Study H-855 February 5, 2013

First Supplement to Memorandum 2013-6

Common Interest Development: Statutory Clarification and Simplification of CID Law (Civil Code Section 4205)

The Commission has received a letter from Art Bullock, commenting on the discussion of Civil Code Section 4205 in Memorandum 2013-6. His letter is attached to this supplement as an Exhibit.

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

Statutory Definition of "Conflict"

Memorandum 2013-6 discusses a suggestion by Mr. Bullock that Section 4205 use the term "conflict" *and define it*. He believes that the term "conflict" has a well-settled legal meaning: a "conflict" between two authorities exists if there is "an absence of any known harmonizing interpretation." Exhibit pp. 1-2, 4.

The staff acknowledged that the term "conflict" has been used in that way when courts are interpreting authorities of equal dignity (e.g., conflicting statute provisions) but that the term "conflict" has been given a broader meaning when addressing issues of supremacy (e.g., the supremacy of general law over city or county ordinances). For example, in the supremacy context, a "conflict" may exist where the superior authority has impliedly preempted the field. See Memorandum 2013-6, p. 6. In such a case, it is irrelevant whether the superior and inferior authorities can be "harmonized."

Section 4205 is not intended as a tool for reconciling conflicts between authorities of equal dignity. It provides guidance on supremacy. For that reason, the staff recommended against codifying a meaning of "conflict" that is based on the rule for construing conflicting statutes. To do so could unduly narrow the concept, precluding broader meanings that might be apt when addressing supremacy issues.

Mr. Bullock now writes to dispute the staff's analysis. He asserts that his understanding of the term "conflict" applies even in cases of supremacy. He further suggests that preemption never arises if an inferior authority can be harmonized with a superior. ("Harmonizing must be done first. If successful, there is no preemption." See Exhibit p. 1.)

The staff has reviewed the authorities offered by Mr. Bullock in support of his views and has reached a different conclusion. While he does offer examples where successful harmonization avoided the preemption of inferior authority, that does not mean that this will always be the case.

For example, one case cited by Mr. Bullock, *Johnson v. City and County of San Francisco*, 137 Cal. App. 4th 7, 40 Cal. Rptr. 3d 8 (2006), in addressing whether a local ordinance was preempted by general law, explained that

> The first step in a preemption analysis is to determine whether the local regulation explicitly conflicts with any provision of state law. If the local legislation does not expressly contradict or duplicate state law, its validity must be evaluated under implied preemption principles. In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme.

Johnson, *supra* at 13 (citation omitted). In other words, in a scenario involving reconciliation of unequal authority, it is only the *first step* to determine whether the language of a local ordinance can be harmonized with a provision of state law. However, *even when such a harmonious interpretation is possible*, the inferior authority will *still* be superseded by the superior authority, if a court were to find that the inferior authority has been *impliedly* preempted by the superior authority (based on examination of the purpose and scope of that authority). Mr. Bullock's proposed definition of "conflict" would foreclose that second step.

Similarly, in a case cited in one of the cases upon which Mr. Bullock relies, the Supreme Court explained that "federal regulation of an area of commerce may preempt state actions upon the same subject matter if (1) there is an apparent congressional intent to blanket the field, (2) the federal and state schemes directly conflict, *or* (3) any state intervention would burden or frustrate the full purposes and objectives of Congress." *Greater Westchester Homeowners Assoc. v. City of Los Angeles*, 26 Cal. 3d 86, 93; 603 P.2d 1329; 160 Cal. Rptr. 733 (1979) (emphasis added). Again, the "absence of a harmonious interpretation" appears to be only

one of *three* separate and sufficient bases for finding that inferior authority is preempted by superior authority.

The staff still believes that Mr. Bullock's proposed definition of "conflict" would unduly narrow the concept, foreclosing the possibility that an association's governing documents might be in "conflict" with law even if there is a way that the governing documents and the law might be harmonized. The most likely scenario would be one in which the Legislature impliedly intended to preempt the field. There may be other scenarios that are less obvious or that might develop in the future. Those possibilities should not be foreclosed.

