Study H-853 January 10, 2005

Memorandum 2005-2

State Assistance to Common Interest Developments (Comments on Tentative Recommendation)

The Commission circulated a tentative recommendation on S*tate Assistance to Common Interest Developments* (September 2004), which proposes the creation of a state program to assist CID homeowners and association board members by providing education, mediation, and law enforcement services. We received a large number of comments, which are attached in the Exhibit as follows:

After considering the issues raised by the comments, the Commission will need to decide how to proceed. The three general options would be to: (1) approve the tentative recommendation as a final recommendation and seek introduction of implementing legislation, (2) continue working towards the development of a final recommendation, or (3) temporarily or permanently table the proposal.

GENERAL RESPONSE

The staff is pleased by the broad response to our request for comments. A proposal of this magnitude should be subject to broad public review and input before a final decision is made.

Most of the comments were from individuals, although we did receive comments from three interested groups: the CID Bill of Rights Coalition, the California Association of Community Managers ("CACM"), and the Community Associations Institute— California Legislative Action Committee ("CAI-CLAC"). We did not receive any comments directly from the American Homeowners Resource Center ("AHRC"), a CID homeowner advocacy group — though we did receive many individual comments through an Internet-based discussion forum maintained by AHRC. Nor did we receive formal comment from the Executive Council of Homeowners, ("ECHO"), another state-wide CID advocacy

group. However, an article authored by Sandra M. Bonato, ECHO's legislative committee chair, is generally positive about the concept of state assistance. See Exhibit at 83.

Support

Response to the tentative recommendation was mixed. Many individuals expressed general support for the concept of state assistance to common interest developments. For example:

- "I believe you are on the right track with your 'Common Interest Development Bureau' to preempt the litigation process. I commend your efforts to attempt legislation on an overdue matter. You have my support." Michael Doyle, Exhibit at 19.
- "I wish to express my enthusiastic support for your Tentative Recommendation for State Assistance to Common Interest Developments. It is a sorely needed measure to address an area which is currently out of any effective control." Robert D. Saunders, Exhibit at 54.
- "While [procedural impropriety in amending governing documents] may seem insignificant, this example clearly demonstrates that there is no state oversight over compliance with its laws regarding the organizational conduct of HOAs. Private litigation is entirely ineffective in such a case, because no homeowner or group of homeowners is financially impacted. … On these facts no homeowner is sufficiently aggrieved to expend substantial funds to litigate this issue, especially in the face of the huge awards reportedly made by the courts in favor of HOA's attorney fees." Robert D. Saunders, Exhibit at 55.

See also the comments of Frank H. Roberts (Exhibit at 7), Ron Guglielmino (Exhibit at 11), Chris Danley (Exhibit at 22), Larry Robinson (Exhibit at 24), Lorie Martin (Exhibit at 24), Franklin Tilley (Exhibit at 26), Jan Townsend (Exhibit at 26-27), "cbzik@aol.com" (Exhibit at 29), Harvey Dalke (Exhibit at 53), Suzanne Hahn (Exhibit at 69), S. Stephens (Exhibit at 72).

Opposition

We also received a few comments from individuals who are against any state involvement in CID affairs:

- "I am not in favor of establishing this new government bureaucracy. I have lived in Gold River, Ca for 11 years. I bought my home in this development partly due to the homeowners association. I, and anyone who buys or rents in Gold River, are aware of the CC&Rs. It was my choice, and the choice of my neighbors, to live in Gold River and abide by the rules. We do not

want to pay additional homeowners dues to pay someone to deal with a new government agency. Nor do I want my tax dollars spent on more state control." Darell Baxter, Exhibit at 24.

- "I am against the creation of another bureaucracy in state government. The number of problems in HomeOwner Associations is minuscule and adequate remedies now exist such as arbitration, small claims court, legal aid, etc. I have been a member of 10 or more Associations, none would be helped [by] this proposed governmental body. We do not need State Assistance for Homeowner Associations as the Associations practice democracy at its most fundamental level and need no special attention." Eugene Shy, Exhibit at 25.
- "As a long time resident of and current president of a large condominiums association, I urge you to avoid creating any more levels of government. There are ample ways to address problems and reach settlement. The LAST THING anyone needs is more bureaucracy -- more commissions, agencies, etc. It will only confuse and unnecessarily complicate matters." Carolyn Gustin, Exhibit at 66.
- "I don't feel that homeowner associations need another government entity to watch over them. These are self-governing adult organizations whose members have purchased private property in a community that relieves the individual of some of the responsibilities of home owning. We are not public housing in the true sense of the term, yet the state legislature feels compelled to control how we operate. For instance the Davis-Stirling Act." Ed Levine, Exhibit at 80.

In addition, we received two anonymous communications that expressed skepticism that the proposed law would have any positive effect for homeowners. See Exhibit at 13-17. Incidentally, these comments also mistakenly imply that the staff delayed requesting comment from AHRC until December 20 in order to stifle homeowner input. In fact, a request for comments was first published on the AHRC website on October 8, 2004. The December 20 communication was simply a reminder of the then-pending comment deadline.

Routine Inquiries

The staff routinely receives inquiries from homeowners who are having problems within their associations. We are not able to provide legal advice in response to these inquiries, but do offer what practical advice we can (e.g., read your governing documents carefully, try to reach a reasonable compromise, speak to an attorney if necessary). When the callers are asked if a program of state assistance along the lines proposed would be helpful in their situation, the answer is almost universally positive.

One extreme example described to the staff illustrates a situation in which state assistance would have been useful: an association board announces that it has forgiven overdue assessment debt, on a selective basis. A homeowner objects that this is misappropriation of association funds. The board then denies having forgiven any debt. The homeowner asks to see the accounting books and records (as permitted by law). The board refuses. The homeowner asks for membership address list in order to circulate a recall petition (as permitted by law). The board refuses to provide addresses. The homeowner collects necessary signatures for recall, but the board refuses to hold the election. The board then fines the homeowner $1,500 for legal costs it incurred in answering her demands and threatens to foreclose if the fine is not paid. The homeowner seeks legal counsel but cannot afford litigation. She pays the $1,500. In the course of this dispute, the homeowner sought assistance from the Attorney General, the Department of Real Estate, the Department of Consumer Affairs, and the Law Revision Commission, but none of these agencies had the jurisdiction or resources to resolve the problems.

We also receive calls from homeowners who have a mistaken understanding of CID law and the scope of the restrictions on their property. They believe that the law is being violated even though it probably is not. An authoritative and neutral state body could provide information that might help these homeowners to understand the true nature of their problem.

Ambivalence

We received a number of comments that did not express clear support for or opposition to the proposed law. This ambivalence is perhaps best expressed in CACM's comment, at Exhibit p. 39:

> The idea of a regulatory agency specifically created to respond to issues related to CIDs has been bantered about the industry for the last 15 years. While there are and will continue to be pros and cons to the proposal, it is equally if not more important to assume that this concept will eventually occur. With this perspective in mind, we strongly encourage the CLRC to proceed carefully, with much forethought to the concept of a Bureau of CIDs. It is in the state's interest, both economically and in establishing positive and workable public policy, to protect the 9.5 million consumers who are housed in these communities.

The concerns raised by commentators are discussed below, under the following headings:

(1) Timeliness of Proposal
(2) Decisionmaker Bias
(3) Funding Burdens and Procedures
(4) Administrative Law Enforcement Authority
(5) Rulemaking Authority
(6) ADR and Administrative Remedies
(7) Education Issues
(8) Agency Location and Structure

TIMELINESS OF PROPOSAL

Some commentators suggest that the proposed law is premature, either because more study should be done to better tailor the solution to the problem, or because other reforms should be completed before moving forward with the proposed law.

Further Study and Planning Required

Some comments caution against creating a new program without first empirically establishing its likely workload and establishing a workable business plan:

> CACM believes that more resources and consideration should be utilized before legislation is introduced to create a Bureau of CID's. Perhaps an in-depth study should be conducted to quantify serious concerns and to include a 5 year cost analysis and business development plan for the proposed Bureau. There is the potential universe of 9.5 million home owners who could be calling the Bureau to file complaints, ask for assistance and make direct contact with the Bureau. It is essential that the Bureau anticipate a large volume of communication and activity from the get-go. We strongly urge the CLRC to perform some due diligence rather than resolve problems after legislation is created.
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> …
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> We strongly urge the CLRC to make this step to the creation of a new agency a methodical and careful one. We suggest long range planning FIRST, before legislation is enacted, to ensure the financial viability of the Bureau and to promote effect[ive] management of an anticipated large staff and volume of activity. This is a bold step for all California consumers.

See Exhibit at 41, 51.

Adequacy of Resources

A principal concern underlying the suggestion that more study and planning should be completed before moving forward seems to be the possibility that the resources allocated to the Bureau would be insufficient for its workload. CACM provides an interesting extrapolation of available data in an attempt to establish the likely workload and resource needs of the proposed Bureau. See Exhibit at 40-41. CACM posits that approximately 9.5 million individuals live in CID housing in California. If as many as 1% seek Bureau assistance each year, there would be approximately 95,000 inquiries. The staff finds it more useful to extrapolate from the number of CID households (3.8 million) rather than from the number of individuals residing within those households. Under that assumption, a 1% inquiry rate would yield 38,000 inquiries per year — still a sizable figure.

Is a 1% inquiry rate realistic? A rate of one inquiry per 100 housing units per year (1% of housing units) is consistent with data reported from other jurisdictions that provide state assistance to CIDs. As another way of estimating the likely workload, CACM reports that the California Department of Real Estate receives formal complaints about its licensees at the rate of about 2.6% per year. However, that is 2.6% of the *licensees*, not 2.6% of real estate consumers. To apply that figure to CIDs one would have to assume a rate of 2.6 complaints per 100 *homeowner associations*, not 2.6 per 100 CID homes. Given the approximately 36,000 associations within California, that would yield approximately 936 complaints per year. That figure is probably too low. Unlike the transactional relationship between a real estate agent and a real estate consumer, the relationship between a community association and its members is an ongoing one that provides a continuing potential for disagreement and dispute. As a result, there is probably a higher rate of disputes involving community associations than disputes involving real estate agents.

The Nevada Ombudsman for Owners in Common Interest Communities estimates that about half of all the inquiries that it receives are resolved with one or two phone calls. This is not surprising. Many complaints will be based on simple misunderstandings that can be easily resolved by the intervention of a neutral authority. If we assume that half of all inquiries are "easy" cases that can be resolved at the rate of four per day and the remainder are "hard" cases that require an average of two full days to resolve, then the number of hours required to process 38,000 inquiries would be as follows:

19,000 easy cases x 2 hours each = 38,000 hours
19,000 hard cases x 16 hours each = 304,000 hours

Assuming 1,920 hours worked per employee annually (48 weeks x 5 days x 8 hours), the Bureau would require 20 employees to handle the easy cases, and 159 employees to handle the hard cases. If we assume an average annual personnel cost of $100,000 per position, then the total personnel cost for these case workers would be just under $18 million. The Bureau's proposed maximum budget would be $38 million per year. There are too many assumptions within the preceding analysis to provide any real certainty, but it does suggest that the proposed resources are squarely within the range of feasibility.

Empirical study of the actual rate of disputes and complaints could help to pin down the actual workload of the proposed Bureau. However, it is not clear how to conduct such research. Sam Dolnick suggests that the Attorney General's office should compile statistics on the CID-related complaints that it receives. See Exhibit at 9.

Such information would be interesting, but its value would be limited by the limitations on the Attorney General's involvement in CID dispute resolution. The Attorney General only has authority to intervene with regard to a narrow range of matters relating to corporate governance. As a matter of policy, the Attorney General's office will not directly intervene in a CID dispute. The office will send a written "notice of complaint" but do nothing more. See <http://caag.state.ca.us/consumers/complaints/npmb.htm>.

The limited scope of assistance provided may deter some CID homeowners from requesting assistance from the Attorney General in the first place. The limited scope of involvement by the Attorney General would make it difficult to collect information about the relative difficulty of resolving different types of disputes.

Pilot Project

The best way to collect directly relevant information would be to create a program with the same mission as the proposed Bureau: providing assistance with the full range of CID disputes. In effect, that is what the tentative recommendation proposes. Recall that the proposed Bureau would have a five-year sunset date. It would serve as a pilot project to collect information about the actual scope of the problem while testing different methods of providing needed assistance. The information gathering function of the proposed Bureau is

expressed in the proposed statement of legislative intent. Proposed Civil Code Section 1380.100(d) provides:

> (d) Anecdotal accounts of abuses within common interest developments create continuing public demand for reform of common interest development law. This results in frequent changes to the law, making it more difficult to understand and apply and imposing significant transitional costs on common interest developments statewide. By collecting empirical data on the nature and incidence of problems within common interest developments, the Common Interest Development Bureau provides a sound basis for prioritizing reform efforts, thereby increasing the stability of common interest development law.

At the end of the trial period, the Bureau would provide a detailed evaluation of its work to the Joint Legislative Sunset Review Committee. That committee would then determine whether the benefits provided by the Bureau justify its costs.

Another suggestion worth mentioning, from the CID Bill of Rights Coalition, would be to limit the initial pilot program geographically. The concept could be tested in one or two large counties. See Exhibit at 32. This could be done, at the sacrifice of some economies of scale. However, it would probably be difficult to prevent CID residents in other counties from calling for assistance, especially if the trial program includes an informational website.

Consequences of Incorrect Estimation of Demand

If our assumptions about the likely demand for services are wrong, what would be the consequences?

If we overestimate demand, then the Bureau will find itself with more resources than it needs. After two years, the Bureau would adjust its fees downward to reflect its actual needs. See proposed Civ. Code § 1380.120(c). This would not cause any serious problems.

If we underestimate demand, the Bureau would need to prioritize its responses in order to do the best that it can with the resources that it has. After two years it would increase the fee. *The fee could not exceed $10 per CID unit per year.* That may still be inadequate to meet the demand. An understaffed Bureau would probably still do a lot of good. Thousands of CID homeowners would receive assistance who otherwise would have received none. Some, however, would be turned away or made to wait.

It is possible that the demand for services would exceed resources to such a degree as to make it difficult to do much more than screen calls. When Florida recently announced its new condominium ombudsman program, the ombudsman started receiving calls for help at home, before establishing an office. See Joe Kollin, State's New Condo Ombudsman Finds Phone is Already Ringing, Dec. 10, 2004 <Sun-Sentinel.com>.

A Bureau that is too busy to assist a significant part of the public seeking its help would be seen unfavorably by many and might be an albatross around the neck of its host agency.

There is good reason to refine our estimate of the resource needs of the Bureau. **The staff would like to spend some additional time working on this aspect of the study.** In particular, the staff would like to collect statistics from other regulatory agencies as to their consumer complaint workload and resolution rates. This should not take too long but would help to firm up our estimates.

We also welcome suggestions for other useful sources of empirical data. For example, CACM is currently conducting a survey to determine how many CID-related complaints are received by members of the Legislature. See Exhibit at 48-49, 51-52. The results of that survey should be useful.

If the Commission wishes, the staff will approach the Attorney General's office about compiling statistics on their experience handling CID-related inquiries (prospectively, they have not kept such statistics in the past).

Business Plan

CACM also suggests that we should develop a more complete operational plan for the proposed Bureau before proceeding. This could be counter-productive. Given the uncertainties as to the nature and volume of the Bureau's workload, it is probably preferable to leave as much administrative flexibility as possible. The proposed law establishes the basic duties and powers of the Bureau, but leaves the details of implementation up to development by the Department of Consumer Affairs. DCA has considerable experience establishing and operating a range of consumer service and regulatory functions. **We should defer to their expertise.**

Statutory Reforms Should Precede State Oversight

Commentators have also suggested that the proposed law should be deferred until other problems with CID statutory law have been corrected. For example,

CACM suggests that it might make sense to work on simplifying and clarifying existing law before creating a state oversight program:

> **Question:** Has there been enough "clean-up" of the Davis Stirling Act to be able to have a minimum expectation that owners and volunteer board members are first and foremost, able to understand and effectively implement the Act? Why create a Bureau of CIDs that will be required to work within the context of enforcement and adjudication of a confusing and micro-managing body of law?
>
> ***Consideration:*** CACM would strongly urge the CLRC to continue the obvious and necessary process to simplify the language in the Davis Stirling Act for owners and volunteer directors in California CIDs. With simplification and significant comprehensive changes, many of the analogous disputes between owners the boards may be able to resolve themselves. How can any regulatory agency expect consumers and volunteer directors to "obey the rules" if the rules provided are not easily understandable? The revisions for simplification would additionally provide the Bureau the opportunity to garner more appropriate and consistent information on the types of disputes and to adjudicate those disputes with laws that are comprehensible. We need clarification for the lay person.

See Exhibit at 48.

It would certainly be easier for the proposed Bureau to operate if statutory improvements are made first. However, statutory cleanup will take time, and there is a present need for state assistance. **The staff sees no reason that the two projects cannot proceed in parallel.**

The CID Bill of Rights Coalition raises a more significant obstacle. They suggest that existing laws are unfair to homeowners and that state enforcement of those laws would exacerbate that unfairness:

> [Do] we really want a Bureau whose purpose is to enforce laws that are so obviously unjust to homeowners? Or to mediate disputes arising from these laws?
>
> Our coalition believes that further <u>legislative reform must precede the creation of any Bureau</u> whose purpose is to mediate disputes and enforce existing laws.

See Exhibit at 32 (emphasis in original).

The principal example cited by the Coalition is the law authorizing an association to foreclose nonjudicially to collect an overdue assessment. See Civ. Code § 1367. The concern seems to be that the Bureau would use its resources to assist in foreclosures. The staff does not believe that the proposed law would

have that effect. The Bureau's law enforcement authority would be limited to issuing corrective citations for *violations* of law. See proposed Civ. Code § 1380.310. Nothing in the proposed law authorizes the Bureau to substitute itself for an association board and collect assessments on behalf of an association. **This should perhaps be made clearer.**

In fact, it appears to the staff that the requirements of statutory law (whether in the Davis-Stirling Common Interest Development Act, the Nonprofit Mutual Benefit Corporation Law, or elsewhere) all benefit individual homeowners by imposing procedural limitations on associations (relating to meeting and voting procedures, records access, financial disclosures, architectural review procedures, rulemaking procedures, etc.). The staff invites public input on whether there are any statutory provisions that impose restrictions directly on CID homeowners rather than on the governing association.

