

MM10-37s1 seems to have originally concluded that R-Ranch is not a CID, and apparently discounted Ed Weber's suggestions accordingly: "Mr. McPherson's comment does seem to dispose of the only known example of this problem." It does not. An unanimous string of Superior Court cases over 20 years has affirmed, without exception, that R-Ranch is subject to Davis-Stirling. It is not necessary for CLRC to decide whether DS applies to R-Ranch (MM12-48s1, pg 1). Court of Appeal has already done so. After the corporation sued a member, Court of Appeal ruled in *R-Ranch POA v. Lemke* that R-Ranch is subject to Davis-Stirling. Duncan McPherson did the record a major disservice when he inserted his personal opinion without clarifying that it was contrary to years of Superior Court orders and Court of Appeal. Ed Weber expects that H-858 would generate more lawsuits by such firms to aggressively remove DS protections, even where Court of Appeal has settled the issue. Ed Weber asked CLRC to rewrite H-858 to be clear enough to avoid more lawsuits.

After belatedly and briefly considering Ed Weber's explanation, MM12-48s1 concluded "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)." Some corporate attorneys would disagree with that assessment in court, though possibly not in this record. Indeed, H-858 affects many DS CIDs, not just R-Ranch.

MM10-37s1 apparently concluded that R-Ranch was the only known example of this problem. It is not. As McPherson admitted in the exhibit, pg 2, other recreation ranches have similar documentation. This means the 'theoretical problem' described still needs to be resolved. MM12-48s1 only begins to address it.

H-858 should not proceed until this improperly 'disposed of' example, and others like it, are integrated.

H-858 should not proceed until the Commission can be clear, with facts, on what developments, and how many, would fall between the cracks of the false dichotomy 'residential' vs. 'nonresidential'.

21. Taken as a whole, H-858 has troubling parallels with *Dred Scott*.

H-858 and its record parallel in several troubling respects the *Dred Scott* decision and dynamics.

In *Dred Scott*, the U.S. Supreme Court was presented a limited question of law, whether a slave taken into a free state became free under that state's residence laws even though his master took him back to a slave state. Supreme Court used that limited question to introduce an entirely new frame. It held that blacks had no constitutional rights, and that the laws of the slave state governed Dred Scott even when he resided in a free state, because he never became free. *Dred Scott* declared that blacks have no constitutional protections (even though the Constitution used slave counts to add more white representatives in Congress). *Dred Scott* declared antislavery laws to be unconstitutional and instantly made slavery legal in all U.S. territories.

When *Dred Scott* was announced, there was much partying and rejoicing by the stakeholder group who financially benefited by denying basic rights to black Americans. This stakeholder group had hoped for a victory on a limited legal question, to support re-slavery of freed black Americans who reentered slave states. Instead, they got a fundamental reframing of Constitutional law removing all constitutional rights for all black Americans, who according to the lead opinion, had "no rights which any white man was bound to respect".

If the proposed H-858 legislation passes as currently proposed, there will be much partying and rejoicing by those with a financial interest in removing Davis-Stirling rights. There will be toasts to the cleverness of reframing the entire Act through an unnoticed side study on Commercial & Industrial Developments. There will be 3 cheers for deft maneuvering of claims in public documents that the law did not affect developments with a residence. Glasses will be raised to celebrate the sly circumvention of the backlash that occurred last time, when the removal of C&I CID rights was opposed and stopped by those who would lose the rights. There will be accolades, bonuses, and backslapping for those who found a way to slip §4202(a) and (c)

below the radar by reframing exceptions and shifting the burden to prove that exceptions do not apply.

After *Dred Scott*, outside the celebrating stakeholder group, a doom and despair of foreboding swept over the land. One 19th century attorney explained that *Dred Scott* destroyed his confidence in the American legal system. Before *Dred Scott*, he viewed the American legal system as the pinnacle of civilization. It was THE place where every person was equal under the law. Where rationality prevailed over politics. Where the rights of one individual were as important as the rights of the powerful. Where social change could be achieved morally through the rule of law rather than through death and destruction. *Dred Scott* fundamentally and permanently changed this attorney's view of the American justice system.