Other Substantive Issues

As discussed below, Mr. Bullock also renews his suggestions on some other related points.

Governing Documents Addressed in Section 4205

Section 4205 provides guidance on the relative authority of the law and the most common types of CID governing documents. Mr. Bullock renews his proposal that Section 4205 be expanded to include other types of governing documents. In particular, he believes that Section 4205 should address the relative authority of a CID's "covenants, conditions, and restrictions" ("CC&Rs"). See Exhibit p. 2.

In fact, Section 4205 already addresses most CC&Rs, because it addresses the authority of the association's "declaration."

Since 1986, all declarations are required to include the "the restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes." Section 1353. Mr. Bullock's response is that pre-1986 declarations were not required to contain CC&Rs.

In fact, between 1963 and 1986, the Condominium Act required the recordation of a "declaration of restrictions" before the conveyance of the first unit. See former Section 1355; 1963 Cal. Stat. ch. 860 § 3. So it does appear that the longstanding practice is to record CC&Rs in the body of a document known as a "declaration" or "declaration of restrictions."

That is not surprising, because it has long been the case that a covenant (along with a detailed property description) must be recorded if the covenant is to "run with the land." Section 1468. A declaration is a convenient means of recording

the required information. See also Section 1354 ("covenants and restrictions *in the declaration* shall be enforceable equitable servitudes") (emphasis added).

While it is possible that a declaration will not contain CC&Rs, the staff is confident that most declarations do contain the CC&Rs. Therefore, Section 4205 does address the most common types of governing documents, as intended. If the Commission wishes to revisit the scope of Section 4205 (and other provisions of the Davis-Stirling Act) to provide greater uniformity in provisions that address specific types of governing documents, it should do so as part of a separate study. The issues are too significant to be rushed.

Terminological Consistency in Davis-Stirling Act

Mr. Bullock also renews his request that the terminology used in Section 4205 and other sections of the Davis-Stirling Act be revised to achieve greater consistency throughout the act. Exhibit pp. 2-3.

Again, this might be an appropriate topic for a separate study, but should not be done in a hurried fashion, as part of the current "clean-up legislation" study.

Respectfully submitted,

Steve Cohen
Staff Counsel

A Public Comment Response (2013Feb1) To MM13-06

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

Thank you for your efforts to improve the Davis-Stirling Act (DS). This is a Public Comment response to MM13-06, distributed last week for a decision next week. As explained in the 2013Jan21 public comment, releasing MM13-06 so close to Feb.7 meeting prevented public response to the staff's request to approve its proposal for a specific direction regarding 'conflict' and 'governing documents'. This is a partial response, given the too-short time frame. A summary of this response can be found in the Conclusions section.

H-855 was designed to cleanup problems in AB805 and AB806, which recodified the Davis-Stirling Act, and "to correctly implement already-settled Commission policy recommendations" (MM13-06, pg 2).

MM13-06 addresses the just-added Civ. §4205. This recent addition has unwittingly created new confusions in DS. This clarification legislation can and should correct the new confusions--the definition of 'conflict' and what constitutes governing documents. MM13-06, Ex1-5. MM13-06 recommendations (change 'inconsistency' to 'conflict', and change 'controls' to 'prevails') do not resolve core issues created by §4205.

1. "Conflict" is "the absence of any known harmonizing interpretation".

1a. For §4205, Marjorie Murray informally suggested that 'inconsistency' be replaced with 'incompatibility' or 'conflict'. A separate submission recommended 'conflict' (MM13-06, Ex.1-2 (¶2)). MM13-06 suggested 'conflict' be used without defining its normal usage, "the absence of any known harmonizing interpretation".

MM13-06 (pg.5-6) viewed defining "conflict" as a conflict between 2 'models', harmonizing and preemption. 'Harmonizing' was viewed as applying to 'equal dignity' statutes, with 'preemption' and the 'supremacy' model applying to claims conflicting laws at different precedence levels. This view is incorrect. It led MM13-06 to conclude that defining 'conflict' is a substantive issue, thus inappropriate for this cleanup legislation. A fuller understanding would show that this is a technical issue based on well-settled law that would correct an unwitting process problem and accurately implement the Commission's policy decision for §4205. Thus, these changes should be included in the corrective cleanup recommendations for §4205.