A very different question would be presented if the Bureau were given authority to enforce an association's governing documents. In that case, the Bureau would be enforcing restrictions on individual homeowners. Policy considerations aside, constitutional restraints on executive exercise of judicial power probably preclude giving the Bureau such authority (see "Administrative Law Enforcement Authority" below).

Recent Changes to ADR Should be Given a Chance to Work

In 2004, Assembly Bill 1836 (Harman) implemented the Commission's recommendation on *Alternative Dispute Resolution in Common Interest Developments,* 33 Cal. L. Revision Comm'n Reports 689 (2003). That bill made improvements to the existing prelitigation ADR requirement and added a new requirement that associations provide their members with an internal dispute resolution process. A number of commentators suggested that those reforms should be given a chance to work before proceeding with the proposed law. CAI-CLAC comments:

> A threshold question is whether it makes sense to create a Bureau whose function is partly to resolve disputes when the legislature has just enacted AB 1836, which the CLRC supported, containing the new Civil Code Sections 1363.810 through 1363.850 which provide for new dispute resolving requirements. Shouldn't these provisions be tested to see if they work before mandating a new layer of dispute resolution is added by the Bureau?

See also comments of CACM, Exhibit at 45-46 .

There is some overlap between the dispute resolution functions of the proposed Bureau and the procedures established by AB 1836. Coordination between those two dispute resolution alternatives is discussed below (see "ADR and Administrative Remedies"). However, the staff does not see any conflict between the reforms implemented by AB 1836 and the proposed Bureau. Unless the suggestion is that the reforms enacted by AB 1836 may be sufficient by themselves to resolve CID-related disputes, the staff sees no reason to delay progress on the proposed law.

AB 1836 was never intended as a panacea. It enriches the range of nonjudicial dispute resolution options, but it lacks many of the benefits that would be provided by the proposed Bureau. The Bureau would serve as a neutral and objective source of information, which would help resolve many disputes that are based on ignorance or misunderstanding of the law. The fact that Bureau conciliation efforts are backed by binding enforcement authority would resolve some disputes that would not be settled by simple appeals to good faith and reason. The staff does not believe that we need to wait until the efficacy of an informal "meet and confer" type process is established before adding other, more robust, arrows to the dispute resolution quiver.

Conclusion

Commentators suggest that the proposed law is premature because (1) we do not yet have enough concrete data on probable workload or a detailed business plan, (2) we should first simplify the law and make it easier to understand before involving the state, (3) we should correct inherent unfairness in the law before facilitating its enforcement, and (4) we should wait to see whether the reforms enacted by AB 1836 are successful.

The staff recommends that the Commission delay approving a final recommendation until we have collected more data about probable workload. This would also give us time to address other issues that have been raised.

Another argument in favor of delaying final action is the current political climate. The staff has not yet been successful in requesting an informational hearing on the proposed law before the relevant legislative committees — other committee priorities have intervened. However, one theme that came to the fore during those discussions was the difficulty of creating any new state program at the current time. The reorganization and streamlining of state government is

currently a very hot topic in Sacramento. It might well make sense to wait until the waters have calmed a bit, before trying to add another element to the mix.

DECISIONMAKER BIAS

A number of commentators expressed skepticism about whether the proposed Bureau would be neutral and even-handed, or would instead be "captured" by the industry it is intended to regulate.

- "ANY additional control over Homeowner Association members influenced by California Legislative Action Committee, and other lobbyist organizations would be criminal.

  Only an assurance on the part of your committee that CAI, CACM, CLAC and other self serving anti homeowner influences will have NO part in setting policy would calm the tide of anger against the administration for daring to tax us, then use our money to oppress us even further." S. V. Colbert, Exhibit at 1.
- "My only concern about your proposal relates to the qualifications of the Bureau chief and the composition of the Advisory Committee. The much maligned CAI is accused of co-opting Nevada's ombudsman. Whether or not this is true, it is important that your proposal avoid the appearance of being aligned with the group that profits from its employment by HOAs-professional community managers and attorneys. While they have much to contribute to the Bureau and should both be represented on its Advisory Committee, it is the control which they presently exert that is the basis for much of the current problem with HOAs. Some balance between the paid staff (both managers and attorneys) and homeowners should be guaranteed." Robert D. Saunders, Exhibit at 56.

See also comments of anonymous (Exhibit at 14), anonymous (Exhibit at 25), Lloyd Smith (Exhibit at 53-54), S. Stephens (Exhibit at 72).

There are structural ways to reduce the risk of agency bias. One method is to create a multi-member board as the decisionmaker. Membership on the board can then be allocated between different interest groups in an attempt to create a diversity of views. However, there are enough CID homeowners in the state, from all walks of life, that it would be relatively easy to stack a board to represent only a single perspective, if the appointing authority were interested in doing so. That risk cannot be eliminated.

The proposed law achieves some of the benefit of a multi-member board by authorizing the Bureau's chief to appoint a multi-member advisory committee.

The members of the committee would be selected to "ensure a fair representation of the interests involved." See proposed Civ. Code § 1380.110(f).

The Bureau chief and employees would be civil servants rather than political employees. This would help to insulate employees from political pressures.

Bureau bias can also be reduced by legislative and gubernatorial oversight. The proposed Bureau is subject to sunset review after five years. Its administrators would therefore have a strong incentive to demonstrate their commitment to public service during that time. That initial period should establish the Bureau's basic orientation. A sharp deviation from prior practice after reauthorization would probably not be viewed favorably by the Legislature.

Bureau records would be subject to public inspection under the Public Records Act. Its procedural rules would be adopted under the Administrative Procedure Act, which guarantees public notice and participation in the process. Its adjudicative decisions would be subject to judicial review.

The staff sees no statutory way to completely eliminate the risk of capture of a regulatory agency. Public transparency and accountability are the best feasible solutions. The proposed law embraces that approach.

FUNDING BURDENS AND PROCEDURES

Under the proposed law, a community association would be required to pay a fee when registering with the Secretary of State (*every two years*). That fee would be used to fund the Bureau's operations. No general fund revenues would be used. See proposed Civ. Code § 1380.120.

The fee would be based on the number of units within the association. Initially, the fee would be set at $10 per unit (which would average out to $5 per unit annually). The Bureau would be required to evaluate the adequacy of the fee every two years and adjust it, up or down, by regulation. The fee could not exceed $20 per unit (an average of $10 per unit per year). *Id*.

The association would recoup the fee by increasing assessments to cover the amount of the fee. This would effectively pass the fee through to the individual homeowners. The Bureau would have no direct method of enforcing fee payment, but the proposed law would take advantage of the existing sanction for nonpayment of fees on registration with the Secretary of State: suspension of the association's rights, privileges, and powers as a corporation and a modest monetary penalty ($50). See Civ. Code § 1363.6(d); Corp. Code § 8810.

We received a number of comments on funding issues, which are discussed below.

Cost Burdensome

Although the per year cost would be only $5-10 per household, some commentators objected to the burden of this additional cost, especially when added to other costs imposed by statutory regulation of CIDs.

- "The legislature may not realize it but each time legislation affecting CIDs becomes law, the expenses for the CIDs go up. The legislature is nickel-and-diming the CIDs to death. Since a majority of the CIDs are managed by community association management firms, the extra work by these firms to comply with the legislative mandate, on behalf of the CID, forces them to charge to CID for the extra time necessary. CIDs that were considered to be an entry to affordable housing, are becoming anything but affordable. Maintenance assessments have to be increased for normal inflation, but each year the assessments also have to be increased by the added burden of legislative fiat." Sam Dolnick, Exhibit at 8-9.
- "Of course the ever present 'cost' to each owner in a CID was expressed as a concern. Many senior communities are vigilant against any reason to raise assessments. A $10 per unit per year fee is in many cases, impossible for the senior to afford as well as smaller associations that may not have the resources. In recent years items such as increased insurance premiums by as much as 400% have caused many associations serious financial woes. $10 may not seem like a lot of money but to some it is. As we asked earlier, who foots the bill when CIDs don't pay their fair share to fund the Bureau?" CACM, Exhibit at 50.

See also comments of David Farrington (Exhibit at 11), Kathleen Willoughby (Exhibit at 73).

Others expressed concern about the fairness of requiring all associations to fund the Bureau despite the fact that many associations are relatively problem-free:

> The real question in my mind is, how will such a commission or ombudsman be funded without penalizing the good associations that have no need for it?
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> …
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> Some have said that a tax or fee should be applied to all HOA maintenance fees that would fund the cost for a commission. In my mind this penalizes the associations that work well and get along.

Steven Shuey, Exhibit at 66, 68. If our estimates are correct and only 1% of CID households would contact the proposed Bureau, then 1% of households would receive services funded by 100% of the households.

Some object to what they see as "double-taxation." They pay property taxes to local government, even if they receive fewer local services than non-CID properties, and are then asked to fund another entity to resolve problems that result from the choice of the CID form (which is often mandated by local government seeking to reduce its own costs):

> We pay much more than our fair share in taxes now under current practices regarding HOAs. Thus, the government owes us protection under a failing system. We have already paid the price. It would be interesting to see how quickly the government would stop abuses to HOA members if government is forced to fund its own folly.

These are legitimate concerns that must be weighed in deciding whether to create a cost-spreading funding mechanism. The alternatives would be a pure fee for service approach, general tax revenue funding , or some mixture of each. This is discussed more fully below.

It should be noted that the proposed Bureau would provide some benefits to well-run associations. It would provide information and education resources that would be useful to any association. Also, by defusing the most extreme cases of abuse it would tend to minimize the need for legislation to fix problems that may in fact be atypical. As others have noted, changes in the law result in transitional costs as associations are required to seek professional advice and revamp their procedures.

It is also true that even a well-run association can change over time. New members, new fact situations, and new officers and agents may lead to serious disputes despite a history of harmonious relations. No association can be sure that it will never require dispute resolution assistance.

It should also be noted that many regulatory programs are funded by spreading the costs to all regulated entities (and indirectly to their customers). For example, all contractors must pay license fees despite the fact that most contractors are law-abiding. The cost of licensing is passed on to customers, despite the fact that most will never have a problem with a contractor requiring state intervention. Regulation helps to deter contractor misconduct, weed out bad apples that create problems for the industry, and provide "insurance" against the risk that one might get into a dispute with a contractor (however

likely or unlikely that might be). All contractors and customers of contractors are therefore benefited under this system, even though many will never be a party to the state's dispute resolution process.

Funding Alternatives

General revenue funding is probably not politically feasible at this time, regardless of any benefits that general revenue funding might provide.

A pure fee for service approach would avoid concerns about the inequity of charging all CID homeowners to pay for services to a few. However, the full cost of Bureau services would probably be unaffordable to many homeowners, recreating one of the principle problems we are trying to solve — the lack of an affordable remedy for violations of law.

A compromise approach would be to charge modest fees for services. The proposed law already provides for a fee to reimburse the costs of educational materials and training. See proposed Civ. Code § 1380.200(b). This policy could be extended to impose a fee for use of the association's mediation or law enforcement functions.

For example, the Bureau could be authorized to charge a fee of $50 to initiate an investigation of an alleged violation of law. That would provide two benefits: (1) a small but significant stream of additional revenue, and (2) a deterrent to trivial or frivolous complaints. The fairness of this approach could perhaps be enhanced by shifting the cost to the alleged wrongdoer if a violation is found and affirmed after an opportunity for administrative and judicial review.

Filing fees are charged for mediation in Florida and Hawaii. Filing fees are also charged for adjudication of disputes in Montgomery County, Maryland, and New South Wales, Australia.

We did receive comments supporting that approach:

- "How about forcing the party initiating the complaint to pay up front fees that could be reimbursed by the losing party following resolution by the commission. At least this way, the complaint will need to be worthy enough to the initiator to want to gamble the up front fees." Steven Shuey, Exhibit at 68-69.
- "Cost should be considered diligently so that the bureau does not get canceled pre-maturely just for the expense of operating itself. Take the scheme created in your Maryland example where the basic fee is low and there is an additional filling fee. In this case the filling fee is considerably less than the ADR process and should be well accepted by most members and associations who are headed in the direction of litigation." Michael Doyle, Exhibit at 18.

The staff recommends adding a modest filing fee for an investigation of an alleged violation of law ($50), with fee shifting if the complaint is borne out. A filing fee for formal mediation may also be appropriate.

Fee Collection Issues

There are two technical issues relating to fee collection that need to be addressed.

Master and Sub Associations

Most CIDs have a single association to manage their common property. However, some CIDs are organized as part of a master development. Their associations are subordinate to a master association that has some authority over all of the subordinate developments.

In other CIDs "sub" associations are set up to manage resources that benefit only a minority of the members of the association. For example, in an association with an artificial lake, only homes with waterfront lots may have responsibility for maintaining the lake. A sub association of those homes may be set up for that purpose.

These are not statutory distinctions; they are creatures of the governing documents created by the developer. This makes it difficult to define the relationship with bright line definitions.

The proposed law attempts to do so, in order to avoid a single lot being charged the CID Bureau fee more than once. See proposed Civ. Code § 1380.120(a). For example, suppose that a homeowner lives in a CID that is also part of a master development. In addition, the home is included in a sub-association that maintains a clubhouse that is available to fewer than all owners in the CID. The homeowner is a member of three associations, but should not be assessed to pay the CID Bureau fee by each of these associations. A single home should only be charged the fee once.

CAI-CLAC believes that our drafting efforts fall short. See Exhibit at 62. This is a difficult technical problem that requires more attention. **The staff will work further with CAI and will ask for assistance from the Department of Real Estate.**

Assessment Increase

There are limits on the extent to which an association may increase assessments each year. CAI suggests that an increase to recoup the CID Bureau

fee should not be subject to those limits, since the fee is imposed by the state. See Exhibit at 62. This seems reasonable. If the law imposes a new cost it should not interfere with an association's ability to collect revenue for maintenance and other needs. **The staff would add language implementing this suggestion to a future draft of the proposed law.**

ADMINISTRATIVE LAW ENFORCEMENT AUTHORITY

One of the principal powers of the proposed Bureau would be to investigate alleged violations of law and issue corrective citations. This is a necessary backstop to the Bureau's conciliation functions. An agency without enforcement powers would be far less effective in resolving disputes informally.

Issues relating to enforcement powers are discussed below.

Enforcement of Governing Documents

The proposed Bureau would have authority to investigate and correct violations of statutory law, but would not have authority to enforce an association's governing documents. That approach was based primarily on constitutional considerations, which are discussed below.

However, there are also policy benefits to this limitation on the Bureau's enforcement jurisdiction. Statutory requirements are limited in number. The Bureau can quickly develop expertise in what the law requires, simplifying investigation and adjudication of complaints. Governing documents are drafted by developers and association boards and vary considerably in what they require. The enforceability of a restriction depends on a determination of its reasonableness. This opens the door to a near infinite variety of disputes, which could not be decided by application of clearly defined rules.

Enforcement of legal requirements would ensure that the procedures designed to guarantee accountability and openness are observed. This clears the way for a community to govern itself, according to its own rules, with the informed participation of its members. Enforcement of governing documents would substitute the Bureau for the association in determining whether and how to enforce rules. This would disrupt self-governance by inserting the state into discretionary and political decisionmaking.

Furthermore, one of the rationales for the proposed law is that there is an imbalance of resources between an association (which can draw on the collective resources of the community to fund enforcement activity) and the individual

homeowner (who must put personal funds at risk in order to remedy CID-related problems). Enforcement of statutory law provides an inexpensive remedy to *homeowners* if an association violates the law. Enforcement of governing documents would provide an additional remedy to *associations* to enforce their rules. Such assistance is not required to level the playing field and would undermine efforts to do so.

Comments in Favor of Enforcement of Governing Documents

A number of comments suggest that state assistance in enforcing governing documents is desirable.

- "A most egregious example of malfeasance and unprofessional behavior by our Board, Management Company, and Attorney in our HOA's past led to literally stuffing the ballot box at our annual Member's meetings for more than 10 years that I am aware of. I have found no CA State Law that was broken, only a section of our HOA's Bylaws. Under the CLRC tentative recommendation, you could not correct such blatant un-American/un-Democratic behavior." Samuel M. Ross, Exhibit at 13.
- "That this Bureau would have only the ability to hear and adjudicate the law, homeowners and Board of Directors would then be in the same legal situation they are presently. Builders/developers receive from the DRE approval for the initial CCRs which most often are purposely vague so that buyers will not see the future difficulties of enforcement which give lawyers a fertile field for litigation. When Board of Directors of Associations do not comply with CCRs, is litigation still the only answer.

  If we follow Article 4. Operating Rules section Civ. Code #1357.110-1357.150, the procedure used to make the rule made by a Board of Directors would be the jurisdiction of the Bureau, but not the rule. Is this separating of procedure and rule a sensible way to make CIDs more livable or more difficult?

  We cannot speak to the constitutionality of the adjudicative authority of the proposed Bureau with regard to CCRs; however, without the inclusion of the CCRs, the Bureau would defeat its purpose in our opinion." Norma J. Walker & Carole Hochstatter, Exhibit at 58.

See also comments of Mel Klein (Exhibit at 2).

It is true that Bureau enforcement of governing documents would be useful in many cases. However, it is an overstatement to claim that the Bureau's purpose would be defeated if it lacks that authority. Many CID disputes turn, at least in part, on a violation of statutory law. For example, ballot stuffing during an association election could be framed as a violation of Corporations Code Section

7610, which provides that each member only has one vote (except as provided by governing documents or other law). In addition, the Bureau's education and mediation functions would extend to disputes over governing documents (**Mel Klein's suggestions for clarifying this point will be taken into account in future drafts**; see Exhibit at 3). These remedies would be a significant improvement over the status quo, where homeowner-financed litigation may be the only means of resolving a dispute.

In any event, the staff believes that our hands are tied by the Constitution, as discussed below.

Encroachment on Judicial Powers

Background

Bureau enforcement of governing documents would most probably encroach on powers reserved to the courts by the California Constitution. See Cal. Const. art. III, § 3 (separation of powers); Cal. Const. art. VI, § 1 (judicial power vested in courts).

Administrative adjudication does not encroach on reserved judicial powers so long as the ultimate decisionmaking power remains in the courts (the "principle of check") *and* the adjudicative activity is both authorized by statute and reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes. See *McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348, 374, 777 P.2d 91, 261 Cal. Rptr. 318 (1989).