Years later, the Supreme Court Chief Justice who penned the lead *Dred Scott* decision swore-in this forever-changed attorney as the commander-in-chief who had to correct the decision. After leading the country to reverse the injustice, he was killed.

It took a generation, a civil war, a scarred country, an assassination, and 3 constitutional amendments to remedy the Court's error. 600,000 Americans died to overturn that court decision.

H-858 is your *Dred Scott*.

Like *Dred Scott*, H-858 has taken a limited question of law as an opportunity to reframe the underlying law.

Like *Dred Scott*, H-858 began with a special case analysis and ended with a changed jurisdiction that had nothing to do with the special case that initiated it.

Like *Dred Scott*, the reframe removes existing rights for thousands who were not party to the discussion.

Like *Dred Scott*, the proposal is not based on record facts.

Like *Dred Scott*, the record is an unbalanced echo of the frame of those who benefit from removing rights.

Like *Dred Scott*, the H-858 record is a triumph of narrow special interests over balanced public interests.

Like *Dred Scott*, thousands will be justifiably irate when they discover existing rights were removed by a statute that claimed it did not apply to them.

Like *Dred Scott*, the reframe is unnecessary, unwise, counterproductive, divisive, and inflammatory.

Like *Dred Scott,* the H-858 reframe is blamed on original intent. Without pointing to any words in the law to justify the position, *Dred Scott* held that the framers of the U.S. Constitution could not have intended for Constitutional rights to apply to black Americans. Without pointing to anything in the law to justify the position, H-858 claims the Davis-Stirling Act was not intended for anyone outside housing developments.

Like *Dred Scott*, H-858 has significant unintended consequences, and is an embarrassment.

Unlike *Dred Scott*, it is not too late to remedy the error.

22. How should the Commission approach H-858?

Like the 19th century attorney agonizing over *Dred Scott*, most Americans have lost confidence in the law-making process.

Modern Americans envision laws emerging from smoke-filled back room deals, with horse-trading of votes, backslapping agreements that "I'll vote for your bad bill if you'll vote for my bad bill", legislation for sale at corruption prices, public interests being traded off to benefit special interests, majority interests overcome by a powerful few, and special laws for those who donate heavily to campaigns.

As a result Americans rate Congress and legislators as the second lowest in trust among all occupational groups in the United States. Only car dealers rate more distrust.

Americans have lost trust in the legislative process because repeatedly, legislation of x,000 pages passes without legislators ever reading or understanding what they voted in, with the vote 'mostly along party lines'.

Americans equate the making of laws with the making of sausage, and joke that if you were a fly of the wall watching how either was actually made, you would never partake thereafter.

In such an environment, CLRC is a lighthouse beacon.

Like the U.S. Supreme Court before *Dred Scott*, CLRC embodies many ideals of the civilized and sovereign rule of law in an orderly and free society. You pursue a process of writing laws based on openness and transparency. The process is readily and freely accessible to all, not just the select and powerful few. Commission meetings are in public, not behind closed doors. There is no cigar smoke to cloud judgment and hide faces. The process is built on rationality, following a study and fact-finding, publicly reported. Each law has to stand on its own merits, without the horse-trading of votes for 2 bad bills. Unlike the perfunctory hearing process after the real decision is made, CLRC's process is iterative, with conversations and comment-response-comment-response chains that progressively produce better wording and laws. Marked copies online show this progress without charge. CLRC has a demonstrated track record of being responsive and balanced. Even when working through the convoluted combination of the Corporations Code and Davis-Stirling, Commission and staff work hard to make the law as simple and as direct as legally feasible, so that nonlawyers can understand how the law works for them.

As a result, the Commission and staff have earned a well-deserved reputation for more closely approximating the ideals of democratic lawmaking than the legislature itself.

This reputation, and the ideals that enabled it, need to be protected in processing H-858.

