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ARTICLE**SEPARATE BUT NOT EQUAL: THE NEW COMMERCIAL AND INDUSTRIAL COMMON INTEREST DEVELOPMENT STATUTE**

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INTRODUCTION

Since 1986, a single body of law, the Davis-Stirling Common Interest Development Act (“Davis-Sterling Act”), has governed both residential and commercial common interest developments.¹ The provisions of the Davis-Stirling Act, however, were largely geared to the needs and interests of residential projects and homeowner associations, and resulted in cumbersome and unnecessarily restrictive limitations in the organization and structure of commercial and industrial projects. Hearing the call of commercial and industrial developers, and seeing an increase in the number of commercial common interest developments, in 2013 the legislature passed the Commercial and Industrial Common Interest Development Act, SB 752.² Now two separate statutory schemes govern residential and commercial common interest developments. This article gives a brief overview of the evolution of the statutory scheme that has evolved for commercial and industrial developments and provides an introduction to the new Commercial and Industrial Common Interest Development Act.

BACKGROUND OF COMMON INTEREST DEVELOPMENT LEGISLATION

A common interest development is created whenever a separate interest in a real property development, coupled with an interest in the common area or

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membership in an association, has been conveyed, provided that a declaration, condominium plan, and final map (or parcel map) have been recorded.³ The original Davis-Stirling Act was enacted in 1986,⁴ and provided for the following types of common interest developments:

- Community apartment projects,
- Condominium projects,
- Planned developments, and
- Stock cooperatives.⁵

Despite legislative history indicating that the Davis-Stirling Act was intended to apply only to residential developments, the Davis-Stirling Act has been interpreted to govern commercial and industrial common interest developments as well.⁶

CIVIL CODE SECTION 1373 (1988)

In 1988, recognizing the numerous differences between commercial and residential common interest developments, the legislature enacted AB 2484 and exempted commercial and industrial common interest developments from certain provisions (particularly certain operational provisions) of the Davis-Stirling Act.⁷ Specifically, former Civil Code section 1373 provided that the following provisions, under the then existing Davis-Stirling Act, did not apply to an industrial or commercial common interest development:

- Civ. Code, §1356, Petition court to amend CC&Rs.⁸
- Civ. Code, §§1357.100 to 1357.150, Operating rules.⁹
- Civ. Code, §1360.2, Rent restrictions.¹⁰
- Civ. Code, §1363, subd. (b), Budget and disclosure.¹¹
- Civ. Code, §1365, Financial records and reporting.¹²
- Civ. Code, §1365.5, Financial duties of board and reserve transfers.¹³
- Civ. Code, §1366, subd. (b), Certain limitations on assessments.¹⁴
- Civ. Code, §1366.1, Excessive fees prohibited.¹⁵
- Civ. Code, §1368, Disclosure requirements of seller.¹⁶
- Civ. Code, §1378, Architectural approval requirements.¹⁷

In drafting section 1373, the legislature found that these provisions, while appropriate for protecting purchasers in residential common interest developments, may not be necessary to protect purchasers in commercial or industrial common developments, and in fact, could result in unnecessary burdens and costs for such developments.¹⁸

Since the enactment of section 1373, commercial developers have relied upon its exemptions to avoid some of the more onerous operational conditions of the Davis-Stirling Common Interest Development Act. However, the exemptions, while helpful to commercial and industrial developments, were not expanded or updated with the numerous subsequent changes and additions to the Davis-Stirling Act, and thus, commercial and industrial common interest developments increasingly were subject to numerous provisions that are arguably not necessary for purchasers in

commercial and industrial developments. This was one of the factors that led to the legislature's long-awaited restructuring of the common interest development statutes in 2012-2013.

THE COMMERCIAL AND INDUSTRIAL COMMON INTEREST DEVELOPMENT ACT, CIVIL CODE SECTIONS 6500 ET SEQ. (2014)

The California Law Revision Commission's Recommendation:

In August of 2012, the California Law Revision Commission issued a recommendation regarding the legislating of commercial and industrial common interest developments.¹⁹ The Commission made three general recommendations:

(1) The law governing commercial and industrial CIDs should be separated from the law governing residential CIDs. This will prevent any new laws enacted to benefit residential owners from being inadvertently applied to commercial and industrial developments.

(2) The existing foundational provisions of the Davis-Stirling Act should continue to apply to commercial and industrial CIDs. These provisions are necessary for any CID regardless of type.