Under the proposed law, a corrective citation would not be enforceable until after judicial review opportunities have been exhausted. This should satisfy the first prong of the *McHugh* test (the principle of check).

However, it is not clear that the Bureau's "primary, legitimate regulatory purpose" would encompass adjudication of disputes arising from an association's governing documents (rather than from enforcement of regulatory statutes). In applying this part of the test, the *McHugh* court indicated that it would "closely scrutinize the agency's asserted regulatory purposes in order to ascertain whether the challenged remedial power is merely incidental to a proper, primary regulatory purpose, *or whether it is in reality an attempt to transfer determination of traditional common law claims from the courts to a specialized agency whose primary purpose is the processing of such claims*." *Id.* (emphasis added). The court upheld adjudication of whether a landlord had charged rents in excess of the amount allowed by ordinance, but indicated in dicta that adjudication of

common law counterclaims by the landlord would violate the judicial powers doctrine. In such a case, the administrative agency would be "adjudicating a broad range of landlord-tenant disputes traditionally resolved in the courts." *Id*. at 374-75.

This raises the question of whether administrative enforcement of the governing documents of a homeowners association would impermissibly involve the Bureau in adjudicating disputes that are traditionally resolved in the courts (i.e., enforcement of equitable servitudes and contractual obligations). For that reason, the proposed law limits the Bureau's jurisdiction to enforcement of law.

The form of relief granted also has an effect on whether administrative adjudication encroaches on judicial powers. Courts have invalidated awards of compensatory and punitive damages. See, e.g., *Walnut Creek Manor v. Fair Employment & Housing Comm'n*, 54 Cal. 3d 245, 264, 284 Cal. Rptr. 718, 814, P.2d 704 (1991):

> The award of unlimited general compensatory damages is neither necessary to [the regulatory] purpose nor merely incidental thereto; its effect, rather, is to shift the remedial focus of the administrative hearing from affirmative actions designed to redress the particular instance of unlawful housing discrimination and prevent its recurrence, to compensating the injured party not just for the tangible detriment to his or her housing situation, but for the intangible and nonquantifiable injury to his or her psyche suffered as a result of the respondent's unlawful acts, in the manner of a traditional private tort action in a court of law.

For that reason, the proposed law only provides for equitable relief (including restitution where appropriate), and so avoids any constitutional problems that might arise from an administrative award of damages.

Additional Input

The tentative recommendation includes a note specifically asking for input on whether Bureau enforcement of governing documents would impermissibly encroach on reserved judicial powers. In addition, the staff contacted some experts in California administrative law to ask their opinions.

In response to the staff's request, we received a reply from Professor Michael Asimow of UCLA Law School. Professor Asimow served for many years as consultant to the Commission on administrative law. Although Professor Asimow supports the concept of state assistance in resolving CID disputes, he has serious doubts about whether it would be constitutional for the Bureau to

enforce an association's governing documents. He questions whether administrative enforcement of private servitudes or contracts would serve a regulatory purpose. Administrative adjudication may be more affordable and expedient than litigation, but that is also true of a whole host of common law disputes that are traditionally resolved by the courts. He believes that the courts are "really sensitive to laws that would strip them of their traditional business."

By coincidence, Professor Asimow's textbook on California administrative law uses the example of state assistance to condominiums to explore the constitutional limits on administrative adjudication of private disputes. In teaching from that text he raises serious doubts about the constitutionality of such a program.

Conclusion

The staff recommends that the Bureau's enforcement jurisdiction be limited to violations of law. This avoids administrative encroachment on powers reserved to the court by the California Constitution.

Penalties

In addition to issuing orders to "cease and desist" from violating the law, the Bureau would have authority to impose administrative civil penalties (including penalties against individual directors in cases of demonstrated "malice, oppression, or fraud"), and could order the removal of a director. Information about citations would be posted to the Bureau's website. See proposed Civ. Code § 1380.310. There were a number of comments on these provisions.

One general comment from CACM suggests that the proposed law places too much emphasis on punishing directors. See Exhibit at 43. The staff disagrees with that characterization. Proposed Civ. Code § 1380.010 states clear legislative intent that law enforcement be a "last resort." Most of the proposed law is focused on noncoercive assistance, through education and mediation. Before issuing a citation, the Bureau must attempt informal conciliation. At that point a wrongdoer would have an opportunity to correct a violation voluntarily, without *any* sanction being imposed.

The principal purpose of a citation is to order abatement of the violation (including restitution as appropriate). A fine can also be imposed (proportional to the severity of the offense and the size of the association), *but can only be imposed on an individual if there is clear and convincing proof of malice, oppression, or*

fraud by that individual. The same showing must be made before a director can be removed from office.

The staff believes that some enforcement power is necessary. This is not intended to suggest that association boards are disproportionately responsible for CID disputes.

Specific concerns about enforcement are discussed below.

Removal of Director

CAI-CLAC opposes the proposed authority of the Bureau to remove a director from office for a violation of law involving malice, oppression, or fraud:

> We do not think it is a good idea for a CID Bureau government official to be able to remove officers or directors who have been elected by the members. If any such removal is to take place it should only be done after a hearing before a judge, not an administrative body. This is a power that no government agency has over corporations anywhere in the United States.

See Exhibit at 63.

The proposed power is not unprecedented. The Nevada Commission for Common Interest Communities may impose the following penalty for a violation of law:

> 2. If the respondent is a member of an executive board or an officer of an association, the Commission or the hearing panel may order the respondent removed from his office or position if the Commission or the hearing panel, after notice and hearing, finds that:
>
> (a) The respondent has knowingly and willfully committed a violation; and
>
> (b) The removal is in the best interest of the association.

The staff has not researched whether similar powers exist in other jurisdictions or contexts.

Removal of a director would disrupt self-governance within a CID, by thwarting the popular will as to who should represent the community on the board of directors. Is this too intrusive a remedy for an administrative agency to wield? As CAI-CLAC notes, the courts do have the power to remove a director for serious misconduct. See Corp. Code § 304:

> The superior court of the proper county may, at the suit of shareholders holding at least 10 percent of the number of outstanding shares of any class, remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or

> discretion with reference to the corporation and may bar from reelection any director so removed for a period prescribed by the court. The corporation shall be made a party to such action.

Should the removal power be deleted? If the power is preserved, should the order of removal specify a period during which the person removed may not be reappointed or re-elected (as in Corporations Code Section 304)?

Equitable Relief

CAI-CLAC objects to the open-endedness of the provision authorizing the Bureau to order "additional equitable relief as appropriate." They would prefer that the equitable relief available be spelled out specifically. See Exhibit at 63.

The scope of equitable remedies that might be appropriate under different fact situations is broad and the staff is wary of attempting to limit the Bureau's equitable powers to a prescribed list of remedies. This is especially true given that we do not know the full range of disputes and problems that the Bureau might be called upon to remedy. Remedies that might be appropriate include declaratory relief, injunction, accounting, recission or modification of a contract (in cases of unethical self-dealing). **If the Commission wishes to replace the general grant of equitable powers with an exclusive list of equitable remedies, the staff will attempt to develop something suitably comprehensive.**

Volunteer Directors and Officers

CACM is concerned that homeowners might misuse the Bureau's complaint process to harass volunteer directors and officers, and that relatively minor violations could expose those volunteers to liability. Exhibit at 44. See also comments of CAI-CLAC, Exhibit at 62.

This risk is reduced by the requirement that the Bureau attempt conciliation before issuing a citation. Most minor violations could be corrected at that stage. It would also be reduced by the fact that the Bureau's enforcement authority is discretionary. The Bureau is not required to investigate a complaint that it considers to be trivial or frivolous.

Also, the Bureau would be required to take the seriousness of the violation into account in determining whether to impose a monetary penalty. Minor, innocent violations should not result in significant liability, if any.

Finally, a penalty could only be imposed on an individual after a showing of clear and convincing evidence that the violation of law involved malice, oppression, or fraud. This is a high standard of proof and misconduct.

CACM is also concerned that the availability of a relatively inexpensive complaint process would increase the cost for Directors and Officers insurance coverage, since the insurer might have more proceedings to defend. That is an important concern. Presumably the association itself would also have more actions to defend, which might increase the cost of the association's general liability insurance. These increases would probably affect all associations, even those that are relatively problem free.

Another concern that we have heard is that any risk of personal liability will deter homeowners from serving on association boards. This would exacerbate existing difficulties in finding volunteers for these positions.

Personal liability for wrong-doers is not necessarily *required* for an effective enforcement program. The ability to issue corrective orders that are enforceable in court would solve most problems. Administrative civil penalties against associations would provide some deterrence against misconduct and provide a source of revenue to offset enforcement costs. Personal liability would simply add a compelling personal deterrent to misconduct by directors and officers.

The Commission should consider whether the disadvantages of providing for personal liability in cases of intentional misconduct are justified by the benefit. Removing the personal liability provision would avoid some strong points of opposition to the proposal.

Web Publication of Violations

Proposed Civil Code Section 1380.310(e) provides: "If a citation is not contested or is upheld after administrative and judicial review, the bureau shall publish the citation on its Internet website for a period of three years." This is intended as a deterrent and as a method of providing potential home buyers with information about the disciplinary history of the association. A similar provision governs discipline against licensees of the Department of Consumer Affairs. See Bus. & Prof. Code § 27.

Roger Longenbach seeks assurance that unfounded complaints will not be posted to the website. See Exhibit at 20. That should not happen. Complaints would only be posted after all of the following take place: (1) an investigation by the Bureau finds that a violation actually occurred, (2) efforts to correct the violation through informal conciliation fail, and (3) the cited association either declines to pursue administrative and judicial review remedies, or the citation is

upheld after review. The simplest way to avoid publication of the complaint would be to settle the complaint before a citation is issued.

CACM is concerned about the effect a published history of discipline could have on property values within a CID. That is a significant concern. If an association has a history of serious violations, property values might be significantly reduced as homeowners shy away from purchasing homes in the community. On the other hand, prospective buyers have a legitimate interest in knowing whether a community is dysfunctional before buying into the community.

One possible consequence of publication of violations would be to deter complaints. Homeowners who are worried about the value of their homes might decide not to use the Bureau's services in order to avoid another black mark against their association.

The Commission should consider whether the negative effect of publicizing violations is too harsh and should be removed from the proposed law.

Enforcement Against Homeowners

CAI-CLAC notes that the Bureau's law enforcement authority is not expressly limited to enforcement against the association. They suggest that fairness requires that the Bureau should also enforce the law against homeowners. As discussed above, the staff does not believe that statutory law governing CIDs imposes any duties or restrictions on individual homeowners. This means that authority to correct violations of law would not result in action being taken against individual homeowners.

Given that one of the purposes of the proposed law is to level the playing field in terms of resources available for enforcement of rights, it isn't crucial that the Bureau take enforcement action against individual homeowners. Associations already have resources for enforcement. However, the resources available to small associations may be inadequate for that purpose. If there are in fact laws that must be enforced against homeowners individually it might be appropriate for the Bureau to do so. The proposed law leaves open that possibility. **We may wish to revisit that approach if anyone identifies CID laws that bind individual homeowners.**

Management Companies & Attorneys

We received comments suggesting that state oversight should extend to oversight of an association's agents, who often handle many of the functions that generate disputes. For example:

- "I see little to nothing that would correct the underlying problem with the unprofessional conduct of the Management Companies and Attorneys that have preyed on our inexperienced volunteer HOA Directors.

  The State of CA badly needs to have legislation that would impose stiff fines on these two vendors for what I have witnessed to be unprofessional behavior. They are a major underlying factor in HOA problems today." Samuel M. Ross, Exhibit at 13.

The proposed law does not foreclose the possibility of issuing a citation against an agent of an association for a violation of law. For example, suppose that an association delegates records management to a private company. That company refuses to provide legally required records access to a homeowner. In that case it would be the agent that is responsible for the violation of law (along with the association, as the agent's principal). The Bureau could issue a citation ordering the agent to remedy the violation.

As drafted, Section 1380.310 would also allow a monetary penalty against a managing agent under the same standard that governs imposition of a penalty against a director or officer (i.e., clear and convincing evidence of malice, oppression, or fraud).

RULEMAKING AUTHORITY

Frank H. Roberts expresses general support for the concept of state assistance to common interest developments. See Exhibit at 7. However, he believes that the complexity and instability of the Davis-Stirling Act is more of a problem for homeowners associations than the disputatiousness of members. He believes that this problem could be reduced if there were an agency with authority to adopt administrative regulations. Administrative rulemaking allows for rules to be adopted by a specialist entity, with expertise in the matter being regulated. It might provide greater flexibility that would reduce the need for legislative reform.

The Commission considered whether the Bureau should have substantive rulemaking power, but was concerned that rulemaking could have the opposite

effect of that desired by Mr. Roberts. Regulations might simply add to the volume and complexity of the rules that associations must follow.

The proposed law does authorize the Bureau to adopt procedural regulations governing its own operations. This would help to regularize Bureau operations without imposing additional legal requirements on associations.

As discussed above, some commentators are concerned that the Bureau will be "captured" by a particular interest group and will not be even-handed in carrying out its duties. Concerns about capture of the Bureau would probably be more acute if the Bureau were given authority to directly shape the substantive law that governs CIDs. If the Bureau is instead limited to ministerial functions, then the harm that could result from capture would be greatly reduced.

Should the Bureau be given authority to adopt substantive regulations implementing the Davis-Stirling Act?

ADR AND ADMINISTRATIVE REMEDIES

In addition to the comments we received suggesting that the proposed law should be deferred until the new ADR improvements enacted by AB 1836 are given a chance to work, we also received comments suggesting a need for better coordination between those ADR functions and the related functions of the proposed Bureau. See the comments of Mel Klein (Exhibit at 2), Michael Doyle (Exhibit at 21), CID Bill of Rights Coalition (Exhibit at 33).

We should probably also consider whether exhaustion of administrative remedies should be required before filing a lawsuit within the Bureau's jurisdiction.

Exhaustion of Bureau Mediation Process

Existing Section 1369.520 requires that a person offer some form of ADR before filing a lawsuit to enforce CID law or an association's governing documents. The proposed law would amend Section 1369.510 to provide that "alternative dispute resolution" includes the mediation process provided by the Bureau.

Thus, Bureau mediation would be *one acceptable form of ADR, but would not be the only form that could be used to satisfy Section 1369.520*. That provides for flexibility without locking future disputants into use of a process that has not yet been demonstrated to be effective.

Exhaustion of Bureau Law Enforcement Process

The proposed law does not expressly require that a person exhaust the Bureau's law enforcement process before filing a lawsuit to resolve a dispute within the Bureau's enforcement jurisdiction. Could such a requirement be read into the law? Yes. In general, when an administrative procedure is provided by law, that procedure must be exhausted before a court will act. For example, the Fair Employment and Housing Act establishes administrative remedies for unlawful discrimination in employment or housing. Those remedies must be exhausted before filing a civil suit.

> We agree that exhaustion of the FEHA administrative remedy is a precondition to bringing a civil suit on a statutory cause of action. In cases appropriate for administrative resolution, the exhaustion requirement serves the important policy interests embodied in the act of resolving disputes and eliminating unlawful employment practices by conciliation …, as well as the salutary goals of easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures, and providing a more economical and less formal means of resolving the dispute….

Rojo v. Kliger, 52 Cal. 3d 65, 83, 801 P.2d 373, 276 Cal. Rptr. 130 (1990) (citations omitted).

We should not leave the exhaustion question to be determined by case law. This would create a trap for some homeowners who are unfamiliar with the law and do not realize that exhaustion is required. The proposed law should either expressly require exhaustion or expressly provide that exhaustion is not required.

The benefits of exhaustion are stated in the passage quoted from *Rojo v. Kliger*. There would also be some disadvantages to requiring exhaustion:

(1) A homeowner's complaint may involve a mixture of statutory and common law claims. Exhaustion of the process for statutory enforcement would delay litigation of the common law rights. On the other hand, if the administrative resolution is satisfactory, it could obviate the need to litigate the common law claims at all.

(2) Because the Bureau would have discretion as to whether to bring an enforcement action, it would not provide a remedy in every case. That problem could be resolved procedurally. For example, if the Bureau decides not to pursue a case, it could be required to provide the complainant with a "right to sue letter" which would signify exhaustion of the remedy. That is the current practice under FEHA. See *Rojo* at 83-84.

(3) Some homeowners may wish to proceed directly to litigation. For such people, an exhaustion requirement would be seen as just another obstacle in the path to justice (in addition to the pre-litigation ADR requirement).

There are advantages to either approach, but **the staff is inclined against requiring exhaustion, in order to maximize flexibility for the consumer.** Most homeowners would probably still choose to use the Bureau's process as a first step.

EDUCATION ISSUES

The proposed law requires the Bureau to provide information and educational services to homeowners, including association officers and directors. Access to reliable information will help to avoid disputes that are based on misunderstanding of the law or distrust of authorities that may be seen as self-interested in their interpretation of law. This educational mandate is mostly uncontroversial. The only quibble is from CACM, who suggests that the described goal of providing training in "effective community association management" is misplaced:

> We would suggest to the CLRC that the term "effective community association management," is an inaccurate approach in the training of CID volunteers. *The board's job is to govern their community*. Leadership, effective policy making, delegation of authority (not responsibility) and the overall role of a fiduciary is the real job. The board is the link between the owners and the organization and utilizes the necessary resources to implement their decisions. The resources are other volunteers (i.e. committees), and third party contractors which includes professional community management, legal counsel, risk management professionals, etc. that implement to directives of the board.

Exhibit at 49 (emphasis in original). The distinction seems to be that, as a practical matter, boards do not manage, they "govern." Management is delegated to third party agents. **The staff will explore this distinction with CACM to see if the language used in the tentative recommendation can be improved upon.** However, the fact that many or most associations delegate part or all of their management duties does not mean that all associations do so.

Proposed Section 1380.230 provides:

> 1380.230. Within 60 days of assuming office or providing services as a managing agent, a community association director or

> managing agent shall certify to the bureau, in writing, that the director or managing agent has read each of the following:
>
> (a) The declaration, articles of incorporation or association, and by-laws of the association.
>
> (b) This title or, if the bureau prepares a detailed summary of the requirements of this title, that summary.