1b. MM13-06 (pg.6) conveyed that harmonizing does not apply to laws on 2 levels (state vs. city, etc.). It does. Courts have carefully harmonized general law and municipal regulation even where the record reveals a pronounced statewide interest and a comprehensive statewide scheme relating to the field. *People v. Butler* (1967) 252 Cal.App.2d 584; *Gleason v. Municipal Court* (1964) 226 Cal.App.2d 584.

1c. MM13-06 further found that harmonization does not include preemption. It does.

> As can be seen, if Section 4205 were to define "conflict" as Mr. Bullock proposes, the definition would exclude an important type of conflict recognized in *Sherwin-Williams.* That case holds that a local statute may not enter into "an area fully occupied by general law.". (MM13-06, pg6, ¶3).

'Fully occupied' is one of 3 criteria where a higher law preempts a lower law (federal law over state law, state law over county law, etc.). *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807-808. The other 2 criteria are 'contradicts' and 'duplicates'.

MM13-06 found a conflict between 'harmonizing' and 'preemption' where none exists. Preemption must be done within harmonization rules. Harmonizing must be done first. If successful, there is no preemption.

> State and federal laws should be accommodated and harmonized where possible so that preemption can be avoided. *California Arco Distributors, Inc. v. Atlantic Richfield Co* (1984) 158 Cal.App.3d 349, 359.
>
> The appellate court acknowledged...that implied preemption is discouraged where potentially conflicting provisions can be harmonized. *Leslie v. Superior Court ex rel. Southern CA Edison Co.* (1999) 73 Cal.App.4th 1042, 1050.

Vinnick v. Delta Airlines, Inc. (2001) 93 Cal.App.4th 859 harmonized relevant laws and held no preemption. This ruling followed 2 federal cases law where harmonization and preemption were done jointly, and successful harmonization precluded a finding of preemption. *Hodges v. Delta Airlines, Inc.* (5th Cir.

1995) 44 F.3d 334. *Charas v. Trans World Airlines, Inc.* (9th Cir. 1998) 160 F.3d 1259. The issue in the 3 cases was a state law tort claim against airlines, which argued that federal aviation law preempted state law.

In *Johnson v. City and County of San Francisco* (2006) 137 Cal.App.4th 7, appellant argued that a so-called 'belief requirement' in the San Francisco Administrative Code could not be harmonized with the Ellis Act (a California statute), and was preempted by it. The court agreed, and found preemption.

With these and other cases, harmonizing is the general rule. If laws claimed to be in conflict can be harmonized, there is no preemption. Preemption is a special case of conflict, not an opposing model.

1d. Preemption is similar to implied repeal, where a party claims a law was implicitly repealed. As with preemption, for claims of implicit repeal, harmonizing must be used to reconcile the claimed conflicting laws. If harmonizing fails, then the conflict may be held to be an implicit repeal. *Apartment Assoc. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th13.

Preemption and implicit repeal are not considered independently of harmonizing. Preemption and implicit repeal are types of conflict for laws with no known harmonizing interpretation. They are not opposing models.

2. §4205 added new confusions in what constitutes Davis-Stirling governing documents.

2a. As with 'conflict', there is little if any confusion in practice about what constitutes governing documents. The problem is inconsistent wording in the Davis-Stirling Act, which can and should be clarified in this legislation. It would be an important and probably noncontroversial matter to simply describe the main types of governing documents, specify their precedence hierarchy, and be consistent throughout the Act.

2b. §4205 attempted to specify precedence hierarchy for "the most common types" of governing documents (MM13-06, pg.8, ¶2). Yet CC&Rs are noticeably absent. CC&Rs are the key governing document for most associations. As appellate cases show, CC&Rs are the governing document most likely to be litigated. Court of Appeal has held that DS's defined 'declaration' need not include CC&Rs. See MM12-48s3, Ex2-3.

At a minimum, this cleanup legislation for §4205 should correct the inaccurate implementation of "the most common types" to include CC&Rs in the hierarchy list of governing documents.