(3) Most of the existing operational provisions of the Davis-Stirling Act should be made inapplicable to commercial and industrial CIDs. These provisions are not strictly necessary for all CIDs. They appear to have been added to the Davis-Stirling Act to benefit residential property owners, without separate consideration of their effect on commercial or industrial property owners.²⁰

The legislature adopted the Commission's recommendations and on October 5, 2013, the Governor signed the legislation establishing the "Commercial and Industrial Common Interest Development Act."²¹

Enactment of the Commercial and Industrial Common Interest Development Act

The Commercial and Industrial Common Interest Development Act was enacted in connection with a restructuring and relocation of the Davis-Stirling Act in the Civil Code.²² Although enacted earlier in 2012, the reorganization of the Davis-Stirling Act, like the Commercial and Industrial Common Interest Development Act, was made effective January 1, 2014.²³

Structure of the Commercial and Industrial Common Interest Development Act

The regulations governing commercial and industrial common interest developments are now found at Civil Code section 6500, et seq. A "common interest development" under the Commercial and Industrial Act means a condominium project, a planned development, or a stock co-operative.²⁴ A "commercial or industrial common interest development" is defined as a common interest development that is limited to industrial or commercial uses by law or by a declaration of covenants, conditions, and restrictions that has been recorded in the official records of each

county in which the common interest development is located. “Commercial use” includes, but is not limited to, the operation of a business that provides facilities for the overnight stay of its customers, employees, or agents.²⁵ The Act does not apply to a project that does not contain common areas.²⁶

The Commercial and Industrial Common Interest Development Act consists of the following chapters and articles:

Chapter 1, General Provisions

Article 1, Preliminary Provisions²⁷

Article 2, Definitions²⁸

Chapter 2, Application of Act²⁹

Chapter 3, Governing Documents

Article 1, General Provisions³⁰

Article 2, Declaration³¹

Article 3, Articles of Incorporation³²

Article 4, Condominium Plan³³

Article 5, Operating Rules³⁴

Chapter 4, Ownership and Transfer of Interests

Article 1, Ownership Rights and Interest³⁵

Article 2, Restrictions on Transfers³⁶

Article 3, Transfer of Separate interest³⁷

Chapter 5, Property Use and Maintenance

Article 1, Protected Uses³⁸

Article 2, Modification of Separate Interest³⁹

Article 3, Maintenance⁴⁰

Chapter 6, Association Governance

Article 1, Association Existence and Powers⁴¹

Article 2, Record Keeping⁴²

Article 3, Conflict of Interest⁴³

Article 4, Government Assistance⁴⁴

Chapter 7, Assessments and Assessment Collection

Article 1, Establishment and Imposition of Assessments⁴⁵

Article 2, Assessment Payment and Delinquency⁴⁶

Article 3, Assessment Collection⁴⁷

Chapter 8, Insurance and Liability

Chapter 9, Dispute Resolution and Enforcement⁴⁸

Article 1, Disciplinary Action⁴⁹

Article 2, Civil Actions⁵⁰

Chapter 10, Construction Defect Litigation⁵¹

Differences between the Residential and Commercial CID Statutes

The Commercial and Industrial Act essentially mirrors the Davis-Stirling Act as it relates to foundational provisions, and excludes various operational provisions that were largely interpreted as only necessary for residential common interest developments. In sum, the foundational provisions relating to (1) governing documents, (2) property ownership, transfer, and maintenance, (3) establishing the governing body and its powers, and (4) definitions, all are found in both the Davis-Stirling Act and the Commercial and Industrial Act. Also, like the Davis-Stirling Act, the Commercial and Industrial Act contains the often-cited presumption that the covenants and conditions in the recorded declaration are enforceable as equitable servitudes “unless unreasonable” and are enforceable by the association or by any owner of a separate interest, or both.⁵²

The differences between the two Acts include, but are not limited to, the following key provisions:

Governing Documents: Section 4275 of the Davis-Stirling Act, which provides the association or members with the right to petition to the Superior Court for approval of an amendment in certain circumstances, is not included in the Commercial and Industrial Act. The Commercial and Industrial Act also does not include the requirements for notification to members of proposed new or amended operating rules or provisions regarding the ability of five percent of the members to challenge the proposed operating rules.⁵³

Ownership and Transfer of Interests: The Davis-Stirling Act’s requirement (Civil Code sections 4525 and 4530), that certain documents must be provided to prospective purchasers and the timing for providing the documents is not included in the Commercial and Industrial Act. Also, Sections 4575-4580 of the Davis-Stirling Act, which prohibit the collection of transfer fees, are not included. The requirement of at least 67 percent of the members to approve a conveyance of exclusive-use common area for the benefit of an owner or owners (unless a different percentage is required under the Governing Documents) also is not included in the Commercial and Industrial Act.