That provision provoked a number of comments:

Roger Longenbach suggests that the requirement be expanded to require that all governing documents be read, including operating rules. Exhibit at 20. The staff is reluctant to make this requirement too onerous. We learned in a prior phase of this study that very large associations can have thousands of pages of rules that are administered by dedicated staff or committees with specific areas of responsibility. It might be unduly burdensome to require that a director read all of the rules in such an association. CAI-CLAC raises a similar point: "Some larger associations and master associations have multiple sets of CC&Rs for various parts of the project. What is actually required here?" See Exhibit at 62. **Should the staff work with the interested groups to refine the requirement?**

CACM suggests that the requirement should also apply to "on-site managers" and "covenant enforcement employees" who may have responsibility to enforce the governing documents but are not technically "managing agents." **The staff will explore this technical issue further.** CACM also suggests that managing agents should certify their compliance to the association that they serve, rather than to the Bureau directly. See Exhibit at 49-50. **The staff has no objection to requiring that agents make their certification to the boards they serve rather than to the Bureau.** That would cut down on paperwork and record-keeping at the Bureau, while still serving the goal of encouraging familiarity with controlling law and rules. Directors and officers would still make their certification to the Bureau.

CAI-CLAC is concerned that the requirement will generally be overlooked or will deter volunteers from serving. They also note that simply reading the law does not guarantee understanding of the law and that it might be better to require attendance at Bureau training courses that explain the law. See Exhibit at 62. The CID Bill of Rights Coalition makes a similar point. See Exhibit at 32. We have taken a step in this direction by providing that a Bureau-prepared summary can be substituted for the actual text of the law.

AGENCY LOCATION AND STRUCTURE

Lewis Wong renews his suggestion that the Bureau should be located in the Department of Corporations, rather than the Department of Consumer Affairs. **The staff still feels that DCA would be a better fit, given their much broader experience in setting up and running consumer-oriented regulatory programs.** It is true that most associations are incorporated, but the Department of Corporations does not have regulatory authority to enforce the law governing the *management* of corporations. The staff confirmed this directly with the Department's public complaint unit. This jurisdictional limitation is also explained at various places on the Department's website. See, e.g., <http://www.corp.ca.gov/enf/enffaq.htm>, which provides consumers with the following question and answer about the Department's jurisdiction:

> WHAT SHOULD AN INVESTOR DO IF THE CORPORATION HE OR SHE INVESTED IN IS FAILING TO COMPLY WITH THE CALIFORNIA CORPORATIONS CODE REQUIREMENTS OF SHAREHOLDERS' MEETINGS AND CONSENTS, VOTING RIGHTS, RIGHTS OF INSPECTION OF SHAREHOLDERS' NAMES AND ADDRESSES AND OF ACCOUNTING BOOKS AND RECORDS OR IF A LIMITED PARTNERSHIP FAILS TO COMPLY WITH A PARTNER'S RIGHT TO INSPECT AND COPY THE PARTNERSHIP BOOKS, TO HAVE TRUE AND FULL INFORMATION AND AN ACCOUNTING OF THE PARTNERSHIP AFFAIRS OR TO AFFORD OTHER RIGHTS GIVEN TO PARTNERS IN THE CERTIFICATE OF LIMITED PARTNERSHIP?
>
> Answer. An investor should seek private counsel and/or file a complaint with the California Attorney General's Office, as these matters are not subject to the jurisdiction of the Department of Corporations.

MISCELLANEOUS ISSUES

A few miscellaneous suggestions are summarized briefly below:

- Mel Klein suggests further clarification of the differences between the Bureau's mediation authority and its law enforcement authority. See Exhibit at 3. **The staff will review these suggestions in preparing any future draft.**
- Samuel M. Ross suggests, as an alternative to the proposed law, that the jurisdiction of the small claims court be expanded to include CID disputes, and that civil penalties be authorized. See Exhibit at 13. The Commission considered that approach and

decided against making such a recommendation. See Memorandum 2001-43 (available at www.clrc.ca.gov).

- The CID Bill of Rights Coalition wonders whether a complainant would have a right to be represented by counsel in a Bureau-run adjudication. See Exhibit at 33. In an administrative appeal of a Bureau citation, the interests of the homeowner would be represented by the Bureau, which would be defending its decision to issue the citation. The complainant would not be a party.
- CAI-CLAC makes a useful drafting suggestion regarding Section 1380.140, **which will be incorporated in a future draft.** See Exhibit at 62.

CONCLUSION

The comments that we received do not provide a compelling argument for or against the basic concept of providing state assistance to CIDs. What they do provide is confirmation of the sorts of objections that the proposed law is likely to face if we go forward:

- More information about the likely workload should be gathered before proceeding, in order to avoid the Bureau being swamped by demand for its services.
- Improvements should be made to the law's clarity and fairness before proceeding.
- Recent improvements to ADR processes should be given a chance to work before proceeding.
- There is a significant risk that any state program will be captured by those it is intended to regulate.
- The cost to individual homeowners would be too high (especially for those on a fixed income).
- It is unfair to spread the cost of the proposed Bureau to all associations, because well-run associations will not receive a full share of the benefits.
- A Bureau that cannot enforce governing documents would not be helpful.
- Too much emphasis is placed on penalizing volunteer directors. (We will probably also hear that not enough emphasis is placed on penalizing directors.)
- Any power to grant equitable relief should be narrowly delineated.
- The Bureau should not have the power to remove democratically elected boards.
- Web publication of citations inappropriately punishes the entire community.

- Law enforcement activity will deter volunteer service on boards and trouble-makers will misuse the disciplinary process to harass volunteer directors.
- Director and officer insurance costs will increase.
- Fairness requires that the Bureau also enforce against individual homeowners who violate the law.
- Property managers, attorneys, and other agents or employees must also be subject to oversight.
- The Bureau should have authority to adopt substantive regulations implementing CID law.
- The Bureau's ADR functions must be better coordinated with other existing ADR mechanisms.
- The requirement that directors and managing agents read the Davis-Stirling Act and the association's governing documents is too broad (or too narrow).
- The Bureau should be located in a different agency, or organized as a multi-member commission rather than as a program headed by a single executive officer.

These objections are not unexpected. Individually, they are not insurmountable. What's noteworthy is how many objections there are and how many of them represent trade-offs that will inherently offend one or another of the various interests (e.g., penalties against directors are seen by some as draconian, a failure to provide for penalties would be seen by others as inappropriately lenient). This all confirms the staff's sense that this is a very difficult project. Any balanced approach will probably leave everyone at least somewhat dissatisfied.

This highlights one of the general difficulties that the staff has encountered with our work on CIDs, especially in the legislative process. Because we attempt to accommodate all sides' concerns, we strike compromises that are not entirely satisfactory to anyone. Bills implementing our CID recommendations have therefore proceeded with little or no unqualified support.

Where our proposals are modest and have obvious merit, we can be successful despite a lack of active support. The current proposal strikes a difficult balance and will probably be met with more skepticism in the Legislature than have our previous CID recommendations. If we proceed without support from any group, especially the support of groups that are intended to be the principal beneficiaries of the proposed law, we may well fail.

This suggests that we should not proceed until we have the strongest case that we can build. That is why the staff is inclined to spend more time trying to

answer what criticisms we can. It is also why the staff is leery of moving forward at a time when there are large political battles brewing about cost-cutting and government organization. If we proceed, the staff recommends that we do so at a deliberate pace.

Alternatively, we could simply drop the proposal. In addition to the political difficulties we are likely to face, the Commission may conclude that the proposed law would do more harm than good. The cost may be too high and the benefits too speculative or too unevenly distributed.

If, at a later time, someone else wants to pursue a similar proposal they could benefit from the work we've already done by picking up where we've left off. It would be unfortunate to have no immediate benefit for the work that's already been done on this proposal, but it would also be unfortunate to put more work into the proposal if it is not enactable.

If the Commission wishes, we will continue to attempt to organize a legislative hearing to shed more light on the political prospects of this proposal.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

AHRC MESSAGE FROM S.V. COLBERT

ANY additional control over Homeowner Association members influenced by California Legislative Action Committee, and other lobbyist organizations would be criminal.

Only an assurance on the part of your committee that CAI, CACM, CLAC and other self serving anti homeowner influences will have NO part in setting policy would calm the tide of anger against the administration for daring to tax us, then use our money to oppress us even further.

We pay much more than our fair share in taxes now under current practices regarding HOA s. Thus, the governmemt owes us protection under a failing system. We have already paid the price. It would be interesting to see how quickly the government would stop abuses to HOA members if government is forced to fund its own folly.

We are promised under the law that the California Attorney General will do his job. There is no charge for this. Crimes are being committed and the government has failed to do its job to protect its citizens. Don't dare find a way to administer the final blow to our rights

Seven million California Homeowners Association members could and should unseat Schwarzenegger. He has crossed the line.

AHRC MESSAGE FROM JOANN ELLAH

Do California a favor and track the record of the Nevada Ombudsman. Nice guy, with a staff of 12, completely powerless to help owners. We also have a Commission, that in 1 year's time since it's creation, has done nothing but try to put it's own rules together. Don't go to CAI, managment companies involved with CAI, etc. Find a group of homeowner advocates. Sit down with them to find out what the state really needs in an Ombudsman. Then, hire someone with no ties to trade groups or CAI and give him/her the authority to do the job.

EMAIL FROM MEL KLEIN (NOV. 25, 2004)

RE Tentative Recommendation - CID Assistance

I continue to feel that there is an asymmetry in the draft proposal in placing the new bureau at the same "level" as traditional ADR. They are not the same. And that can cause problems and be the source of ambiguities, each layering on the preceding clarification, over and over.

1. When a request is made to the bureau, is the requirement of 1354 that a request for resolution be offered to the opposite party satisfied? (I believe you clarify this for 1369.510, but I do not see, or should I say I do not understand, how this applies to 1354.) What about the other formal requirements of 1354, such as the formal request for resolution? Do they go away?
2. If the answer is in the negative, does that answer even hold in cases where the agency accepts the request and attempts to arrange a settlement?
3. If the answer is again in the negative, does that mean that the complaining party would then have to file a request for resolution… even after an effort at mediation with the agency failed?
4. Conversely, if an ADR of the current variety is attempted and fails, can a party then appeal to the agency for assistance, and force the opposite party into a renewed mediation? (I guess that answers it.)
5. Can a party requesting assistance from the agency request that the assistance be in the form of a binding arbitration, as it is currently under 1354 (as I understand it)?

I realize that the answer to this is likely to be in the negative, but I wonder, why not?

6. What consequences are there if the agency offers to participate, but the opposite party declines (where the dispute involves the governing documents)? What if the participation is clearly not a good faith effort (a problem that already exists with 1354)?

I continue to maintain that the proposed approach is complicating things, and missing the point of the effort, which is to eliminate litigation.

As I believe I recall reading in comments of another party that you published on your Web Site, what is needed is an agency with enforcement powers, not another mediator.

All this is resolved, I believe, should you find it proper to extend the proposed legislation 1380.310 to all disputes, even those involving the governing documents.

I believe you have to find some methodology to reach that objective.

Would it be more acceptable, in terms of the constitutional considerations, to allow a party to request binding arbitration by the agency, and in that way command agency enforcement (even in the face of a refusal by the opposite party)?

EMAIL FROM MEL KLEIN (NOV. 27, 2004)

RE Tentative Recommendation - CID Assistance - second set of remarks

1. I take it that 1380.300 applies both to complaints related to alleged violations of the law, as well as disputes involving the governing documents. It is possibly a bit confusing to find the next section, 1380.310, begin with the heading "Violations of the Law", as if 310 were the place where such cases are considered. (This may appear to be a quibbling comment, but there is a bit more behind it.)

2. In 1380.300, the proposed legislation promises review only within the resources of the agency. I think it might be preferable to commit the agency to reviewing complaints related to violations of the law, and hedge the commitment only with respect to disputes related to the governing documents.

3. I can see no reason why the legislation provides for removal of a director or officer, when evidence of malice, oppression or fraud is found, only in the context of issuance of a citation (1380.310 (c)). What if the person agrees to informal intervention by the agency, and the agency finds evidence of such conduct in the informal discussions? Shouldn't the same penalty apply? It is no great show of good faith on the part of an offender to agree to informal settlement when the alternative is a citation.

4. The same concern applies to disputes involving the governing documents. Shouldn't there be the identical penalty when there is evidence of malice, oppression or fraud in such cases? It is the fact of the malice etc. that is what should be penalized, not the context in which occurs.

5. I have difficulty understanding what is intended in Section 1380.310 (b) where it provides, as the initial step, for informal settlement as described in 1380.300. If the agency discovers a violation of the law, what is there to be settled "by mutual agreement of the parties?" The offending party simply has to abide by the law; what is there to discuss or agree to between the parties? It could be that what is meant is that the offending party would initially be offered a chance to correct the violation, and should he (or she) agree, then no citation would be issued. If that is what is meant, then possibly it should be expressed outright, without referral to 1380.300.

6. I also have trouble with 1380.310 providing equitable relief only when a citation is issued. Should there not be the same provision for relief even where the offending party informally agrees to comply, without a citation?

I believe that the intent of the legislation could be made be more clear and the provisions more equitable if 1380.300 dealt exclusively with disputes related to the governing documents, if 1380.310 dealt exclusively with violations of the law, if there were an entirely separate section dealing with penalties for conduct involving malice, oppression or fraud that is independent of the underlying dispute, whether a violation of the law or a dispute related to the governing

documents, and similarly, a section dealing with equitable relief, again independent of the underlying dispute.

Section 1380.300, relating to disputes related to the governing documents, would offer the services of the agency only to the extent that resources are available. Section 1380.310, related to violations of the law, would commit to agency review.

Most of us recognize that homeowners in Community Interest Developments are exposed to all manner of abuse and injustice at the hands of HOA boards, though, of course, not all HOA boards.

It is therefore warranted to remark… to proclaim, really… that members of CIDs throughout California are immeasurably in the debt of the California Law Review Commission… for their devoted attention, their wisdom, and their concern, in addressing our problems.

That such an institution should exist, and be there working with us, and for us, is something one can't help but view with delight and awe.

EMAIL FROM MEL KLEIN (NOV. 28, 2004)

RE Tentative Recommendation - CID Assistance - third set of remarks

This memo relates to whether a proposed CID agency would be constitutionally able to issue enforceable decisions on disputes related to the governing documents.

Others, knowledgeable about such matters, presumably will address that question directly. What I would like to suggest here is an alternative that could sidestep that question altogether, if that turns out to be necessary.

Rather than give the agency decision-making powers in disputes related to the governing documents, I would suggest that legislation be considered that would proscribe the powers of a Board to write governing documents altogether, by making all such documents subject to the approval and the interpretation of the CID agency if challenged (or something like that).

EMAIL FROM LEWIS WONG (NOV. 30, 2004)

The key point of my suggestion that I sent you in before is that the Department of Corpoations, rather than the Department of Consumer Affairs, will have the expertise to resolve HOA governance problems. The former knows the provisions of Cal. Corp. Code S 7000-8000 well. That department knows how to show that a HOA in fact is not a mutual benefit corporation due to breach of duties of the board, failure to provide books and record for inspection by HOA member, failure to provide open opportunity for nomination of candidates in annual election,

failure to obtain majority of HOA members' approval (Only the board's which is not enough) for using association's fund to oppose a member's suit that requires the board to comply with laws and bylaws or to perform a duty.

The Department of Consumer Affairs, on the other hand, would advise the HOA member to seek private attorney's help, which advice is the same of Department of Real Estate has been giving for the past 30 years.

This legislation is the only opportunity to pull a department of "competent jrusidction" in to balance tbe power between the ruling HOA boards and its members, so that equal justice can be available by getting the Department of Corporations involved as "conurrent jurisdiction" to hear complaints beside Department of Consumer Affairs, without the cost of private attorneys which HOA cannot afford (Due to attorney fees awardable to the prealling party, as many Bylaws have so written to scare off any attemept to enforce bylaws and state laws).

Thank you.

Sincerely yours,
Lewis Wong B Sc CLA

THE HAMILTON
555 BYRON STREET, PALO ALTO, CA 94301
FAX (650) 327-8197 TEL. (650) 463-1400

December 3, 2004

Nathaniel Sterling, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

I write to comment on the tentative recommendation entitled "State Assistance to Common Interest Developments" issued by the California Law Revision Commission last September.

I am an owner of a condominium at The Hamilton, a residential condominium development of 36 units located near downtown Palo Alto. The Hamilton also qualifies as a senior citizen housing development under Section 51.3 of the California Civil Code. I have been a Director and President of The Hamilton Homeowners Association for the past year.

1. I submit that the following statements are factually correct and are relevant:

(a) Americans are not very good at group living. In California and throughout the United States, aggressive and spiteful quarrelling among CID members is frequent and extensive.

(b) On the other hand a great many CIDs - - perhaps particularly residential condominiums housed in a single building - - are able to function effectively. In our case the members very rarely have unanimous agreement, but they try to deal with their differences with courtesy, collegiality and compromise. Frankly our problem is that the constant changes in the legislation make this effort more difficult than should be the case.

(c) In the end, after due regard for the rights of individual members and certainly after full participation by all members, it is essential to recognize the great democratic principle of majority rule.

2. I fully endorse the tentative recommendation for participation by a State agency. However I think that the core difficulty is the Davis-Stirling Act, rather than the disputatiousness of CID members. It seems to me that a State body with authority to issue regulations is just as essential here as it is in the for-profit corporation, (Department of Corporations), non-profit corporation (Attorney-General), insurance, retirement facility, (Department of Social Sciences), et al. fields.

3. I realize that there are "political" problems - - although I think they are better described as "administrative" problems - - in re-organizing the Davis-Stirling Act and giving broad regulatory authority to a State agency. In the end however I think this would be much more effective - - and much happier for the legislature - - than the current process of trying to regulate in minute detail at the legislative level.

4. I should also like to mention that one of the most difficult problems of the existing situation is the fact that there are many different kinds of CID operations, but the differences are rarely taken into account in the provisions of the Davis-Stirling Act. It would be relatively easy to consider these differences in drafting regulations.