2c. MM13-06 (pg.4) quoted *Thaler* (2006) and *Cebular* (2000) for precedence of state law over governing documents, yet failed to point out that the 2 governing documents described in those quotes are not in §4205. *Thaler* references CC&Rs, which are excluded from §4205. *Cebular* references a "declaration of CC&Rs" which is also excluded. §4205 includes a declaration, whose definition does not require CC&Rs.

Instead of support, *Thaler* and *Cebular* show the lack of clarity and need for repair.

2d. MM13-06 (pg.6-9) viewed integration of §4205 with the rest of the Act to be substantive and recommended against clarification here. This is the dynamic that has produced patches-on-patches in DS. As a result, newly-added §4205 needlessly adds another inconsistent patch causing lawsuits.

2e. MM13-06 (pg.9) represented the mismatch between §4205 and 13 'notwithstanding' sections of DS as redundancy. It is not. See MM13-06 Ex. 3-4. The 'notwithstanding' sections are inconsistent with §4205 because they would arguably require application of a different precedence hierarchy. Further, they rely on a different list of governing documents, which complicates the mismatch. Further still, they use "contrary" rather than 'conflict', which enables lawsuits to dispute the difference.

At a minimum, 'contrary provision' could be standardized with 'conflicting provision'. See below for why.

2f. MM13-06 (pg.9) discounted this issue as harmless:. "But again, what is the harm? Redundancy does not undermine the effect of the law, and it can sometimes provide helpful emphasis."

The issue is not redundancy. The problem is not harmless. *Inter alia,* the harm is to CLRC's well-deserved reputation for higher-integrity drafting of laws. California Supreme Court sets a higher standard than MM213-06 accomplishes. In the applying cases below, internal cites and quotes are deleted for readability.

(1) Where different words are used in the same connection in different parts of the statute, it will be

presumed that the legislature intended different meanings. *Twain Harte Homeowners Assoc., Inc. v. County Of Tuolumne* (1982) 138 Cal.App.3d 664, 699.

(2) It is presumed the Legislature made changes in wording and phraseology deliberately and intended different meanings when using different words. *In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 939.

(3) If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388.

(4) Significance should be given to every word, and construction making some words surplusage is to be avoided. *Khan v. Medical Board* (1993) 12 Cal.App.4th 1834, 1842.

(5) In considering the language, we presume that the Legislature had in mind existing and related laws when it enacted or amended the statute. We are also mindful that when two statutes touch upon a common subject, they are to be construed in reference to each other, so as to harmonize the two in such a way that no part of either becomes surplusage. *American Nurses Assoc v. O'Connell* (2010) 185 Cal.App.4th 393, 412.

(6) When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 717-718.

(7) Interpretive constructions which render some words surplusage are to be avoided. *Watkins v. Real Estate Commissioner* (1960) 182 Cal.App.2d 397, 400.

(8) To disregard statutory language as insignificant violates the canon that whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage. *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330.

2g. MM13-06 (pg.9) defended its approach as 'conservative'. "Moreover, the Commission intentionally adopted a conservative drafting approach in preparing the recodification recommendation. Existing language was preserved, except where it contained some plain defect."

Describing an approach that layers another unintegrated DS patch as 'conservative' would be a misnomer. The issue here is the cleanup of the new §4205 and its integration with the remainder of DS, not the recodification and renumbering of DS sections into the new structure for 2014.

For example, §4205 sets precedence order for "operating rules". §4715 (pets) uses a different label, "rules and regulations", then a different label, 'rules or regulations' and then "rules, and regulations", apparently distinguishing the two. §4730 (selling an owner's interest) also uses a label different from §4205. §4930 (meetings) uses a different label, 'rules or procedures'. §5105 (nominations and campaigns) uses the label 'rules' rather than operating rules.

MM13-06 (pg.9) positions these differences as harmless redundancies. Courts must view them otherwise. Statutory construction rules require that different words have different meanings if possible. The result will be multiple Superior Courts agonizing over subtle differences in synonyms to tease out some meaning unintended by the Commission, with Davis-Stirling owners funding both sides of unnecessary lawsuits.