Association Governance: The Davis-Stirling Open Meeting Act, sections 4900-4955, which contains the provisions for the conduct of board meetings, is not included in the Commercial and Industrial Act. The provisions for the conduct of director elections and important member votes (sections 5000-5145) also are not included. Inspection rights, which are expanded under the Davis-Stirling Act, are not included in the Commercial and Industrial Act, and are instead limited to the procedures in Corporations Code sections 8330-8333. The Davis-Stirling Act’s requirement, set forth in Civil Code section 5300, that the association provide financial disclosures and certain other information annually is not included in the Commercial and Industrial Act. Finally, the association governance chapter of the Commercial and Industrial Act does not include provisions regarding regulating managing agents of the association which are found at sections 5375-5385 of the Davis-Stirling Act.

Association Finances: This chapter in the Commercial and Industrial Act, set forth in sections 6750-6760, is significantly different from the Davis-Stirling Act. There are a

number of provisions in the Davis-Stirling Act that are not included in the Commercial and Industrial Act. For example, omitted from the Commercial and Industrial Act is a requirement of member approval for assessment increases that are more than 20 percent of the prior year's assessments, or any special assessment over 5 percent of the budgeted gross expense. The Commercial and Industrial Act also does not include a member's rights to invoke certain internal and alternative dispute resolution mechanisms in collecting delinquent assessments that are found in the Davis-Stirling Act (including the right to request a meeting before the board and the right to demand alternative dispute resolution with the association).

Dispute Resolution and Enforcement: Again, similar to the differences noted in the handling of disputes involving assessments, the provisions for internal and alternative dispute resolution that are found in the Davis-Stirling Act at sections 5900-5965 are not included in the Commercial and Industrial Act. Moreover, while section 5975 of the Davis-Stirling Act mandates that the prevailing party in an action to enforce the governing documents be awarded attorney fees and costs, this mandate is not expressly stated in the Commercial and Industrial Act.

CONCLUSION

The new Commercial and Industrial Common Interest Development Act governs a common interest development that is limited to industrial or commercial uses and does not apply to residential common interest developments (although it does apply to a commercial development that includes the operation of a business that provides facilities for the overnight stay of its customers, employees, or agents).⁵⁴ The Act includes the foundational provisions of the Davis-Stirling Act, but omits various operational provisions of the Davis-Stirling Act. As noted in the Law Revision Commission's recommendation, the "operational regulations of the Davis-Stirling Act were enacted to benefit residential property owners. They are not needed by business property owners, who have the sophistication to order their own operations and are already adequately regulated by general commercial law. Because the operational needs of business property owners are different from those of residential property owners, the one-size-fits-all procedural mandates of the Davis-Stirling Act may impose undue burdens on commercial operations."⁵⁵

It is unclear at this stage what impact the Commercial and Industrial Act will have on commercial common interest developments that were created under the Davis-Stirling Act where the governing documents include provisions required by the Davis-Stirling Act that are not required by the Commercial and Industrial Act. The Act does not invalidate the documents prepared or actions taken prior to January 1, 2014, that were consistent with the Davis-Stirling Act at the time the document was prepared or the notice was taken, but this provision specifically does not apply to the "governing documents" of the development.⁵⁶ The Act also provides for some special procedures to amend the governing documents of an existing project formed under the Davis-Stirling Act, but these provisions are far from comprehensive.⁵⁷ While time will tell how courts will handle the effect of this new statutory scheme on existing commercial common interest developments that were created under the Davis-Stirling Act, associations should amend their governing documents if they want to make it

clear they are not subject to certain provisions that are contained in their governing documents, but which they should no longer be subject to.

This is not the last word on both the Davis-Stirling Common Interest Development Act and the Commercial and Industrial Common Interest Development Act. In the future, the legislature will need to continue to update both Acts, address which Act governs projects that do not squarely fall within one act or the other,⁵⁸ and to further clarify the impact on existing commercial common interest developments that were created under the Davis-Stirling Act.

