

First Supplement to Memorandum 2013-10

2013 Legislative Program (Status Report)

This supplement reports further on the status of Senate Bill 752 (Roth), which would implement the Commission's recommendation on *Commercial And Industrial Common Interest Developments* (Aug. 2012).

SB 752 is presently scheduled to be heard by the Senate Transportation and Housing Committee on April 16, 2013. In anticipation of that hearing, committee staff has suggested some amendments to the bill. Some or all of the amendments may therefore be implemented at the upcoming hearing.

Pursuant to Rule 3.3 of the Commission's Handbook of Practices and Procedures, this supplement presents those amendments to the Commission for review and approval. Because the committee hearing had previously been scheduled for April 9, 2013 (prior to the Commission's April meeting), pursuant to that same rule the amendments have already been discussed informally with the Commission chair, who expressed no objection to any of the amendments.

The authority of a legislator carrying a Commission bill to amend the bill is unlimited. Rule 3.3, *supra*. Further, unless the Commission directs otherwise, the Commission's approval of amendments to a bill that would implement a Commission recommendation will ordinarily not result in any change to that final recommendation. Instead, Commission approval of an amendment denotes only an expression that the amendment would not undermine the recommendation to an extent that the bill would no longer fairly implement the recommendation's overall objective.

In the historically rare event that the Commission was unwilling to approve an amendment to a Commission bill, the Commission's recourse would be to either (1) make clear that the Commission was not associated with and took no

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. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

position as to that amendment, or more drastically, (2) withdraw the recommendation from the legislative process entirely.

When the Commission approves a proposed amendment, it then needs to decide whether or how to revise the official Comment to the amended section that the Commission approved in its final recommendation. Revised Comments are memorialized in a supplemental report that is typically published as an appendix to the Commission's Annual Report. The supplemental report is also provided to legislative committees and the Governor, when they are considering the Commission-recommended bill.

Revision of Comment language corresponding to the amendments proposed to SB 752 will be discussed in conjunction with the presentation of each proposed amendment.

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

One other clarification with regard to statutory references in this supplement may be helpful. The Commission's study in this matter involved analysis of each of the provisions of the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act"), the primary statutory authority governing all CIDs. That study predated the Commission's recodification of the Davis-Stirling Act (operative January 1, 2014), which assigned different section numbers to provisions continued by the recodification. See *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm'n Reports 235 (2010). However, in order to coordinate with the statutory references made in prior memoranda in this study, Davis-Stirling Act provisions referred to in this supplement are identified by the "old" section number of the provision, (i.e., before recodification).

OVERALL OBJECTIVE OF STUDY

As explained in the Commission's final recommendation, the Commission's objective in the study was to implement a historical legislative preference that statutory authority governing commercial and industrial common interest developments ("CIDs") be distinguished from authority governing residential CIDs. *Commercial And Industrial Common Interest Developments* (Aug. 2012), at 1-3.

The Legislature had expressly stated that preference in 1988 when adding Section 1373 to the Davis-Stirling Act, a section that exempted commercial and

industrial CIDs from several provisions contained in the Davis-Stirling Act at that time. Thereafter however, the Legislature had rarely analyzed whether commercial and industrial CIDs should be exempted from any of the many new provisions added to the Davis-Stirling Act after Section 1373 was enacted.

The Commission recommended that analysis be performed as to all existing provisions of the Davis-Stirling Act, primarily by extrapolating from the expressed legislative rationale underlying Section 1373. The Commission concluded that rationale had been based on the exemption of commercial and industrial CIDs from provisions of the Davis-Stirling Act that appeared primarily “operational” in nature (i.e., provisions governing the day-to-day management of a CID), as such provisions generally constituted unduly burdensome regulation that was unneeded by commercial enterprises. On the other hand, it appeared the Legislature had concluded that provisions that were primarily “foundational” in nature (i.e., related to the establishment and basic property form of a CID) were needed by all types of CIDs, and therefore should remain applicable to commercial and industrial CIDs.