Yours very truly,

Frank H. Roberts

SAMUEL L. DOLNICK
5706-348 Baltimore Drive
La Mesa, CA 91942-1654
Phone/Fax 619-697-4854

December 21, 2004

Mr. Brian Hebert
Assistant Executive Secretary
California Law Revision Commission
4000Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

VIA FAX: 650-494-1827
E-mail: bhebert@clrc.ca.gov
Total: 2 pages

Re: Tentative Recommendation: State Assistance to Common Interest Developments
Study #H-853 Memorandum 2004-20

Dear Mr. Hebert:

This response is supplemental to my letter of April 5, 2004 on this topic. Since that time my thoughts on the value of state oversight on CIDs went from "a terrific idea" to "this is not good for CIDs."

One reason for this extreme vacillation is based on the experience I've had conducting monthly homeowner educational programs in Southern San Diego County for anyone who owns a CID or is a prospective owner of a CID. Over and over attendees presented letters sent to the Attorney General (AG), under Corporation Code 8216, that provides for a complaint to be investigated by the AG office. In all instances the response letter from the AG stated that since there were not sufficient funds to investigate the complaint, the complainant would have to hire their own attorney. Should another state office be created, the same response may happen. In my opinion since Corporation Code 8216 already gives the AG the authority to investigate complaints. His office should be properly funded so that current law could be implemented. A new bureau is not necessary because of the extra costs just to set up a new bureau.

This brings me to another reason for my back and forth seesawing. The recommendation provides that the "costs of the Common Interest Development Bureau shall be borne entirely by common interest development homeowners, through imposition of a biennial fee." The legislature may not realize it but each time legislation affecting CIDs becomes law, the expenses for the CIDs go up. The legislature is nickel-and-diming the CIDs to death. Since a majority of the CIDs are managed by community association management firms, the extra work by these firms to comply with the legislative mandate, on behalf of the CID, forces them to charge to CID for the extra time necessary. CIDs that were considered to be an entry

to affordable housing, are becoming anything but affordable. Maintenance assessments have to be increased for normal inflation, but each year the assessments also have to be increased by the added burden of legislative fiat .Another reason for my ups-and-downs on this issue is that a state bureau will not solve the problem of the "haves" and the "have-nots." Mr. Saul Alinsky, a community activist, in his 1971 book, *Rules for Radicals,* put forth the concept of "the haves and have-nots." The thesis is very simple. The "haves" consist of the power structure that make the rules and regulations and then enforce them. The "have-nots" are those who have to follow the rules and regulations. When a rule that the "haves" make does not suit them, they ignore or violate the rules, however, if the "have-nots" violate the same rule they are cited and fined. The only way that the "have-nots" can overcome this is to force the "haves" to follow their own rules. This is very difficult unless the "have-nots" can band together to force the "haves" to follow their own rules.

There are certain parallels in CIDs with Mr. Alinsky's thesis. The board of directors has the authority to make rules and regulations, in addition to interpreting the governing documents. Any homeowner, who is not a board member, who violates the rule, is entitled to a hearing before the board. Many times the board will not conduct a hearing. Those who make the rules, (the board) also enforce the rules. The board acts both as the legislative body and as the judicial body when the hearing is held. The board, acting as the judicial body, will rarely find they are wrong in upholding their legislative actions. However, when a board member, or the entire board, violates the same rule, and a homeowner brings it to the boards' attention, the board does nothing to correct their violation(s). After all the board are the "haves" and they cannot be forced to do anything without court action.

At this point I can't envision how a state bureau can level the playing field so that board members, individually and collectively, and homeowners receive equal treatment.

I am sorry, Mr. Hebert, that I am not knowledgeable enough to offer a viable solution. I would offer the thought that CIDs should be classified as a special type of corporation as the current corporation code is not really applicable to CIDs.

One silver lining I'd like to refer you to is HOA attorney, Beth Grimm's letter in the April 14, 2004 Supplement to Memorandum 2004-20, page EX 8, beginning with the paragraph starting "My last recommendation to a legislative committee…" Her recommendation is extremely sound and should go forward before any proposed legislation is presented to the legislature.

Thank you for your attention to the material above.

Sincerely yours,

Samuel L. Dolnick
Condo Homeowner

AHRC MESSAGE FROM DAVID FARRINGTON (DEC. 21, 2004)

I don't know if State oversight is a viable solution. Anything that places boards on notice that someone with power to act is watching them would probably be better than the status quo, but how best to do that is perplexing. Five years is quite a long time. If the idea goes sour, five years is a very long time.

Also, boards would defend their actions vigorously and retaliate against owners who do not go along with them. In our particular CID the board levied our first special assessment this year. It was done in violation of California Civil Code 1366.

When I called it to their attention, they held a meeting 30 days after it was levied, and without taking a vote feebly attempted to cover their tracks. So, instead of calling a meeting to rectify their error, they simply chose to compound it. They have been guilty of other errors, all of which could have been corrected, but they simply chose not to do so.

It is clear to me that they have created a sort of elite club of owners who are determined to decide what is best for the rest of us. As of this writing I suspect that key players will remain in place in the January election. The fee to which you say would not be enforceable against the homeowners might prove too much.

I cannot imagine any homeowner refusing or not wanting to pay for something which would ostensibly offer a helping hand. But, the plain truth could be that they just couldn't afford to pay. That would be unfortunate because the board would not hold such owners in good standing. The fact is our expenses for the year 2004 have leaped a whopping 55%.

The board has done this without consulting the owners and I don't see where the end would be at this time. I fear that unless CC&R's are amended or done away with entirely, boards will continue to draw from the document whatever they want to justify the end sought.

AHRC MESSAGE FROM RON GUGLIELMINO (DEC. 21, 2004)

I can hardly believe that I have read something so positive in this proposal from the California Law Revision Commission. It would certainly bring more than just a "helping hand" to so many homeowners that are under such corrupt HOAs.

This is the best proposed agenda that, homeowners, in Associations, have going for them. It will certainly make BoDs be more cautious and more reluctant to foreclose on homeowners over missed dues payments or something else on the nature of violations.

Brian, I am speaking on my own, but I am sure that there are many, many people out there who have "stood tall" and saluted you for this major proposal if it can get passed. I know this agency will work out very well.

EMAIL FROM GEORGE W. ISETT (DEC. 21, 2004)

After twenty years residing in a 65 unit Chatsworth, CA condominium town home project I sold. Selling is the only way to escape the "outlaws" who are board members. The issue in CID living, as I have explained to Mark Stivers both in writing and in person in his Sacto offices, is not directly a need for non judicial review (NJR). The real problem is there is absolutely no enforcement of Davis-Sterling. Consequently, boards are simply outlaws. They do as they please.

The vast majority of situations in which boards simply ignore the law do not involve money or, at least very much money. However, CID boards are largely amateurs when it comes to fiscal planning, i.e., use of the required reserve study, law enforcement, i.e., enforcing the cc&r's and rules, and proper business meeting procedure, i.e., open meeting requirements.

Not only are they amateurs they can and do anything they choose and call it "common sense." Boards simply disregard any member protest and do so with complete immunity. ADR, forget it. It's a joke and far too expensive. A lawsuit, forget it, it is both too expensive and virtually no CID issue is worthy of a judicial struggle.

At my California association my good friend was appointed President. The previous year I asked him not to run for the board as he publicly announced he had never read our cc&r's, corporate bylaws, rules or Davis-Sterling and the corporations code and would not do so. He was later--gasp-- elected and his carryover board members, none of whom have read these documents either, are running the zoo any way they like.

NJR is interesting and probably needed but first I suggest you cause board members to 1. get trained in CID management and law and 2. make them subject to the criminal code for willful ignorance and/or failure to follow the law. During my twenty years in a CA CID I was the only person, including all board members, who ever read our governing documents. All boards simply flew the ship by the seat of its pants. All the while the legislature was writing change after change in Davis-Sterling with every paragraph completely ignored by our boards. Well, maybe not ignored since none even bothered to read it.

As the CAI lawyer Kelly Richardson says, the CID open meeting law is "the most ignored law in California." Even more than the jaywalk law!

I'd say his statement is entirely too narrow. In my experience the entire CID law is dismissed as a bother. Worse, there is no way a member can cause a change. The legislature has done millions of Californians who live in CID a dirty deed.

George W Isett

EMAIL FROM SAMUEL M. ROSS (DEC. 21, 2004)

I have been a HomeOwner Member of a small [85 unit] CID for more than 15 years and when we had little money saved in our reserve fund volunteered my ì sweat-equity — and later as a Director. I have seen our HOA manipulated by Management Companies and Attorneys through a $5,000,000 construction defect litigation as well as day-to-day operation of our HOA. Despite the success of our litigation and collection of the $5,000,000 we still have less than 30% of the funds our latest reserve study calls for.

I have seen much outright malfeasance and violations of CA law on the part of most of our volunteer Directors over this time mostly brought on by the lack of professionalism of our Management Companies and Association Attorneys who have knowingly advised our Board to break CA law.

After reading CLRC's September, 2004 TENTATIVE RECOMMENDATION on State Assistance to Common Interest Developments, I wish to make the following comments:

(a) I see little to nothing that would correct the underlying problem with the unprofessional conduct of the Management Companies and Attorneys that have preyed on our inexperienced volunteer HOA Directors.

The State of CA badly needs to have legislation that would impose stiff fines on these two vendors for what I have witnessed to be unprofessional behavior. They are a major underlying factor in HOA problems today.

(b) A most egregious example of malfeasance and unprofessional behavior by our Board, Management Company, and Attorney in our HOA's past led to literally stuffing of the ballot box at our annual Member's meetings for more than 10 years that I am aware of. I have found no CA State Law that was broken, only a section of our HOA's Bylaws. Under the CLRC tentative recommendation, you could not correct such blatant un-American/un-Democratic behavior.

CA Law badly needs to address this problem such that a Member can take their Association into a Small Claims Court and impose stiff civil penalties there rather than trying in vain to find an attorney to represent them in a regular court action.

ANONYMOUS AHRC MESSAGE (DEC. 21, 2004)

Gee, how nice of the commission to invite comment during the end of the Christmas holidays. How long has this invitation been in effect? Yesterday? You guys behave like nothing more than slightly glorified HOA board members.

I remember hearing something along the lines of - “we can’t possibly submit for the record all of the correspondence we receive from HOA homeowners”. This was in response to the question - “where is my letter that I submitted to the CLRC that was clearly marked FOR THE RECORD”.

It has long been rumoured that the CLRC is in bed with the HOA industry vendors. Wasn’t one Susan French tied to CAI?

Opposition to an ombudsman has been presented to the CLRC for a long time. If the CLRC isn’t aware of the problems that Nevada has had with their ombudsman position then you all are not only in bed with the HOA industry, you have been asleep at the helm.

Prediction - MARK THESE WORDS!!

1. The proposed ombudsman office will be a complete and utter failure.

2. It will NOT be able to levy sanctions against law breaker boardmembers or property managers, let alone even enforce it.

3. It WILL cost homeowners and taxpayers more money.

4. Recalcitrant boards will laugh in its face.

5. The HOA industry vendors will be making money off of it.

6. The reference to educating boards will OF COURSE be provided by the HOA industry vendors - how convenient.

7. HOA industry lawyers will get the referrals for litigation.

8. Complaints about the ombudsman’s office WILL BE ignored by the attorney general’s office and whatever other taxpayer sink hole government entity that is supposed to “oversee” it.

9. This is just another ploy by the government to create employment on the backs of “Joe Homeowner”.

10. The first article to be written about the failure of this government mandated taxpayer sink hole will be:

“TEN THINGS YOUR HOA OMBUDSMAN WON’T TELL YOU”.

Mr. Hebert - please fill us in on just exactly WHAT the purpose of the CLRC is.

Some of us are sick and tired of all the CLRC recommendations that seem to only benefit the HOA industry. If you want to make a recommendation - make this one: (That is what you all do right? Make recommendations at the California Law Revision Commission? Right?)

BAN FORECLOSURE BY NEIGHBOR IN HOMEOWNER ASSOCIATIONS! Hello, 7 words. Count them. 7. Not 150 pages of legalese. 7 words.

Many States in this country DO NOT HAVE FORECLOSURE BY NEIGHBOR.

Come on Brian - we challenge you to make that recommendation.

If not, please don’t waste anymore taxpayer money with all of those silly little studies. It doesn’t take a rocket scientist to figure out that the biggest problem with homeowner associations are:

1. the “foreclosure factories” they have become

2. the fact that HOA boards break the law with impunity because they can, because they are protected,

3. because most homeowners CAN'T afford costly litigation,

4. because mandatory arbitration/mediation is nothing more than a dance with debt,

5. because it is an unlevel playing field,

6. because it is an inherently flawed housing product,

7. because it is a legalized housing scam,

8. because there is not adequate disclosure,

9. because the politicians LOVE those contributions,

10. because the trial lawyers LOVE the litigious nature of HOA's,

11. because the municipality saves millions not having to foot the bill for the infrastructure,

12. because "Joe Homeowner" has become a full employment tool for and assumes all liability for a plethora of HOA industry vendors that includes:

a. big ticket insurance companies,

b. insurance brokers,

c. property managers,

d. realtors,

e. landscapers,

f. maintenance contractors,

g. pool services,

h. janitorial services,

i. tennis coaches,

j. aerobic instructors,

k. swim coaches,

l. board members and of course

m. lawyers!

If you want real, qualified, and undisputed input from homeowners as opposed to this last minute request garbage at the peak of the Christmas season - Why don't you people send out a questionaire to every single CID homeowner (surely you could get this list from your buds at CAI) with the following question:

"Would you prefer to buy property with a homeowner association or without one".

Just cut to the chase. Stop it with all the ridiculous studies, bandaid fixes, and layers and layers of laws not worth the paper they are written on.

Toilet paper serves a more useful purpose.

With that being said, I gotta go. I'll take a copy of this request for input with me.

ANONYMOUS AHRC MESSAGE (DEC. 21, 2004)

☞ **Staff Note.** The anonymous author of this message intersperses parenthetical observations, in capital letters, within the body of an email sent by the staff to Elizabeth McMahon, one of the administrators of the AHRC website. The email was sent to remind Ms. McMahon of the deadline for comment and to clear up some misunderstandings regarding a letter that she had written to Sacramento Bee reporter Lakeisha McGhee.

I saw a copy of the letter you wrote to Lakeisha McGhee of the Sacramento Bee, in response to her question on the merits of the Law Revision Commission proposal on state oversight of CIDs.

(FIRST OF ALL, JUST WHO IS THE COMMISSION??????? WHAT IS YOUR BACKGROUND? WHY ARE YOU QUALIFIED TO TELL US HOW TO LIVE IN OUR HOMES?)

I thought it would be helpful to clarify a few points about the Commission's proposal.

(1) You're right to be concerned about costs.

(WE HAVE AN ADMISSION OF 'COSTS'.)

However, we've drafted the proposal to keep costs low. The initial

(KEY WORD 'INITIAL'.)

cost would be $5 per CID household per year. That amount could be adjusted up or down

(KEY WORDS - 'ADJUSTED UP OR DOWN')

by agency regulation, to better match actual program costs, but could not go higher than $10 per household per year.

(UNTIL THE CLRC MAKES ANOTHER RECOMMENDATION TO RAISE IT?)

(2) The state agency

(STATE AGENCY??? NEED WE SAY MORE?)

would not have any power to foreclose

(WHEW! SAVED BY COMMON SENSE!)

for any reason. The agency's funding would be collected from associations by the Secretary of State

(WHAT IF I LIVED IN THE HOA PRIOR TO THIS LEGISLATION BEING PASSED AND I DIDN'T AGREE TO IT?)

under the procedure provided in Civil Code Section 1363.6. Under that section, an association that fails to pay the required fee would have its corporate status and privileges suspended.

(COOL - LET'S ALL STOP PAYING IT!!)

There is no remedy against individual homeowners for nonpayment of the fee.

(HELLLOOOO,,,,,,,THAT'S BECAUSE YOU ALREADY HAVE A BUILT IN REMEDY - THE BOARD OF DIRECTORS TARGETING THE HOMEOWNER AS THE PARIAH WHO REFUSED TO PAY AND GOT THE HOA'S CORPORATE STATUS REMOVED!)

(3) The agency would exist to (a) educate,
(READ - COMMUNITY ASSOCIATIONS INSTITUTE)
(b) mediate,
(READ - LAWYER$)
and (c) enforce CID law.
(OH GOOD, ANOTHER POLICE STATE ON TOP OF A POLICE STATE)
It would not have authority to create any new legal requirements. It would have no authority to enforce CC&Rs against homeowners. What sort of law violations would it have jurisdiction over? Violation of assessment collection procedures, failure to hold meetings, failure to provide access to records, election law violations, unlawful imposition of fines, etc. What powers would the agency have? To issue binding corrective orders, remove board members, order repayment of illegally collected money, impose fines
(ANOTHER TRICKLE DOWN COST TO INDIVIDUAL HOMEOWNERS)
(including fines on individual board members in cases of willful violation of the law), etc.
(HAHAHAHAHAHAHAHAHAH!!!!! GOOD LUCK! THE ONLY THING THAT WILL HAPPEN HERE IS THE BOARD WILL PROBABLY JUST IGNORE THE OMBUDSMAN LIKE IT IGNORES THE ATTORNEY GENERALS OFFICE - THEY AREN'T AFRAID - THEY ARE COVERED!)
(4) The proposal includes an automatic repealer. In other words, the law would need to renewed by the passage of new legislation five years after it is enacted or it would automatically be repealed. If the agency can't prove itself to be useful in five years, it would go away automatically.
(USEFUL IN WHOSE OPINION??? THE HOMEOWNER OR THE HOA INDUSTRY VENDORS? WHY DON'T YOU PEOPLE JUST TALK TO THE NEVADA OMBUDSMANS OFFICE! FURTHER TO THAT, WHEN AND IF THIS REPEALER IS UNREPEALED - WHAT WILL THE FEE BE THEN????? $100.00 PER CID HOMEOWNER?)
The deadline for comments on the Commission's tentative recommendation is December 31, 2004.
(MERRY CHRISTMAS AND HAPPY NEW YEAR - SORRY, WE ARE ON VACATION)
We will consider
(KEY WORD - CONSIDER? - WHY NOT JUST INCLUDE ALL OF IT "FOR THE RECORD"!!! OR WOULD THAT BE TOO MUCH TO KEEP TRACK OF?)
those comments at our January 21, 2005 meeting. If AHRC or any of its members has comments on the proposal, we would welcome the feedback. Thank you.
(DON'T THANK US, THANK THE HOA INDUSTRY FOR THEIR CONTINUED SUPPORT OF THE CLRC.)