23. Summary.

H-858 and its supporting memoranda are not up to par with your normal high standards.

It is an embarrassment to CLRC and the ideals it embodies.

H-858 may be the most insidious legislation ever brought before the Commission.

It is not ready for prime time, for several reasons.

H-858 was not drafted to apply to the narrow exceptions that were the basis of its original scope.

The scope of the proposed legislation morphed dramatically from exceptions to Davis-Stirling regulations for 3 narrow special cases to a subtle, unacknowledged, and expansive reframing of DS jurisdiction.

What started as a 'slight broadening' of 3 exceptions beyond Commercial & Industrial CIDs, ended with new jurisdictional requirements for residential developments, while claiming it did not affect them.

The record has no facts to support the contention that there are any Davis-Stirling CIDs not already covered by the exceptions in the current law for which even a slightly-expanded exception is needed.

H-858 relies on a false dichotomy of residential vs. nonresidential, defined only by tautology.

The burden of proof shifted from proving that one of the limited exceptions applies, to proving, under new, unnecessary, vague, harder, lawsuit-prone requirements, that the exceptions do NOT apply.

H-858 would remove existing DS protections in many CIDs without a clear statement that it was doing so.

The normally accurate and informative cover sheets and supporting memoranda misrepresent the scope and impact of the proposed law as only slightly expanding the scope beyond C&I CIDs, and incorrectly claim (MM12-48s1) that "This study would have no effect on any subdivision that contains a residence".

The public process failed because key constituencies who normally weigh-in on CID law did not understand, thanks to misleading cover sheets, that this 'side study' of Commercial & Industrial Developments exceptions would fundamentally reframe all Davis-Stirling CIDs, increase jurisdictional requirements, and provoke lawsuits against the people that the law is designed to protect.

The public process failed because the one voice who passionately and accurately represented the views of those covered by Davis-Stirling, Ed Weber, was misunderstood and discounted by inaccurate statements in the record. The follow-up memorandum to the Public Comment Period (MM12-48s1) did not adequately represent or respond to Ed Weber's important and legally correct warnings and suggestions.

24. Conclusions.

The closer CLRC approximates the ideals underlying its success, the greater the integrity and respect CLRC earns in this most public and carefully documented democratic process of legislation to benefit all.

The wording of proposed H-858, even with MM12-48s1 adjustments, differs greatly from the statement of intent, the accompanying explanations, the public process behind it, normal legal standards, and the need.

Key factors generating legislation that produces more justice and fewer lawsuits have been sacrificed.

H-858 has unnecessarily traded off balance, responsiveness, integration of all points of view, intention-law congruence, explanation-law congruence, simplicity and directness, interpretability by nonlawyers, bright-line tests for exceptions, avoidance of lawsuits, and avoidance of unintended consequences.

You would be wise to tap 'RESET'.

H-858 should be withdrawn from the 2012Dec13 agenda as having failed the required public process, fact-finding, balanced legal analysis, intended scope, normal legal standards, and CLRC standards.

If it is considered, the Commission should return the proposal to staff with the following instructions.