Based on that rationale, the Commission recommended that a new “Commercial and Industrial Common Interest Development Act” be created (Civ. Code §§ 6500-6876), applicable *only* to commercial and industrial CIDs, and generally containing only those provisions of the existing Davis-Stirling Act that the Commission concluded were primarily foundational in nature. The Commission further recommended that, except when a stronger countervailing consideration existed, provisions that were seen as primarily operational should no longer apply to commercial and industrial CIDs, and therefore should not be included in this new act.

However, recognizing that today’s Legislature might reach different conclusions than what was suggested by an extrapolation of prior legislative preferences, the Commission’s recommendation expressly states that its proposed treatment of each individual provision of the Davis-Stirling Act is designed to be severable from the rest of the recommendation, in order to accommodate current legislative preferences as to any individual provision. *Commercial And Industrial Common Interest Developments* (Aug. 2012), at 9-10.

It is the staff’s view that each of the amendments proposed by Senate Transportation and Housing staff are consistent with the expressed rationale and overall objective of the Commission’s recommendation in this study. The

staff therefore recommends that the Commission approve each of the proposed amendments.

PROPOSED AMENDMENTS

Deletion of State Registry Requirement

Section 1363.6 of the Davis-Stirling Act requires all CIDs to register with the Secretary of State, and provide various identifying information.

Although this section had been viewed by the Commission as operational, the Commission recommended that it be continued in the new act (as proposed Section 6760), because it was seen as imposing a minimal burden, while fulfilling a legislative objective independent of CID regulation. Memorandum 2009-32, pp. 50-52; Minutes (Aug. 2009), p. 5.

An amendment proposed by Senate Transportation and Housing Committee staff would delete Section 6760 from the new law, along with a cross-reference to the new provision in Government Code Section 12191.

As described above, the Commission's conclusion that prior legislative intent suggested continuing this provision was a close one, based on balancing several competing considerations. An amendment discontinuing this provision would therefore be completely consistent with the Commission's expressed deference to current legislative preferences with regard to individual provisions.

Needed Comment Revision

If the Commission approves the deletion of proposed Section 6760, and the deletion is implemented, no revision would need to be made to the Commission's proposed Comment to that section. If Section 6760 is not enacted, the Comment proposed for the section would simply not be reported to any entity that publishes Commission Comments.

Similarly, if the cross-reference to Section 6760 in Government Code Section 12191 is deleted, the Commission Comment corresponding to the proposed revision of Section 12191 (to add that cross-reference) would also not be reported.

Deletion of Usury Exemption

Section 1366(e)(3) of the Davis-Stirling Act caps the interest rate that associations can charge on overdue assessments. Another provision of that section, Section 1366(f), exempts CIDs from the constitutional prohibition on

usury. The Commission recommended that the statutory cap mandated by Section 1366(e)(3) no longer apply to commercial and industrial CIDs, and also recommended that those CIDs remain free from the constitutional usury prohibition, by continuing the exemption in Section 1366(f) (in proposed Section 6808(b)).

An amendment proposed by Senate Transportation and Housing Committee staff would discontinue the constitutional usury exemption, by deleting Section 6808(b) (along with cross-references to subdivision (b) elsewhere in Section 6808, and in proposed Section 6814). The theory underlying the amendment is that the statutory cap on interest in Section 1366(e)(3) and the constitutional usury exemption in Section 1366(f) were intended to operate *together* (i.e., the usury exemption for CIDs had been allowed by the Legislature, solely based on the existence of the statutory interest cap).

The staff views this as at least a reasonable construction of the two provisions. Implementation of the Commission recommendation would remove *all* limitations on interest that a commercial or industrial CID might impose on delinquent owners.

It is true, strictly speaking, that this amendment would impose a regulatory restriction on commercial and industrial CIDs that is not imposed on residential CIDs. However, it *is* a restriction imposed on many other types of businesses. In light of the discontinuation of the statutory interest cap in Section 5650, the imposition of the constitutional usury limitation again appears consistent with the Commission's expressed deference to a current legislative preference as to a relatively close policy decision.