AHRC MESSAGE FROM MICHAEL DOYLE (DEC. 22, 2004)

The "Common Interest Development Bureau" is a very good idea given the main purpose is to support the individual member. In other words, when a board or its agents act wrongful, a member would have a bureau to turn to for assistance. This assistance might be to educate them on their specific problem, or take action against a community association and their agents for their wrongful acts. If the board needs to file an action against a member, then the board would be required to submit their complaint, against a member, to the bureau so that the matter could be analyzed for validity even before the community association levies a fine, assessment, foreclosure or ADR procedure. In this way the board, and their agents, would have a "check and balance" administrated by the bureau before the conflict escalated to either a non-judicial or judicial act against a member. There should be remedies for all violations the bureau finds the community association committed and did not try to correct. This should include fines for the community association's agents, not limited to, the board members as individuals, the management company, the attorney, and any other professional hired by the board that has committed a wrongful act that has affected a member or the community association itself.

As for the fees, I think it would be better to re-analyze the $5 to $10 per household estimate. It may be better to establish a basic fee, like a club membership, and when an association goes over their "base limit" of use then that association would be assessed accordingly at the end of the year. Every member and director would still have the right to use the bureau without limit. A community association that requires more attention should not be funded by the community association that does its duty correctly and does not have disgruntled members. Indeed a base fee to establish the bureau is needed for the oversight of California's CID's although we need to give an incentive for the board members to work diligently to resolve disputes even before the bureau is contacted. A community association and board that knows it will have a higher assessment, and possibly a poor rating, may work harder in the fair resolution and compromise process.

As for the bureau management, I believe that anyone contacting the bureau in writing via mail or by phone should not be "toll free". This will add to the expense and possible abuse. A website is a good idea for those who want to contact the bureau immediately for free and get a response quickly. (I would pay a few dollars for a phone call if I needed to talk with some one at the Bureau immediately.) Cost should be considered diligently so that the bureau does not get canceled pre-maturely just for the expense of operating itself. Take the scheme created in your Maryland example where the basic fee is low and there is an additional filling fee. In this case the filling fee is considerably less than the ADR process and should be

well accepted by most members and associations who are headed in the direction of litigation.

In closing, my belief is that an oversight bureau is needed. My own experience was the ADR process failed because both sides did not have to make it final nor was there any mandatory remedy for wrongfulness on either side. My matter went to trial and I believe the superior court interpreted the law incorrectly or ignored the law because there is little case law to rely on for my matter. It would be a good idea to have the department of real estate (who approve the CC&R's), consumer affairs (who protect the consumer), local county departments (who make the local ordinances), the attorney general's office (who has authority to investigate), possibly a panel of CID residents and CID professionals that collectively would make up the commission to decide on the matters. I would not like to have a sole commissioner and "staff" making the final decision on CID bureau matters.

I believe you are on the right track with your "Common Interest Development Bureau" to preempt the litigation process. I commend your efforts to attempt legislation on an overdue matter. You have my support.

You can contact me anytime at .

Sincerely,

Michael Doyle.

ANONYMOUS AHRC MESSAGE (DEC. 22, 2004)

I am very happy that this has come forward to be voted on and I pray that our Governor of Calif. will do something that the homeowners associations need, and sign this into law.

It is sad what has happened in our association, to persons who by law has ask to see records, and has been refused most all of the requests as the were to touchy to let them get out. This person was accosted on the golf course and was able to get a [permanent] restraining order against that person.

The Governor of this great State should take a good look as to what is going on within all of the homeowners association in his state, instead of flying around the world working to better his agenda. I do not believe he would be voted in as Governor a next term if he doe not do the right thing for the people of this state, as there are many thousands of retired people in this state and they are finding out that there was a bill that would have helped all of us, but he refused to sign this bill and help the people who live in all of these associations.

Thank you AHRC for the help that your web site done to keep all of us appraised as to what is going on.

OPTIMUM
PROFESSIONAL
Property Management, Inc.
A Certified Management Firm

December 22, 2004

California Law Revision Commission
4000 Middlefield Rd, Room D-1
Palo Alto, CA 94303-4739
Fax: 650-494-1827

To Whom It May Concern:

Re: State Assistance to Common Interest Developments

While I applaud your efforts to improve relations between poorly managed associations and their members, I do have a few comments to make:

- Assurance that unfounded complaints against an Association will not be posted online. While the legislature receives anecdotal stories about horrible associations, on the other side, there are homeowners who will try everything to not allow an Association to perform their duty and enforce the governing documents. These homeowners cause unexpected expenses for the Association and the Association has no recourse unless they actually file a lawsuit and lose.
- Section 1380.230 should be expanded to include the rules and regulations (which are governing documents per the escrow document law), architectural standards (since the Board may have to act as an appellate court for architectural review), the Fair Housing Act, and the Davis-Sterling Act, as the Act may supercede their own governing documents.

I hope that my comments are useful for your organization.

Sincerely,

Roger Longenbach
Compliance Officer

17731 Irvine Boulevard, Suite 212 • Tustin • CA • 92780 • Office 714.508.9070 • Fax 714.508.9071
www.optimumpm.com

AHRC MESSAGE FROM MICHAEL DOYLE (DEC. 24, 2004)

I wanted to add more comment that strongly supports a need for the "Common Interest Development Bureau".

My association has three, of five, board of directors that are tied to each other thru family and employment. I am trying to build a house on my lot. There is a conflict with my next door neighbor because I believe he does not want a house built on my lot. My next door neighbor is on the board. On the other side of my next door neighbor is his daughter's lot and the son-in-law who is also on the board. The daughter and son-in-law have employed the president of the association to be the "builder" of their custom home. The president is also on the board. All three of the above are also on the architectural control committee. Here is the "dead mans lock" on an association where a member cannot get a fair or unbiased review by either the architectural control committee or the board of directors because a conflict exists.

Where does a member go for help? Only litigation can result in this example and the majority board has vast resources, including insurance, to further their strangle hold on complete (biased) control. In this instance it is almost impossible for these three directors to fulfill their fiduciary duty by acting independently on association matters.

Our law makers need to understand that an association is not like a corporation where if we don't like the way things are run we sell our stock and buy another stock. These are our homes, our land and our privilege. We have the right to enjoyment and have already created laws and ordinances that protect all the people equally.

An association strips us of most of those government protections and puts the fate of our property in the hands of anyone that can act subjectively on anything we do thru the CC&R's. In my example, and it is my real life scenario, you can see that it will not be possible to get a "fair and independent" response from my association on an architectural application.

The "Common Interest Development Bureau" may help considerably to overcome this kind of problem between a member and a community association. I can only guess that there are other members in community associations currently being oppressed by a wrongful board that is acting for their own self interest instead of making unbiased decisions for each member or the community as a whole.

I would like to see the "Common Interest Development Bureau" replace the requirement for alternative dispute resolution (ADR) per California Civil Code 1354. In my opinion, ADR does not work. In my case a quorum of the board did not attend, only my next door neighbor, his attorney, his architect, the president of the association (who I believe was in my next door neighbor's employ at the time or for financial gain) and the association attorney.

Our mediator was a retired Orange County Superior Court judge. One of the judge's comments was; "Are we here for a meaningful mediation or are you just touching base before litigation?" The association asked for 30 days to evaluate my grading. A couple days later, after making this request, my association filed a lawsuit in superior court and never returned to the ADR process. Another example is a recent appellate decision (Case No: G032358 - Greenbrook Fountain Valley HOA vs Tezak) where the court commented on ADR:

"ADR Issue

Next, defendants claim plaintiff cannot recover attorney fees because it did not engage in ADR. We find nothing in the statute to that effect. With certain notable exceptions, section 1354, subdivision (c) requires the party filing the action, whether owner or association, to "file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b)." It is undisputed plaintiff filed no such certificate, but defendants' remedy was to file a demurrer or motion to strike. (§ 1354, subd. (c).) Defendants in fact invoked that remedy and lost. Neither in the trial court nor on appeal have defendants cited any authority that a party's failure to engage in ADR defeats its request for attorney fees. Indeed, section 1354, subdivision (f) simply advises the court it may consider the ADR factor in making its award. In the absence of evidence to the contrary, we will presume the court did just that. Defendants have not carried their burden of affirmatively demonstrating either error or prejudice in this regard."

In closing, my belief is that an oversight bureau is needed to add remedy where none exists and to intervene where there is dispute between a member and a community association. My own experience was the ADR process failed and our courts do not seem to pay much attention to "considering the ADR factor". I look forward to legislation that will balance the scales between homeowners and their community association. You have my continued support for the "Common Interest Development Bureau".

You can contact me anytime

Sincerely,

Michael Doyle.

EMAIL FROM CHRIS DANLEY (DEC. 24, 2004)

I live in an association in Northern California called Serrano Homeowners association.

I completely support your efforts. If possible please keep me informed.

Chris Danley

EMAIL FROM TRAJA ROSENTHAL (DEC. 24, 2004)

I wanted to comment on the oversight bureau for homeowners associations. I live in a town home developed governed by a homeowners association. We have CC&Rs. Everyone signs an agreement to abide by the rules when they purchase a home in the development. This is a major reason why we bought our home there. Previously, we lived on a lovely little street with beautiful homes. Our next-door neighbor, however, purchased a number of broken-down cars and installed them in front of the house, in the drive and on the lawn that we shared in the back yard. We want rules to make sure people do not work on cars in their driveways, leave their trash cans out all week long and make life unbearable for other people who live nearby. We want to live in a community that is beautiful and clean and not marred by cars parked all up and down the streets, hoses left out, etc.

Our homeowners association is made up completely of members. We vote for our board of directors, and they volunteer their time to make sure that things run smoothly. They constantly update our CC&Rs as needs change, and none of the rules are silly or arbitrary. For instance, people are asked to leave their garage doors completely down, not part-way open. This discourages crime. However, a rule that people had to park inside their garages was modified with homeowners with three cars came to the meeting and asked that people with three cars be allowed to park in their driveways. This was done accordingly.

When you hear from people who complain because they cannot put up clothes lines that may block their neighbor's lovely view, or because they want to work on their cars in the driveway, or because they want to let their cats out to defecate and urinate in the bark and under the deck in the neighbor's private, fenced back yard, creating a smell that makes it unbearable to leave the patio doors open or sit outside on a summer evening, please consider the people who decided to live in a community governed by CC&Rs and a homeowners association that sets rules because they want to live in peace and harmony that unified standards that apply to all. There are many places without CC&Rs and rules, and perhaps people who don't believe in indoor pets and cat boxes or laundry rooms with washers and dryers would be happier there. They could move to Rio Linda and park on the lawn, if that is what they would like to do.

I would love to contribute any other comments to the study that reflects this alternate viewpoint. I live in the Cirby Hills Townhomes in Roseville, a property managed by Kocal. My home number is (916) 786-1315; my work number is (916) 321-1220. Thank you.

EMAIL FROM LARRY ROBINSON (DEC. 24, 2004)

There are so many issues that arise when living in a CID that cannot be resolved without the expense of attorneys and sometimes court costs. One example regarding mailing list of homeowners: Our CC&R's state that a homeowner has the right to inspect and copy all documents; Bylaws state all documents and specifies mailing list; Davis-Stirling act provides for a homeowner to "inspect and copy the accounting books and records and the minutes of proceedings of the association"; Corporate Codes "unless the corporation provides a reasonable alternative, a member may do either or both of the following as permitted by subdivision Inspect and copy the record of all the members' names, addresses. . ." In this last case, "reasonable alternative" is open to a wide interpretation. Only an oversight committee of some type can resolve these types of issues.

EMAIL FROM LORIE MARTIN (DEC. 24, 2004)

Please make sure the HOA oversight bureau is created. We live in a tract of 11 homes and have a HOA. Homeowners who are "in" with the president of the HOA can pretty much do as they want in making changes to their yards while those of us who do not go to the "right" church or have the "right" friends are given grief over every little thing.

A HOA is basically a mini-government for a community but there is no recourse for members who are treated unfairly. There should be a bureau in California that people can turn to for unbiased advice and help against unfair practices.

Thank you for your time and attention,

Lorie Martin

EMAIL FROM DARELL BAXTER (DEC. 24, 2004)

I read the article on the front page of the Sacramento Bee regarding homeowners associations and their rules. In the article it said that you are soliciting comments on a proposal to create an oversight bureau for homeowners associations.

I am not in favor of establishing this new government bureaucracy. I have lived in Gold River, Ca for 11 years. I bought my home in this development partly due to the homeowners association. I, and anyone who buys or rents in Gold River, are aware of the CC&Rs. It was my choice, and the choice of my neighbors, to live in Gold River and abide by the rules. We do not want to pay additional homeowners dues to pay someone to deal with a new government agency. Nor do I want my tax dollars spent on more state control.

Sincerely,
Darell Baxter

EMAIL FROM EUGENE SHY (DEC. 24, 2004)

I am against the creation of another bureaucracy in state government. The number of problems in HomeOwner Associations is minuscule and adequate remedies now exist such as arbitration, small claims court, legal aid, etc. I have been a member of 10 or more Associations, none would be helped this proposed governmental body. We do not need State Assistance for Homeowner Associations as the Associations practice democracy at its most fundamental level and need no special attention.

EMAIL FROM MARTHA POTIRIADES (DEC. 24, 2004)

I do live in a homeowners association, and there is a clear need for better oversight. Primarily, I would like to see some stringent conflict of interest provisions. In our development, one board member owns much of the property, and controls the agenda. Tho this board member technically doesn't "vote" at the final tally, he exerts powerful influence. I feel he should not sit on the board, or his position should be subject to resident's approval, rather than the current incestuous appointment procedures. They should be required to post their minutes online, also. I am glad to see that these issues may be addressed.

ANONYMOUS AHRC MESSAGE (DEC. 26, 2004)

What will be the necessary qualifications of the person appointed to intervene in an Homeowner Association conflict?

If I were a homeowner being victimized by a homeowner association board of directors I would NOT want a lawyer to mediate, or a minimum wage moron, or a middle income level college graduate still living in an apartment helping. I encountered all those so called "qualifications" in more than one bureaucracy who did nothing to help, only exacerbated the problem and cause the inevitable lawsuit to take place ANYWAY!!

For one thing, will this 'intervener' be required to have any experience in HOA Conflict? The only TRUE experience one can acquire in understanding the

complexities of this housing beast is TO HAVE LIVED IT!!! To have been a victim.

Fine, go on ahead and create another government bureaucracy but please do not expect homeowners to fund it. Double taxation without representation went the way of the Boston Tea Party hundreds of years ago. So take that step backwards. We have already stepped so far back into history with the concept of homeowners associations - so it isn't likely to make any difference either way.

Good luck with your special agenda.

EMAIL FROM FRANKLIN TILLEY (DEC. 26, 2004)

I sincerely hope that State and Consumer Services establishes an oversight bureau with appeal rights for home owner associations. I was denied the bylaws when I purchased my home and only given them when I paid $115 for them after my sale closed. These rules have been arbitrarily and capriciously modified by the Executive Committee since that time in regards to enforcement and penalties, increasing from $10 minimum to $50 maximum to $50 minimum to $1500 maximum. Rules are enforced selectively, and have given me reason to only consider sale and relocation to a non-association community. I am not impressed with their meetings that ignore audience input, and have little if any structure and always promise the board will look into things that are promptly forgotten. Since there appears to be no solution or recourse, we will be selling our home soon.

EMAIL FROM JAN TOWNSEND (DEC. 27, 2004)

Hello. I have been active in our homeowner association for many years. We live at Lake of the Pines in Nevada County.

For most of the 19 years we have owned here, I worked to promote the community. I wrote the only book of Lake of the Pines history, which still sells as a coffee table book in Administration. I have served on 6 committees, 4 as chair, and was vice-chair of the complete rewrite of our CC&Rs and Bylaws.

However, a few years ago, I put my efforts into watching what the boards and management were doing, and working to make major changes to policy. In 2001, the community put forward a massive building project that was ultimately voted down by the membership. Since then, board after board has pushed through the projects piecemeal without votes. Plus the boards have put us into debt, wiped out policies that kept subsidies down, kept amenities that cause huge losses, and so much more. I attend all board meetings - sometimes I'm the only one there -

voicing my opinions about agenda items. And I write up my minutes of each board meeting, which I post on a member forum through Yahoo.

The very worst and most deceitful thing recent and current boards have done is to refuse access to the books to members. Two years ago, I asked to see the books, as specified by Davis-Stirling and our own bylaws. I received a 3-page letter from the association lawyer, denying me access to anything more than end of year financial reports, which already appear in the community newspaper and are very basic with no specifics. This spring, after the new law about seeing the books was adopted, I again asked to see the books. Again, I received a 3-page letter from the association lawyer, saying basically the same thing - that member access to the books is a "term of art" - and adding a new paragraph that threatens me with legal action if I look at the information which is available and reveal that information to anyone. What could I possibly reveal? I am only allowed access to what is printed for everyone to see. I also asked to see employee salaries, as specified by law. That, too, was turned down.

Most members do not realize how much the powerful CAI (Community Association Institute) control how associations operate. It is for the managers and lawyers, not the members of associations. Directors fall into the trap of thinking they have the real power when they simply follow what the lawyers and managers promote and stipulate.

I could go on and on, but I won't unless I know you are interested in hearing more. There are major problems with this association and I'm certain with most of them. You definitely must establish an oversight bureau for homeowner associations, and I would be happy to be part of that bureau if it were possible.

Thank you for reading my email to you, and I look forward to hearing from you.

Jan Townsend

EMAIL FROM RON TRANQUILLA (DEC. 27, 2004)

I am a resident owner of a condominium in Grass Valley.

First, I want to comment on the way the issue of the Oversight Board and homeowners' associations has been framed in today's Sacramento _Bee_. (Friday, December 24, 2004. A1, A14.)