1. Redo H-858 so that it does not directly or indirectly alter the scope of Davis-Stirling.
2. Do not use narrow exceptions as an opportunity to reframe DS as residential vs. nonresidential.
3. Do not use narrow exceptions as an opportunity to raise jurisdictional requirements for all CIDs.
4. As in the current Davis-Stirling, maintain the standard legal design that exception legislation be narrowly drawn, rather than reframing the general body of law more narrowly, and making exceptions an undefined catch-all category of 'everything else'.
5. Use the narrowest possible language to give needed relief to those who have factually shown they are a special case where members receive no DS benefit and/or the costs are an undue hardship.
6. To justify relief, use the standard set in background text though not the law--CID membership that is corporate, sophisticated, and well-resourced with attorneys and accountants, who do not need protection.
7. If you find factually find CIDs injured by DS regulations, provide some estimate of the number affected so the public, Commission, and legislature do not have to rely on self-serving conclusory statements claiming a need for exemptions from basic DS requirements for sound business practices.
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', 'residential occupancy', etc. to prevent lawsuits.
10. Remove all new requirements for CC&Rs to exist and include certain components.
11. Remove any new requirement that governing documents or laws allow or limit 'residential' use.
12. Reverse the scope creep from Commercial & Industrial Developments to 'Nonresidential Subdivisions' by limiting the study to the 3 special cases addressed in the scope memorandum.
13. Remove the word and frame of 'subdivision' and stick with the current and legally correct Davis-Stirling words of 'development' and 'common interest development'. Acknowledge that not all Davis-Stirling developments are subdivisions and that Davis-Stirling does not require subdivided land.
14. Include vacation CIDs, recreational CIDs, innovative CIDs, pre-1986 CIDs, and mixed-use CIDs that do not fit either 'residential' or 'nonresidential' label, yet still need the entire panoply of DS protections.
15. Accommodate the full range of DS CIDs, and explicitly address stock cooperatives where Owners have interests to occupy a portion of the property without owning separate parcels or units.
16. Do not use words in a phrase to 'define' the phrase, since the result is circular and lawsuit-prone.
17. Above all, maintain a public process and balanced legal analysis deserving of the moral authority to govern California.

Mr. Lincoln would have us do no less.

Respectfully Submitted,

Art Bullock

DavisStirlingAct@yahoo.com
DavisStirlingAct@gmail.com

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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San Francisco
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12 December 2012

Mr. Brian Hebert
Executive Director
California Law Revision Commission

Mr. Hebert:

Re: Third Supplement to Memorandum 2012-48

I wish to join Mr. Bullock in urging the Commission to defer a final decision on the proposed law. I apologize for writing you at this late hour. I know that you and your colleagues have put much effort in this project. Unfortunately, I have been otherwise engaged and have just had the time to study Mr. Bullock's comments and your responses this afternoon.

A proposal that could lead to any erosion of the protections of CID association members accorded by the Davis-Stirling Act gives me a great concern.

I agree with you that it would be best that the proposed law be unambiguous as to its meaning, to avoid unnecessary and costly litigation. However, I am very concerned about your attempt to define the term "residential use" on a short notice. Your "alternative" suggestion to define "residential use" to mean use as a dwelling place, for more than 60 days per year, is particularly alarming to me.

I am a member of a CID association that manages a condominium project comprising over two hundred residential units, five commercial units and the common area. The association's present declaration provides, *inter alia*:

> Residential Units shall be used solely for residential purposes, except that an Occupant may engage in a professional or administrative occupation within the Property if (1) it is merely incidental to the use of the Unit as a residence, (ii) it conforms to all applicable Governmental Regulations, and (iii) there is no external evidence of business activity.
>
> Commercial Units shall be used solely for commercial activities permitted by Governmental Regulations.

The terms "Commercial Unit" and "Residential Unit" are defined respectively with reference to the unit numbers shown on the condominium plan as follows:

> "Commercial Unit" means any of the Units designated with Unit Numbers [N_1] through [N_2] on the Condominium Plan.
>
> "Residential Unit" means any of the Units designated with Unit Numbers [N_3] through [N_4] on the Condominium Plan.

The declaration defines neither "commercial activities" nor "residential purposes."

A large proportion of the owners of residential units use their units as their primary residences. However, many others use theirs as secondary or tertiary homes and some others lease theirs for rent. Moreover, those who use their residential units as their primary residences might not necessarily maintain their personal presence in the units year after year, for a variety of reasons—business, health, professional. I could be absent from my primary residence for more than a year consecutively on an extended trip.

I don't want the new law to create a slippery slope that might lead to the curtailment of the application of the Davis-Stirling Act to any CID project containing a separate interest available for human dwelling. Housing is a matter of state interest. The Legislature should not be induced to withdraw the protections of the Davis-Stirling Act from any person who owns a residential facility and who would be protected under the present Davis-Stirling Act or its successor to become operative in 2014.