NOTES

1. Civ. Code, §§4000 et seq. (formerly Civ. Code, §§1350 et seq.)
2. Civ. Code, §§6500 et seq.
3. Civ. Code, §4200.
4. Stats. 1985, ch. 874, §14.
5. Civ. Code, §4100.
6. The report of the Law Revision Commission, Commercial and Industrial Common Interest Developments (Aug. 2012), 42 Cal. Law Revision Comm'n. Reports 1 (2012) describes the legislative intent of the original statutes as follows: "See letter from Jerold L. Miles to Michael Krisman (Sept. 16, 1986) (on file with Commission) (In a recent conversation between my partner Rob Thomson and Assemblyman Davis, Assemblyman Davis assured Mr. Thomson that the act was intended to apply only to residential projects.); Office of Local Government Affairs, Enrolled Bill Report on AB 2484 (May 23, 1988) (on file with Commission) (According to the consultant for the Assembly Housing Committee, the Davis-Stirling Act was enacted to benefit residential common interest developments. However, the language of the Davis-Stirling Act *inadvertently* included commercial and industrial developments.) (emphasis added)."
7. See Stats. 1988, ch. 123 (AB2484).
8. Civ. Code, §1373, subd. (a)(1).
9. Civ. Code, §1373, subd. (a)(2).
10. Civ. Code, §1373, subd. (a)(3).
11. Civ. Code, §1373, subd. (a)(4).
12. Civ. Code, §1373, subd. (a)(5).
13. Civ. Code, §1373, subd. (a)(6).
14. Civ. Code, §1373, subd. (a)(7).
15. Civ. Code, §1373, subd. (a)(8).
16. Civ. Code, §1373, subd. (a)(9).
17. Civ. Code, §1373, subd. (a)(10).
18. Civ. Code, §1373, subd. (b).
19. Commercial and Industrial Common Interest Developments (Aug. 2012) 42 Cal. Law Revision Comm'n. Reports 1 (2012).
20. *Id.* at 4.
21. 2013 Stats. Ch. 752.
22. The statute that restructured the Davis-Stirling Act, 2012 Stats., ch. 180 (AB805) made various substantive changes and renumbered all sections, commencing at Civil Code sections 4000, et seq.
23. Civ. Code, §4010. See also Civ. Code, §6505: Nothing in the act that added this part shall be construed to invalidate a document prepared or action taken before January 1, 2014, if the document or action was proper under the law governing common interest developments at the time that the document was prepared or the action was taken. For the purposes of this section, "document" does not include a governing document.

24. Civ. Code, §6534.
25. Civ. Code, §6531.
26. Civ. Code, §6582, subd. (b).
27. Civ. Code, §§6500 to 6524.
28. Civ. Code, §§6526 to 6566.
29. Civ. Code, §§6580 to 6582.
30. Civ. Code, §§6600 to 6610.
31. Civ. Code, §§6614 to 6620.
32. Civ. Code, §6622.
33. Civ. Code, §§6624 to 6628.
34. Civ. Code, §§6630 to 6632.
35. Civ. Code, §§6650 to 6654.
36. Civ. Code, §§6656 to 6658.
37. Civ. Code, §§6662 to 6670.
38. Civ. Code, §§6700 to 6713.
39. Civ. Code, §6714.
40. Civ. Code, §§6716 to 6722.
41. Civ. Code, §§6750 to 6752.
42. Civ. Code, §6756.
43. Civ. Code, §6758.
44. Civ. Code, §6760.
45. Civ. Code, §§6800 to 6804.
46. Civ. Code, §§6808 to 6819.
47. Civ. Code, §§6820 to 6828.
48. Civ. Code, §6840.
49. Civ. Code, §§6850 to 6854.
50. Civ. Code, §§6856 to 6860.
51. Civ. Code, §§6870 to 6876.
52. Civ. Code, §6856, subd. (a). See Civ. Code, §5975, subd. (c) (applicable to residential projects).
53. Civ. Code, §§6600 to 6632.
54. Civ. Code, §6531.
55. Commercial and Industrial Common Interest Developments (Aug. 2012) 42 Cal. Law Revision Comm'n. Reports 1, p.18 (2012).
56. Civ. Code, §6505.
57. Civ. Code, §§6610, 6614, 6618.
58. For example, the definition of "commercial use" is still somewhat ambiguous. "Commercial use" includes, but is not limited to, the operation of a business that provides facilities for the overnight stay of its customers, employees, or agents. (Civ. Code, §6531.)

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