The _Bee_ article refers to "arbitrary rules--from the color of house paint used to types of lawn ornaments allowed." The use of the word "arbitrary" trivializes the issues involved. The condo development I live in has rules for colors and they are not

"arbitrary"--they seek to define a uniform aesthetic for the dwellings, which are not just buildings randomly built on a city block, but form a circle around a common area. We may decorate our individual units, but there are some rules that seem intended to eliminate showy or bizarre decorations. We may plant small

gardens in front or behind, even though these are in common areas, but we must ask permission--the purpose of that is to insure that fire safety and prohibition of fire “fuel” is adhered to. According to the minutes, this past year has seen no denials of permission for plantings. The point is, that aesthetics affect not only the harmony of the environment, but also the *property values* of all of the condos, not just the one in question. What matters is how flexible the rules are while ensuring the common good, and how willing the Board is to make some compromises to accommodate individual taste--but strong overall rules eliminate the “they did it why can’t we do this...” type of conflict among the owners and renters within an association. The bottom line is, if someone doesn’t want to abide by these rules or thinks them arbitrary, the person shouldn’t buy in the first place--the CC&Rs should be read over carefully before buying or renting! (In the case of the woman with the cat, we learn that she obviously never read her CC&Rs while she was renting. She apparently has read them after buying, but bought anyway!)

Which brings me to the cat story that is the feature of the _Bee_’s article. I’m sure that the majority of readers were affected by the warm fuzzy photo of the woman and her cat, and wonder, why can’t she let her cat out? Buried back on a later page of the article is the fact that the director of Sacramento Animal Care Services agrees that cats should not be permitted to roam around common areas in a condominium development. In fact, in Pennsylvania, where I moved here from, all the local municipalities near where I lived and even the Pennsylvania State SPCA and animal care groups were very much opposed to cats roaming free and were all pushing for cat leash laws or laws restricting them to the owners’ yards. A cat-leash rule in a condominium is *NOT* arbitrary. In our case, a nearby renters’ cat often walks over our car leaving footprints, and recently our neighbor has found that the cat had urinated in her convertible overnight. There’s a reason animal care people believe cats should be confined--their feces and urine, as well as rabies, pose a potential health threat, roaming cats can pick up and spread disease, they fight each other and impregnate each other, and they are at risk--in the area where our condo is, at least--from coyotes and other predator animals.

Finally, the article refers to one “advocate” of homeowners and associations as director of “a powerful lobby for homeowners association interests.” Therefore, I guess we are to conclude, her arguments, even though she is just one example of such a advocate, can be dismissed as those of a selfish power-group. In fact, the issue about which she is quoted is important, and her point of view makes common sense. Our association, and I assume many others, *does* depend on homeowners’ fees and dues for its budget, which is mighty slim. And it’s true that ordinarily a person should NOT be deemed “OK” for being 2 years behind in paying dues. Again, when a person buys, he/she should be aware of the dues and how these fit his/her budget; one does *contract* to pay dues in a timely manner. On the other hand, in a case of medical or other catastrophe, I think the association should be lenient and understanding, maybe working out a payment schedule. If the association does not do so, then the person’s having to sue or whatever is the

last thing such a person needs to be focused on, and here's where some outside arbitration, such as a State Oversight Board, might be useful.

As for the Oversight proposal itself, the article doesn't say what the specifics of the proposal are, so comment is difficult. Based on my experiences dealing with my association so far, I would have to agree with the view that the State knows less about condo situations than those who live there. I think that a State Oversight Board should be involved only in processes of "arbitration," helping individuals and boards to settle matters of finance etc. that they have been unable to settle themselves, that is, issues that might end up in court, which will waste time and money and energy better spent elsewhere. Other than this very limited definition, I think the State should not be involved. CC&Rs should be read carefully by prospective buyers (and renters). If they are unwilling to abide by them, then they shouldn't buy or rent.

Homeowner associations should not pass "arbitrary" rules, either, but unless one lives in a particular condominium development, who but those who live there can say *from experience* what is "arbitrary" and what is needed *for that particular development*? That is, "blanket rules" and generalities likely to be set up by an Oversight Board probably won't apply uniformly to all developments. Many rules that are characterized from the outside as being "arbitrary," as the _Bee_ article demonstrates, may in fact be needed and necessary for a particular condo development.

So I would like to see a specific and very limited role for such an oversight board--simply functioning as an arbitration board in cases that can't otherwise be resolved outside of court.

I would welcome further discussion of this point of view; if you have questions or comments, please call.

EMAIL FROM "CBZIK@AOL.COM" (DEC. 27, 2004)

I strongly urge that you pass the common interest developments law. I can tell you numerous horror stories from living in condo associations where the management, who is making 6 figures to run the assoc. has harassed and threatened homeowners and gotten away with it because the homeowners have no recourse

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December 27, 2004

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303
ATTN: Brian Hebert, Esq.

RE: State Assistance to Common Interest Developments

Dear Mr. Sterling:

This letter is a joint statement from the CID Bill of Rights Coalition on the CLRC proposal to create a Bureau that provides "state assistance" to common interest developments. The Coalition asks that this statement be entered into the CLRC record.

Our Coalition, as you know, comprises the Congress of California Seniors, Gray Panthers, Older Women's League (OWL), and the California Alliance for Retired Americans (CARA). With Sentinel Fair Housing and Consumers Union, we endorsed the CID Homeowners Bill of Rights delivered to the CLRC in September 2001.

Our Coalition, which represents more than a million California seniors, has deep reservations about the CLRC proposal, which is expected to cost homeowners a minimum of $30 million in its first year of operation.

We agree with the CLRC that there needs to be an alternative to the courts for resolving disputes between homeowners and boards. But is the Bureau – as conceived in the draft legislation – the right alternative? We have looked closely at the draft proposal; this letter lays out some of our concerns.

The draft legislation states that the Bureau will have three purposes:

- Education of homeowners and board members as to their rights and responsibilities under the law
- Dispute resolution through "informal Bureau-facilitated mediation."
- As a last resort, enforcement of California laws governing CIDs Section 1380.310 (pp 19-20) states that the "Bureau's enforcement authority would be limited to disputes involving a violation of the law" and <u>not</u> violation of the governing documents. [The minutes of the September 17, 2004 CLRC meeting state that the commission was going to seek public comment on this issue; but the Commission seems to have already made up its own mind on this point. Homeowners may be astonished to learn that the Bureau will not enforce governing documents.]

The aspect of the proposal that concerns us the most is having the State of California create an elaborate state bureaucracy – paid for by homeowners -- in order to enforce laws hostile to homeowners.

The unfairness of California's foreclosure laws illustrates the point.

By now, the Commission has learned of the January 2004 Calaveras County foreclosure, in which a homeowner association foreclosed on a senior couple, Tom and Anita Radcliff, because they owed the HOA $120. They are now suing in the courts to get their home back.

The association lawyer and the debt collector/trustee have insisted publicly[1] that, in foreclosing on the Radcliffs, they followed "the letter of California law." Unfortunately, this is probably true: that the association, the lawyer, and the debt collector all followed the letter of law, because current California law sacrifices the economic interests of the homeowners to the economic interests of the association and the debt collector. The Radcliff case proves the point: their $285,000 home was auctioned to settle a $120 debt to the association and about $1800 in collection charges imposed by the debt collector.

The Calaveras County foreclosure is not an isolated case, but part of a pattern and practice of California homeowner associations.

Testifying before the Senate Housing Committee in February 2004, Sentinel Fair Housing presented its research on the use of foreclosure by homeowner associations in five Bay Area counties: Alameda, Contra Costa, Santa Clara, Sacramento, and San Mateo counties. Sentinel collected data on 699 Notices of Default (NODs) recorded by associations and their agents between October 2000 and October 2001. Between 8-10% of the NODs proceeded to the Trustee Sale: that is, ***up to 69 homes were put on the foreclosure auction block in a single year in just five California counties.***[2]

As Sentinel notes: the most startling aspect of these foreclosures – like the Calaveras County case -- is the infinitesimal amount of money owed the association. Another startling feature: the extent of collection costs charged the homeowner. Says Sentinel: "In all of the cases where we have been able to get additional information, the amount filed in the Notice of Default typically included more than $1,500 in legal and collection fees to the CID's agent." In the Calaveras case, the debt collector charged the Radcliffs more than $1800 to collect the $120 debt.

[1] They have made these statements publicly in newspaper articles, on-camera in television reports, and in testimony before the Senate Housing Committee in February 2004.
[2] In 2003, these five counties had 5351 associations. In 2003, California had 37,400 associations. Another 1000 associations are built each year.

Homeowners, the CLRC itself, and our Coalition are all seeking an alternative to the courts. But do we really want to create a Bureau whose purpose is to enforce laws that are so obviously unjust to homeowners? Or to mediate disputes arising from these laws?

Our Coalition believes that further legislative reform must precede the creation of any Bureau whose purpose is to mediate disputes and enforce existing laws. Neither the proposed mediation nor administrative hearings can remedy the underlying problem: laws, which are inherently unfair to homeowners.

In particular, we would like to see the Commission tackle California's foreclosure laws, because the Commission would bring its considerable prestige and influence to resolving a problem recognized by homeowners and the Governor alike. The Governor's veto message on AB 2598 indicates clearly that reform needs to occur, and reform of CID law is of course the mandate of the Commission.

We cannot emphasize enough our concerns about the State collecting $30 million[3] from homeowners in order to create a Bureau whose purpose will be to enforce unfair laws.

We will detail in future letters to the Commission our other concerns about the draft proposal, including:

- The education and oversight, not just of homeowners and board directors, but of association managing agents, i.e. property managers and lawyers. Boards often delegate their legal authority to law firms and property managers so that the lawyers and managers are functioning – in an ongoing basis -- as "agents of the board," i.e. acting in its stead. The draft proposal states that managing agents need to certify that they have read the association's governing documents, but there is no requirement that managing agents either understand the documents let alone agree to comply with them.

- That the Commission look closely at the concept of "separation of powers" raised in the background paper. Ironically, although the California state constitution insists on a separation of powers in its own governmental functions, it has created in homeowner associations a government entity in which all powers are fused: legislative, judicial, executive. The association board makes up the rules, carries them out, decides when they've been broken, and punishes the transgressor – all without any assurance of due process.

- That any proposal to create "state oversight" be done on a pilot project basis – at the county level, using the Maryland model -- in two California counties before going to the expense of launching a statewide program. Disputes are best

[3] In 2003, California had about 4 million CID units, i.e. the State would actually collect about $40 million from homeowners in the Bureau's first year of operation. About 500,000 more CID units are built each year, increasing Bureau revenues.

resolved "close to home." Local governments can bring a certain kind of local expertise to dispute resolution that the state may not have, e.g. knowledge of local conditions and local resources.

- That the administrative hearing process be examined closely. In other administrative hearings – at the Department of Fair Employment and Housing, for example -- board directors are represented by the association's legal counsel, but the homeowner is not. In other words, the hearing has all the trappings of a court proceeding. Will board directors be allowed access to legal counsel during a Bureau administrative hearing? Will the homeowner have counsel, but only at his/her expense?

- That the proposal clarify the relationship between its mediation services and the many community dispute resolution programs already in existence and listed on the Department of Consumer Affairs website; that it clarify the relationship between the Bureau's mediation services and the dispute resolution programs established by AB 1836, signed into law this year.

Respectfully submitted,

Marjorie Murray, Chair
The CID Bill of Rights Coalition

Betty Perry, Policy Director
Older Women's League (OWL)

Joan Lee, President
Gray Panthers/Sacramento

Gary Passmore, Director
Congress of California Seniors

Bill Powers
California Alliance for Retired Americans

Karen Raasch
AARP

cc: Senator Liz Figueroa, ATTN: Bill Gage, Consultant
Senator Tom Torlakson, ATTN: Mark Stivers, Consultant
Senator Joe Dunn, ATTN: Kara Hatfield, Consultant
Assembly Member Dave Jones, ATTN: Drew Liebert, Consultant
Assembly Member Gene Mullin, ATTN: Hugh Bower and Lisa Engel

Attachment: CID Homeowner Bill of Rights

CID HOMEOWNER BILL OF RIGHTS

On September 25th we will celebrate the 210th anniversary of the ratification of the federal Bill of Rights. To honor this occasion, we the undersigned have ratified ten resolutions comprising a Common Interest Development Homeowner Bill of Rights. Modeled on the Preamble and the Amendments to the U.S. Constitution, this document is meant to inspire public confidence in the concept of the CID, to ensure that this local government institution pursues benevolent goals, and to prevent abuses of power. Any changes to California law governing CIDS must conform to these inviolable principles. We resolve ***THAT***,

I ***Since*** living in a common interest development (CID) requires an individual citizen to enter into a contract with a governing association, the prospective homeowner must give written informed consent to the terms of the association's rules and governing documents, but most especially to the Codes, Covenants, and Restrictions (CC&Rs) ten days before close of escrow. The governing documents comprise the contract between the association and the buyer.

II ***No*** CID board shall abridge a citizen's freedom of speech or of the press either through direct order or through intimidation or any kind of public abuse; that no board shall abridge the right of homeowner citizens to assemble peaceably or to petition the board for a speedy redress of grievances. No CID board shall abridge freedom of religion.

III ***Boards*** give a full, true and accurate accounting in writing of all association actions. No actions shall be taken in secret.

IV ***Homeowner citizens*** shall be entitled to speedy access to all association records, particularly to financial records, contracts, and records of governance at any time without exception.

V ***Homeowner citizens*** shall not be deprived of liberty or property, without speedy due process of law. Nor shall private property be taken without just compensation, specifically, there shall be no non-judicial foreclosure.

VI ***Homeowner citizens*** shall have the absolute right to vote on any changes to the terms of the original contract, i.e. changes in rules and amendments to governing documents or fines they are expected to pay. No fine shall exceed the true costs of the remedy.

VII ***If accused*** of violating rules, homeowner citizens are entitled to a speedy and public hearing by an impartial body not selected by the board; the impartial body shall determine the guilt or innocence of the accused and determine what fines, if any, be imposed; that the accused be informed of the nature and cause of the accusation; be confronted with witnesses; and have a compulsory process for obtaining witnesses, records, and advocates. Use of this system does not cancel a citizen's rights of appeal in the courts.

VIII ***Residents*** shall be treated equally, and not in an arbitrary fashion, without reference to age, race, gender, cultural lifestyle, sexual orientation, national origin, marital status, disability or familial status as established by both state and federal laws and regulations.

IX ***Rules*** enacted by a CID association and amendments to its governing documents must conform to all state and federal fair housing and health, safety and welfare laws.

X ***Elections*** shall be in the hands of the homeowner citizens, not the CID board: ballots shall be secret; no homeowner citizen shall be denied the right to vote for failure to pay any fine or tax, including assessments; directors shall serve no more than two terms and be held accountable for their decisions; the makeup of the board shall reflect the makeup of the association membership. ***September 21, 2001/ Congress of California Seniors, Older Women's League, Sentinel Fair Housing, Co[illegible]ion, Gray Panthers, Charles Egan Goff.***

California Association of Community Managers, Inc.SM

2171 Campus Drive • Suite 260
Irvine, CA 92612-1430
949.263.2226 • 949.263.3789 Fax
800.363.9771
info@cacm.org • www.cacm.org

December 28, 2004

Mr. Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road #D-1
Palo Alto, CA 94303-4739

Sent Via Email

Dear Mr. Sterling:

Re: Comments to State Assistance for Common Interest Developments (Study H-853)

On behalf of the California Association of Community Managers ("CACM"), Inc., I am pleased to submit to the California Law Revision Commission ("CLRC"), our initial response to the above referenced Study regarding common interest developments ("CIDs") as defined in the Davis Stirling Common Interest Development Act (the "Act").

Founded in 1991, CACM is a statewide professional association for the community manager and management firms who provide products and services to CIDs. Our goal is to raise the bar of professionalism for community managers through education and state-specific certification. The *Certified Community Association Manager® ("CCAM*") credential is state-specific, complies with Sections 11500-11506 of the Business & Professions Codes, and identifies managers as professionals committed to higher standards of practice and ethical behavior. CACM is the first of its kind in the nation and has supported the recent development of professional manager groups in Oregon, Washington, Nevada and Arizona. While CACM has no direct involvement with these state trade groups, we consider them "sister" organizations and share our experiences with them as they evolve in their respective states.

The community manager has a very unique perspective about CIDs since we are "in the trenches" day-in and day-out with the volunteer directors and their respective challenges. When CACM became aware of the proposed Bureau of CIDs by the CLRC, our Board of Directors determined it appropriate to appoint a Blue Ribbon Task Force ("TF") in October 2004 to gather data, explore proposed concepts, provide feedback and act as a resource for the CLRC regarding the proposed Bureau of CIDs or other issues as required.

On November 1st, November 16th, and December 9, 2004, the CACM CID Bureau Task Force met via teleconference calls to discuss the proposed CLRC recommendation to establish a regulatory agency know as the Bureau of CIDs, housed within the Department of Consumer Affairs.

Based on the Charter and job description of our TF, this body of industry professionals discussed the pros and cons of such a regulatory scheme. The TF explored a number of concepts specific to the proposed Bureau from the various documents published (i.e. CLRC Study H-853, Memorandum 2004-39 and subsequent supplement memorandums). Each member of the TF was assigned several of the concepts to investigate and report back their findings to the group.

The attached report is not intended to be all encompassing due to time constraints but has identified some of our initial observations and insights. Due to holidays and certain time constraints, we were not able to include all of our research and information. We will be provided a supplement to this document later in January. For those grammatical and spelling errors we missed, please accept our apologies.

CACM appreciates the enormous amount of work generated by the CLRC and thanks you for your dedication and service. For your edification, I have listed below those individuals who serve as members of the TF. Please note that our intention is to have members on the TF who represent a wide and diverse perspective that range from portfolio management, on-site management, the senior community, and the legal community from throughout the state of California. The culmination of the expertise of these individuals represents over 350 years of community management and business experience in California.

Thank you and we look forward to continuing our efforts to provide information to the CLRC.