Sincerely,

Kazuko K. Artus

A Public Comment Response For H-855 and H-858 For CLRC's 2013Feb Meeting

Dear Brian Hebert, Barbara Gaal, Steve Cohen, Kristin Burford, CLRC staff, and CLRC Commission,

This is a Public Comment response for H-855 and H-858 for CLRC's 2013Feb meeting.

MM12-48s1 (pg. 8), dated 2012Nov27, suggested for the 2012Dec13 meeting the alternative "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***)." (Emphasis added)

At that meeting, for H-855, "The Commission did not decide whether to recommend any change to the wording of Civil Code Section 4205. That issue will be considered further at a future meeting." 2012Dec13 Draft Minutes, 3:24-26.

At that meeting, for H-858, "The Commission did not approve the staff draft as a final recommendation. Instead, the staff will prepare a memorandum discussing the issues raised in the memorandum and its supplements, for consideration at a future meeting. The Commission provided the following guidance to the staff, for use in preparing the next memorandum in this study:

- The Commission reaffirmed its intention that the proposed law should have no effect on a common interest development or subdivision that permits any residential use by its owners.
- The proposed law should not contain or imply a presumption that a common interest development or subdivision is nonresidential.
- The memorandum should discuss defining "residential use" for the purposes of the proposed law.
- The memorandum should include a brief summary of the Commission's process in conducting this study." 2012Dec13 Draft Minutes, 3:30 - 4:13.

The 2013Feb agenda shows both H-855 and H-858, yet as of 2012Jan21, when this document was prepared, no memoranda were found on any of the above subjects.

The issues for H-855 and H-858 are not trivial or minor wording issues. *Inter alia,* H-855 issues address conflicts between laws. *Inter alia,* H-858 issues address the word 'residential', which court cases show to be ambiguous and prone to litigation.

The agenda shows that these memoranda are planned and pre-numbered, yet as of 2013Jan21, they were not found on the CLRC web site.

The 2013Feb meeting is so close, there is not enough time for the interested public to receive and digest a memorandum with the above content, or to draft, vet, format, and submit an appropriate response.

This submission is a request, based on the above information and previous substantive submissions for H-855 and H-858, that those affected by Davis-Stirling have adequate "time to consider the issues raised above (and any new issues that might surface in future public comment and deliberations)".

Adequate time is particularly important here, because of the incorrect cover-page announcements that the proposed law's wording does not affect Davis-Stirling CIDs that are residential developments.

Respectfully submitted,

Art Bullock
DavisStirlingAct@yahoo.com
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EMAIL FROM EDWARD WEBER
(1/23/13)

As a most consistent observer and commentator on the DSA activities of the CLRC, I am writing to concur with Art Bullock in encouraging the commission to continue to delay alterations in the law in any area considering use of the term "residential." It is clear from your own expressed concerns that you do not wish to create new court-crippling crises for property owners, the true stakeholders in CID associations. Thus, finding yourselves in conflict after discovering the volatility and inadvertent affects of introducing the term "residential" in proposed revisions, I suggest you have no choice but to re-examine the process that created this quagmire and start over.

Brian, you will recall that I, for one, on day one, was immediately expressing concern to your office about the path being taken to define out industrial CID language. I protested instantly against any use of the term "residential" even as the process began. But your legal staff had deaf ears to those concerns, listening instead to self-interested attorneys who fraudulently defined themselves as "stakeholders." Those attorneys who directly profit from conflicts in CID law, might even have had subversive intentions in their minimizing my expressed concerns. And they almost got away with it, didn't they? I, as a CID stakeholder, had to step forward, alone, and challenge a roomful of attorneys, anxious to do the wrong thing!

Since this matter is an actual consideration of a significant reduction in protections for property holders in CID properties, supposed as "commercial or industrial," it should be treated in a sacred manner as it attempts to reduce a property owners constitutional right to protection of the law.

Please begin this process anew, protecting property rights as the first, not last, priority.

Respectfully,

--

Mr Ed

Ed Weber