Needed Comment Revision

If the Commission finds this proposed amendment (along with the deletion of cross-references to Section 6808(b)) acceptable, and the amendments are implemented, **the staff would recommend that the Commission approve revision of its previously approved Comment to Section 6808 (appearing below the proposed amendment), as follows:**

6808. ~~(a)~~ A regular or special assessment and any late charges, reasonable fees and costs of collection, reasonable attorney's fees, if any, and interest, if any, ~~as determined in accordance with subdivision (b)~~, shall be a debt of the owner of the separate interest at the time the assessment or other sums are levied.

~~(b) Associations are hereby exempted from interest rate limitations imposed by Article XV of the California Constitution, subject to the limitations of this section.~~

Comment. With respect to a commercial or industrial common interest development, ~~subdivision (a) of Section 6808 continues the first sentence of Section 1367.1(a) without change, except as indicated below.~~

The following nonsubstantive change is made:

- ~~A cross reference is updated to reflect the new location of the referenced provision. A cross-reference to Section 1366 is deleted.~~

~~With respect to a commercial or industrial common interest development, subdivision (b) continues Section 1366(f) without change.~~

For further information, see Section 6500 Comment.

See also ~~Sections 6528 (“association”),~~ Section 6564 (“separate interest”).

For a similar provision in the Davis-Stirling Common Interest Development Act, see Section 5650.

With regard to the proposed amendment to Section 6814 (to delete cross-references to Section 6808(b)) **the staff recommends no Comment revision, as the Commission’s originally approved Comment (shown below the proposed amendments) appears to remain appropriate:**

6814. (a) The amount of the assessment, plus any costs of collection, late charges, and interest assessed in accordance with ~~subdivision (b) of Section 6808,~~ shall be a lien on the owner’s separate interest in the common interest development from and after the time the association causes to be recorded with the county recorder of the county in which the separate interest is located, a notice of delinquent assessment, which shall state the amount of the assessment and other sums imposed in accordance with ~~subdivision (b) of Section 6808,~~ a legal description of the owner’s separate interest in the common interest development against which the assessment and other sums are levied, and the name of the record owner of the separate interest in the common interest development against which the lien is imposed.

(b) The itemized statement of the charges owed by the owner described in subdivision (b) of Section 6812 shall be recorded together with the notice of delinquent assessment.

(c) In order for the lien to be enforced by nonjudicial foreclosure as provided in Sections 6820 and 6822, the notice of delinquent assessment shall state the name and address of the trustee authorized by the association to enforce the lien by sale.

(d) The notice of delinquent assessment shall be signed by the person designated in the declaration or by the association for that

purpose, or if no one is designated, by the president of the association.

(e) A copy of the recorded notice of delinquent assessment shall be mailed by certified mail to every person whose name is shown as an owner of the separate interest in the association's records, and the notice shall be mailed no later than 10 calendar days after recordation.

Comment. With respect to a commercial or industrial common interest development, Section 6814 continue the first five sentences of Section 1367.1(d) without change, except as indicated below.

The following nonsubstantive change is made:

- Cross-references are updated to reflect the new locations of the referenced provisions.

For further information, see Section 6500 Comment.

See also Sections 6528 ("association"), 6534 ("common interest development"), 6546 ("declaration"), 6560 ("person"), 6564 ("separate interest").

For a similar provision in the Davis-Stirling Common Interest Development Act, see Section 5675.

Owner Non-Liability for Timely Assessment Payment

Section 1367.1(a) of the Davis-Stirling Act requires a CID, before commencing lien proceedings against an owner for delinquent assessments and related charges, to send the owner a pre-lien notice containing certain specified information.