What is the harm? The harm is to the people Davis-Stirling is designed to protect, whose assessment dues will fund lawsuits against themselves as individuals, to resolve inconsistencies that should not exist.

What is the harm? The harm is to taxpayers, who fund courts to administer these unnecessary cases.

What is the harm? The harm is to injured parties in clogged courts, where justice delayed is justice denied.

What is the harm? The harm is to CLRC's reputation for drafting legislation that conforms to Supreme Court standards while balancing public interests. MM13-06 is at odds with those standards. It fails basic expectations for how laws are written. Supreme Court explicitly assumes that lawmakers are aware of relevant laws and that different words and phrases have different meanings, which the courts must then tease apart to avoid 'surplusage'. Yet MM13-06 suggests that cleanup legislation not resolve lawsuit-prone inconsistencies and known 'surplusage' because they are harmless redundancy. They are not.

3. Conclusions.

The ultimate criterion for cleanup legislation is to prevent unnecessary lawsuits over ambiguity.

§4205 is a new section that added more confusions to Davis-Stirling, which is already patches-on-patches.

MM13-06's claimed confusion over defining 'conflict' vs. 'preemption' is inaccurate and unnecessary. For over 100 years, California courts have clarified how to resolve claimed conflicts between 2 laws, whether at the same or different precedence levels. This issue is purely technical, with no known controversy. It is well-settled law. CLRC has not indicated it intends anything other than what courts interpret 'conflict' to mean--the absence of any known harmonizing interpretation. Like 'implicit repeal', 'preemption' is a special case of harmonizing, not an opposing model, as MM13-06 asserts.

It would be unwise the kick the can down the road here, as MM13-06 (pg.6) suggests.

> "Instead, the issue is left to judicial development."

This is a million dollar sentence. Here, a no-conflict issue (the well-settled definition of 'conflict') is purposely left ambiguous in clarification legislation, with the expectation of more court cases.

'Judicial development' means lots of lawsuits. These lawsuits costs California taxpayers millions of dollars in court administration. The lawsuits create injustice via clogged courts that cannot timely dispense justice. Dozens of Superior Courts simultaneously and repeatedly adjudicate the same ambiguity, awaiting a published appellate decision. None of these lawsuits are necessary. None are in the public interest.

MM13-06 (pg.3, ¶7) proposed that the strongest argument for changing 'inconsistency' to 'conflict' was *inter alia* "relevant appellate decisions", yet declined to use the standard definition used by those appellate decisions. Driven by U.S. Supreme Court decisions, the interpretation has been remarkably consistent for over 100 years. DS owners would benefit greatly from the definition in improving their CID communities.

Why is it that changing 'inconsistency' to 'conflict' is purely technical and noncontroversial because of "relevant appellate decisions", yet using the standard 'conflict' definition in those decisions is not?

Is there any known public good in having clarification legislation cause more lawsuits? No.

Who is injured by this 'judicial development'? Taxpayers and Davis-Stirling owners.

Who benefits from this 'judicial development'? Attorneys.

We already have 100+ years of 'judicial development' on this issue. Instead of waiting for a published appellate decision to eventually resolve new §4205 issues, the uniformity can be accomplished now.

The Commission can direct staff to fix §4205 by (1) defining 'conflict' as the absence of any known harmonizing interpretation, and (2) standardizing the list of key governing documents with the remainder of the Act.

This would stop a waste of tax $$ and prevent unnecessary lawsuits against the people Davis-Stirling protects.

In so doing, CLRC would mirror *Johnson*, which took constructive action for the same reasons posited here.

> To require each landlord to litigate the issue separately could lead to inconsistent rulings by different trial court judges. ...The City claims that a published appellate opinion arising from an unlawful detainer action "will *eventually* resolve the issue in a manner that will ensure future uniformity in the trial courts" but does not provide an adequate reason why such uniformity should not be accomplished now. Indeed, we see none. *Johnson, supra,* 18. {Italics added by Court of Appeal.}

Respectfully submitted,

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