One of the items that must be included in this notice is a statement that the owner will not be liable to pay the delinquent charges, interest, or costs of collection specified in the notice, if it is determined that an assessment asserted to be delinquent had actually been paid on time. This non-liability on the part of an owner is fairly implied by Section 1366(e) of the Davis-Stirling Act, which provides that an association may recover those cost items "if an assessment is delinquent."

The Commission recommended that the notice provision in Section 1367.1(a), including the statement of non-liability described above, continue to apply to commercial and industrial CIDs, as part of a larger comprehensive lien enforcement procedure deemed needed by all CIDs. However, the Commission did not recommend continuing the provisions in Section 1366(e), provisions that added other regulatory restrictions relating to delinquent assessment payments.

As a result, the new act would require that a *notice* of non-liability in the described scenario be given to owners, but would neither contain nor imply any substantive *rule* providing that an owner has no liability in that circumstance.

An amendment proposed by Senate Transportation and Housing Committee staff would add that substantive rule to proposed Section 6810, mirroring the statement of non-liability in the pre-lien notice:

6810. (a) When an owner of a separate interest makes a payment toward an assessment, the owner may request a receipt and the association shall provide it. The receipt shall indicate the date of payment and the person who received it.

(b) The association shall provide a mailing address for overnight payment of assessments.

(c) An owner shall not be liable for any charges, interest, or costs of collection for an assessment payment that is asserted to be delinquent, if it is determined the assessment was paid on time to the association.

The staff sees no harm that would be caused by the inclusion of this provision in the new act. Technically speaking, the amendment would add a provision to the new act that does not appear, at least explicitly, in the Davis-Stirling Act. Nevertheless, the provision is clearly reasonably implied in the Davis-Stirling Act, both based on inferences that can be reasonably drawn from Section 1366(e), as well as general principles of equity.

Needed Comment Revision

If the Commission approves the proposed amendment to Section 6810, and the amendment is implemented, **the staff would recommend that the Commission's approved Comment to Section 6810 be revised as follows:**

Comment. With respect to a commercial or industrial common interest development, subdivisions (a) and (b) of Section 6810 ~~continues~~ continue the substance of Section 1367.1(b), except as indicated below.

The following substantive change is made:

- The first sentence of Section 1367.1(b) is not continued.

The following nonsubstantive change is made:

- The provision is divided into subdivisions for ease of reference.

Subdivision (c) of Section 6810 is new. Cf. Section 1366(e).

For further information, see Section 6500 Comment.

See also Sections 6528 ("association"), 6564 ("separate interest").

For a similar provision in the Davis-Stirling Common Interest Development Act, see Section 5655.

Technical Correction

Another amendment proposed by the Senate Transportation and Housing Committee would correct a technical drafting error.

Proposed Section 6756, which requires specified statutory requests of an owner to an association to be in writing, would be amended to delete a reference to a statutory request that the Commission recommended should not be continued in the new act.

Needed Comment Revision

Assuming this technical correction is made, **the staff recommends that the Commission approve revision of its previously approved Comment to Section 6756 (appearing below the proposed amendment), as follows:**

6756. To be effective, ~~any of the following requests~~ a request to change the member's information in the association membership list shall be delivered in writing to the association, pursuant to Section 6512.

~~(a) A request to change the member's information in the association membership list.~~

~~(b) A request to add or remove a second address for delivery of documents to the member pursuant to Section 6814.~~

Comment. Section 6756 is new. It requires that ~~the specified requests~~ a request to change a member's information in an association membership list be written and delivered to the association pursuant to Section 6512.

See also Sections 6528 ("association"), 6554 ("member").

For a similar provision in the Davis-Stirling Common Interest Development Act, see Section 5260.

Pet Ownership Provision

Section 1360.5 of the Davis-Stirling Act prohibits a CID's governing documents from precluding an owner from keeping at least one pet of the types specified by the statute within the CID. Although this provision had been viewed as having both foundational and operational aspects, the Commission decided the provision should remain applicable to commercial CIDs, largely because discontinuing a likely vested owner property right was seen as problematic. Memorandum 2009-32, pp. 79-81; Minutes (Aug. 2009), p. 5.

The last amendment proposed by Senate Transportation and Housing Committee staff would continue the application of this provision (Section 6706 in the new proposed act), but *only* as to owners in commercial or industrial CIDs who had lawfully kept a pet in their CID prior to January 1, 2014 (the proposed effective date of SB 752). The amendment would discontinue the application of the provision as to all other commercial or industrial CID owners.

The staff suggests this amendment can be viewed as a reasonable compromise of arguably competing considerations relating to this provision. The amendment would continue to preserve any vested ownership property right, but would otherwise free commercial and industrial CIDs from an arguably burdensome governance restriction that quite likely had only been intended to benefit homeowners when first enacted.

Moreover, if this amendment were offered and accepted, it would again be in accord with the Commission's expressed deference to current legislative preferences relating to continuing or not continuing a particular Davis-Stirling Act provision.

Revision of Statutory Language

The statutory language that committee staff has proposed to implement this amendment requires some explanation. Rather than revise the proposed text of Section 6706 to provide for the limited applicability described above, the amendment language would explicitly link Section 6706 with Section 4715 of the Davis-Stirling Act (the recodified version of Section 1360.5), and then limit the applicability of Section 4715 as described above.

Further, because Section 4202 of the Davis-Stirling Act provides that the entire Davis-Stirling Act has no application to commercial and industrial CIDs, the amendment language would state this provision as an express exception to Section 4202.

Needed Comment Revision

If the Commission approves the proposed amendment to Section 6706, and the amendment is implemented, **the staff would recommend that the Commission approve revision of its previously approved Comment to the section (appearing below the proposed amendment), as follows:**

6706. (a) ~~No governing documents shall prohibit the owner of a separate interest within a common interest development from~~

~~keeping at least one pet within the common interest development, subject to reasonable rules and regulations of the association. This section may not be construed to affect any other rights provided by law to an owner of a separate interest to keep a pet within the development.~~

~~(b) For purposes of this section, “pet” means any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the association and the owner.~~

~~(c) If the association implements a rule or regulation restricting the number of pets an owner may keep, the new rule or regulation shall not apply to prohibit an owner from continuing to keep any pet that the owner currently keeps in the owner’s separate interest if the pet otherwise conforms with the previous rules or regulations relating to pets.~~

~~(d) For the purposes of this section, “governing documents” shall include, but are not limited to, the conditions, covenants, and restrictions of the common interest development, and the bylaws, rules, and regulations of the association.~~

~~(e) This section shall become operative on January 1, 2001, and shall only apply to governing documents entered into, amended, or otherwise modified on or after that date.~~

Notwithstanding Section 4202, Section 4715 applies to an owner of a separate interest in a common interest development who kept a pet in that common interest development before January 1, 2014.

~~**Comment.** With respect to a commercial or industrial common interest development, Section 6706 continues Section 1360.5 without change, except as indicated below.~~

~~The following nonsubstantive changes are made:~~

- ~~• A reference to “homeowner” is replaced with “owner” in subdivision (b).~~
- ~~• The words “his or her” are replaced with “the owner’s” in subdivision (c).~~

~~For further information, see Section 6500 Comment.~~

Section 6706 is new. It provides that Section 4715 governs an owner who kept a pet in a commercial or industrial common interest development prior to January 1, 2014.

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

~~For a similar provision in the Davis Stirling Common Interest Development Act, see Section 4715.~~

CONCLUSION

As indicated, in the staff's view, the proposed amendments are all compatible with the overall policy goals of the Commission's recommendation. Except for a technical correction, where the amendments differ from the Commission's recommendation, they represent reasonable alternative legislative preferences that the Commission has explicitly expressed deference to in the Commission's final recommendation.

The staff therefore recommends that the Commission approve the amendments, and approve the attached draft of revised Comments, with or without changes, for inclusion in a supplemental report that will be published and distributed to the Legislature and the Governor.

Respectfully submitted,

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Staff Counsel