Sincerely,
/S/
Karen D. Conlon, CCAM
President

Cc: Mr. Brian Hebert *(via email)*

TF Chair: Mr. John Handel, CCAM – jhandel@monarchgrp.com
The Monarch Group, CMF
42-600 Caroline Ct. Ste. 101
Palm Desert, CA 92211

760-776-5100
760-776-5111 Fax

Mr. Nathaniel Sterling, Executive Secretary
CLRC
December 28, 2004
Page Three

Members

Mr. Jim Antt
Pacific Management Company
Bakersfield, CA

Mr. James Barta, CCAM
Castle Breckenridge Management
La Mesa, CA

Ms. Wendy Bucknum
Leisure World/Laguna Woods
Laguna Woods, CA

Mr. Doug Christison, CCAM, PCAM
Community Associations Services
Pleasanton, CA

Mr. David Feingold, Esq.
Law Offices of David Feingold
San Rafael, CA

Ms. Sandy Huesby, CCAM, PCAM
Crummack Huseby, Inc.
Lake Forest, CA

Ms. Linnea Juarez, CCAM, PCAM
Condominium Financial Management, CMF
Martinez, CA

Mr. Dan Kocal, CCAM
Kocal Management Group, Inc.
Folsom, CA

Mr. William E. Stewart, CCAM, PCAM
The Merit Companies, CMF
Santaluz, CA

Ms. Mary Walker, CCAM
The Monarch Group, CMF
Palm Desert, CA

Primary Contact
Ms. Karen Conlon, CCAM
CACM
2171 Campus Drive #260
Irvine, CA 92612-1430
949-263-2226, x13
949-263-3789 Fax
karendc@cacm.org

Mr. Greg Vorster, CCAM, PCAM
Rancho Murieta Association
Rancho Murieta, CA

California Association of Community Managers, Inc.SM

2171 Campus Drive • Suite 260
Irvine, CA 92612-1430
949.263.2226 • 949.263.3789 Fax
800.363.9771
info@cacm.org • www.cacm.org

"In organizations with great forethought and planning, dreams do come true."[1]

From 1999 to 2002, the number of CIDs in California increased by 11% from 32,279 to 36, 214,[2] housing 3.8 million units. If the average percentage of increase in the number of CIDs (following this example and the recent housing boom in California), is 2.5% per year, projections by the end of 2005 estimates there will be approximately 38,930 CIDs housing 4.1 million units in the state.

With the diminished availability of buildable land and with the fallout of Proposition 13 in the early 70's, developers in the past several years have not had a choice in creating a common interest development for their new subdivisions. Notably, more recent state and local municipal budget woes demand cities and counties to continue to require privatization of services maintained by a CID as new subdivisions are built.

The idea of a regulatory agency specifically created to respond to issues related to CIDs has been bantered about the industry for the last 15 years. While there are and will continue to be pros and cons to the proposal, it is equally if not more important to assume that this concept will eventually occur. With this perspective in mind, we strongly encourage the CLRC to proceed carefully, with much forethought to the concept of a Bureau of CIDs. It is in the state's interest, both economically and in establishing positive and workable public policy, to protect the 9.5 million consumers who are housed in these communities.

In reviewing the Study H-853 and various Memorandums related to the creation of the Bureau of CIDs ("Bureau"), the CACM CID Bureau Task Force ("TF") discussed numerous ***concepts*** that will be generally addressed in this paper. This paper is not intended to be all inclusive. As we began to gather research data, many more questions were raised as we progressed with our task.

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1. *Executive Thinking*, Leslie L. Kossoff, Davies Black Publishing, 1999
2. *2002 California Community Association Statistics*, Levy & Company, CPA's, HOA-Info™ Information Services Division

Here are some of the initial questions and concepts raised by the CACM Task Force:

1. **What could be projected about the quantity of work of the Bureau based on estimated statewide statistics available as of September 2002 and what could the volume of activities create for the Bureau staff?**
2. **Will a CID Bureau, as contemplated by CLRC Memo 2004-39, significantly improve the early and cost effective resolution of Association disputes?**
3. **Shouldn't the Legislature allow time to evaluate the impact of the newly adopted ADR processes of Assembly Bill 1836, effective January 1, 2005, before assessing the need for a CID Bureau to handle HOA disputes?**
4. **The bodies of laws that govern CIDs continue to be cumbersome and confusing to volunteer directors and owners. Should there be more simplification of the Davis Stirling Act before the enactment of a Bureau?**
5. **What is the number and types of complaints received by our elected officials regarding CID disputes?**

Let's look first at some of the statistics, using a conservative approach, of the potential volume of activities that the Bureau would supervise and administrate.

Concept: **What could be projected about the quantity of work of the Bureau based on estimated statewide statistics available as of September 2002?** [3]

- There are 36,214 Associations in California
- About 8,000 are of unknown size
- Of the 28,000 remaining, 50% are less than 25 units and the average size of an association is 106 units
- Of the total, 16,000 associations, or about 40%, are 21 years of age or older
- Aggregated revenues from associations are estimated at $6 billion annually
- 50% of all California associations are condominiums; 10% are condominium conversions; 33% are planned developments and another 6% are classified unknown. These percentages track closely to the 1999 statistics cited by the same source
- There exists 180,000 individual directors at a conservative estimate of five (5) directors per association
- There are 3.8 million units housed in the 36,214 associations
- There are an estimated 9.5 million residents using an average of 2.5 residents per unit

Concept: **What would the Bureau of Common Interest Developments look like?**

- At a $10.00 fee per CID unit per year, the annual Bureau budget would be $38,000,000.
- Payroll, benefits, employee training, etc. is the highest expense for any business. Estimate approximately 200 employees in the Bureau

- If half of the employees were dedicated to the complaint response and dispute resolution and administered an average of 4 disputes per day, the Bureau would respond to 96,000 complaints per year. This does not anticipate the additional number of telephone inquiries that will be made to the Bureau for general information.

    1. 48 work weeks x 5 days per week = 240 days per person.

    2. 240 days x 4 complaints per day = 960 complaints per Bureau employee in a year

    3. 960 complaints x 100 employees = 96,000 complaints per year

- If only 1% of consumers asked for a dispute to be resolved by the Bureau, there would be approximately 95,000 disputes to be resolved annually. If it were 2%, then it would be 190,000 complaints. With 3%, it would be 285,000 complaints. With 4% it would be 380,000 complaints to adjudicate annually.

- The balance of the staff would handle general inquiries, board education, administration and law enforcement, etc.

- If a conservative 5% rule is used, then it is possible that *in addition* to the disputes to be resolved, 475,000 phone calls annually could occur (5% of 9.5 million consumers)

The California Department of Real Estate receives approximately 10,000 formal complaints each year against its 390,000 licensees, or 2.6%. It is our understanding the DRE investigates 60% while the balance of 40% is deemed invalid. The DRE has 300 employees in their investigation division, 95 whom are in enforcement. Their budget is approximately $20 million. Is the DRE able to "keep up" with this level of complaints with its current level of staff and budget ? It is our understanding they are not able to do so under current staffing conditions.

Questions: Based on these conservative estimates, is it feasible to think the Bureau could handle this level of activity within its proposed parameter of activities? Has the CLRC determined, if the proposed average fee of $10/unit/year is not enough to administrate the program, how will the short fall be funded? If for various reasons, CIDs refuse to pay or financially cannot pay the fee, what kind of action to collect the debt can or will the Bureau take against the CID? (Example: if the legislature removes the association's ability to collect their assessments – which will include the fee to the Bureau - in a timely manner as defined in ASM Steinberg's AB 2598, it could take 5 years to collect a past due assessment)

Consideration: CACM believes that more resources and consideration should be utilized before legislation is introduced to create a Bureau of CID's. Perhaps an in-depth study should be conducted to quantify serious concerns and to include a 5 year cost analysis and business development plan for the proposed Bureau. There is the potential universe of 9.5 million home owners who could be calling the Bureau to file complaints, ask for assistance and make direct contact with the Bureau. It is essential that the Bureau anticipate a large volume of communication and activity from the get-go. We strongly urge the CLRC to perform some due diligence rather than resolve problems after legislation is created.

Concept: There exist certain groups who are determined to either eliminate the CID structure all together or create new laws that prevent boards from properly governing their communities by micro-managing the decisions unique to their community. The reporting of CID "abuses" typically does not accurately describe both sides of the issue and may consequently exaggerate the circumstances involved. It is impossible to legislate the disruptive or behavioral issues that find

their way into a CID dispute? We agree education of the CID operations and legal structure can be a strong deterrent to minimizing disputes.

3. Ibid.

Obviously, CIDs are not going away. Can you imagine the chaos that would be created if the 36,214 CIDs were to suddenly eliminate the products and services they provide to California consumers? CID's were essentially formed to take the financial burden off the state, county and city's because state and local municipalities continue to be in a financial crisis.

By over legislating, the State continues to make it more expensive to live in a CID. CID's are not like cities and they are not reimbursed for costs from the State. Further, because of the aging of these communities, redevelopment to keep the buildings viable becomes a significant financial challenge. When a new bill is introduced and the term "no fiscal impact" to the State is noted in the bill, it is not often understood that any new piece of legislation enacted and imposed on the CID will raise assessments to the homeowners in the community. Typically, it takes legal counsel to provide an interpretation for the Board in order to correctly implement and adhere to the new law.

CIDs are not "mini-governments" but private entities that have a contractual relationship between the owners and the association (via their governing documents and financial operations). Owners agree to pay their fair share (monthly assessments) to support the infrastructure and level of services in their community. Being an owner in a CID makes each owner part of the business of the community.

Judge William Huss and Dr. Marlene Coleman state in their book, *Working With Your Homeowners Association: A Guide to Effective Community Living, "…remember that the association exists for the protection of your home and investment. The association is not an enemy – nor is it particularly on your (the owner's) side. The association is committed to the betterment of the community and the property it oversees."*[4]

The authors also go into great detail describing disruptive behaviors and resolving conflicts in an association and provide great insight to dealing with these issues. The education required to proactively prevent misunderstandings in CIDs is a viable and important aspect proposed by the creation of a Bureau of CIDs.

Concept: **Will a CID Bureau, as contemplated by CLRC Memo 2004-39, significantly improve the early and cost effective resolution of Association disputes?**

The CID Bureau contemplated by the CLRC would have as one of its primary assignments the obligation to "provide informal assistance in resolving disputes, and as a last resort, [to] enforce the law governing common interest developments."[5]

[4] *Working with Your Homeowners Association. A guide to Effective Community Living,* Marlene M. Coleman, MD & Judge William Huss, Sphinx Publishing, Napersville, IL, 2003.
[5] CLRC Tentative Recommendation, page 2, lines 29-31.

There appears to be three primary reasons for the CLRC's recommendation for a CID Bureau charged with dispute resolution and enforcement.

First, that litigation involving associations and their members drains community resources and degrades the quality of life in CID communities. This is true.

Second, that most homeowners are at a disadvantage in a dispute with their association because they lack the resources to pursue litigation or even alternative dispute resolution. This is generally true, as an association is often better able to bear the costs of engaging in a dispute.

Third, at least as expressed in the tentative recommendation, the primary cause of disputes is attributed to inexperienced volunteers who "make mistakes and violate procedures," which "inevitably leads to conflicts."[6]

To resolve these conflicts, the Bureau would be authorized to resolve disputes informally by Bureau facilitated mediation. As a "last resort," the Bureau would have authority to issue a citation for a violation of the law.[7]

Such a citation could be issued by the Bureau against any person "responsible" for the violation.[8] If the Bureau finds by clear and convincing evidence that a director or officer acted with malice, oppression, or fraud, the Bureau may order their removal from the Board.[9] Any other person cited, if acting with malice, oppression or fraud, could be fined up to $1,000.[10] The person who is cited would also have their name published on the Internet in order to "allow a potential CID home buyer to research whether a particular community association has a history of violating the law."[11]

Once again, the emphasis on punishment seems to be based on the assumption that costly and divisive problems are driven by the persons in control of the associations. It would seem more accurate to alter this assumption to reflect the fact that it is often the case that the conflicts are driven by disgruntled owners who have difficulty working within the community and availing themselves of their political remedies to affect change. There are of course occasions where the volunteer Board members exercise control in a heavy handed manner, which can create or exacerbate a

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[6]While the CLRC Tentative Recommendation, September 2004, page 1, lines 14-19, gives passing reference to the fact that homeowners may also labor under a misunderstanding of their rights and obligations, those references are primarily reflected in the provision relating to improving education, and not in the "enforcement" aspect of the proposed Bureau. The enforcement provisions are geared toward punishing volunteer directors and managers who are found to have "violated the law."

[7] CLRC Tentative Recommendation September 2004, page 2, lines 28-34. The citations could be issued pursuant to the Department of Consumer Affairs citation authority as authorized by Business and Professions Code Section 125.9. The person cited would have the right to challenge the citation in an administrative and/or judicial proceeding.

[8] The proposed legislation that would create the CID Bureau, on its face, would apply to "any" person responsible. (Proposed Legislation Section 1380.310(b)). This may include directors, officers, committee members, managing agents, and even other consultants to the Boards, including legal counsel.

[9] The standard for this finding is the same standard for assessing punitive damages in a civil case, Civil Code section 3294. While this is a very high standard, the mere threat could have a chilling effect on volunteerism in associations.

[10] Proposed Legislation Section 1380.310(d).

[11] CLRC Tentative Recommendation, September 2004, page 3, lines 4-5.

problem. The dispute resolution procedures of any proposed Bureau should fairly reflect this shared responsibility for disputes.

In sum, while there is the need for a cost effective alternative dispute resolution system, that system should recognize that disputes are not always caused by the volunteer directors, or by management who serves the community.

Other concerns are raised, such as:

- the possibility that the complaint process would be misused by owners without valid claims to establish leverage over their associations; or to "get back" at volunteer Board members;
- the concern that minor "violations of law" would be actionable (such as providing three days notice for a Board meeting as opposed to the required four days under the Open Meeting Act, Civil Code Section 1363.05);
- the negative impact the complaint process will have on Directors' and Officers' liability insurance policies and the issuing insurance companies, who might be obligated to respond and defend "complaints"
- the loss of real estate value and loss of revenue to realtors if an offending association listed on the Bureau's website became a detriment to refinancing or resale of a home in the CID. Real property in CIDs is estimated to be in the trillions of dollars.

In sum, a system that is based on the ability to fine and cite volunteer directors and anyone else for "violations of law" appears to have disadvantages that outweigh the advantages.

In addition, even if these enforcement and citation powers were eliminated, the proposed Bureau's mandate to resolve disputes informally as proposed may be too vague to be effective. The proposal requires that the Bureau, "within the limits of its resources," investigate, confer, and assist in efforts to resolve a dispute.[12] The lack of a specific time frame or process is likely to leave the parties in limbo for indefinite periods of time, especially given the possibility of an overwhelming number of complaints in relation to the staffing of the Bureau.

California has been proactive in enacting legislation relating to CID dispute resolution. The Davis Stirling Act includes very specific pre-filing dispute resolution process. Importantly, Assembly Bill 1863 was recently passed, which will (effective as of January 1, 2005) include new requirements, all geared toward making the ADR process less costly and more available to homeowners. A valid question is whether the new ADR procedures should be evaluated and prior to creating a governmental agency which lacks clear guidelines and resources to resolve disputes.

What does it cost to mediate disputes in CIDs? Our research found a wide range of fees and levels of service.

The California Association of Realtors has a mediation training program at Pepperdine University. The fee to complete the program is $400 per person and the program appears to be a working one for realtor disputes.

[12] Proposed Legislation Section 1380.300.

Mediator billing rates at Judicial Arbitration and Mediation Services "JAMS" are running anywhere from $330 per hour to $10,000 per day (per Heather Muirhead of JAMS, San Francisco). According to JAMS, the average mediation is approximately six (6) hours.

In the Sacramento Region there are three to four Mediation/ADR Service Providers. The average cost for mediation runs approximately $400 per hour, which is split between the parties. While the length of mediation time varies, they typically last from 4 to 8 hours and the process is typically non-binding. One Mediation service requires a $3,500 flat fee which includes a site visit, written report of the findings, and then a mediation session to discuss and mediate the findings. The cost is split between the parties.

Our research (using feedback from CID legal counsel(s) throughout the state) has also told us that many homeowners who have disputes with their Associations begrudgingly use the ADR process under Civil Code §1354. Typically, they proceed to file a lawsuit against their Association because they did not like the outcome of the ADR process or in several instances, ignored and did not respond to the request for ADR by the Board of Directors. We anticipate that the enacting of AB 1836 (January 2005) will assist in mandating use of the ADR process. Only time will tell us so.

Taking a conservative approach, let's say 3% of the consumers living in CIDs (9.5 million) required 1 (one) mediation per year. This would equate to 285,000 mediations annually. Would the Bureau only used paid, trained staff to mediate disputes or would the Bureau contract with outside firms to assist in the anticipated workload volume? If one third (1/3rd) of the 285,000 annual mediations were conducted by outside independent professional mediators, at $330 per hour for 6 hours each, the outside cost for mediation would be $186,219,000 per year (94,050 x 6 hrs x $330 per hour).

Concept: **Shouldn't the Legislature allow time to evaluate the impact of the newly adopted ADR processes of Assembly Bill 1836, effective January 1, 2005, before assessing the need for a CID Bureau to handle HOA disputes?**

The legislature has been addressing dispute resolution in CID's for over ten years. Civil Code Section 1354 was first adopted in 1994 as a response to concerns about relatively minor disputes involving associations becoming costly and time consuming litigation.

In September of 2003 the CLRC issued its recommendation regarding changes in the ADR provisions of Section 1354. This recommendation focused on two primary areas where improvement was required. First, the ADR process should be made more "mandatory" and second, the dispute resolution process offered should be more cost effective. [13] These recommendations became AB 1836, and have now become law. On January 1, 2005, these new ADR provisions of the Davis-Stirling Act will take effect. They will supplement, but not replace, the existing provisions of Civil Code section 1354.

Most importantly, the new provisions require that the association offer and participate in a "fair, reasonable and expeditious procedure for resolving disputes."[14] If the association does not adopt

[13] CLRC Tentative Recommendation, September 2003, page 700.
[14] Civil Code Section 1363.820.

such a procedure, then the statute supplies the process that must be followed, which includes a requirement that the Board (through a designated Board member) have a face to face meeting with the other party.[15]

This is a significant step. While prior law only required the parties to "endeavor" to submit a matter to ADR prior to filing suit, and contained many "loopholes" to its application, AB 1836 requires an association to offer and then participate in this process for almost all of the common disputes between the association and an owner.

Question: Should the impact of these new provisions be evaluated before dispute resolution and enforcement is turned over to a governmental agency?

Consideration: The concept of a CID Bureau is generally welcomed as a step that may assist California CID's to resolve many of the significant problems facing them. A Bureau's educational and data gathering functions could be of significant assistance to CID's. However, a Bureau that would have as one of its main functions the ultimate punishment of unlicensed volunteer directors and community association managers should be reconsidered. Moreover, the dispute resolution process of new AB 1836 may prove to be effective and time should be provided to allow it to be evaluated.

Question: Should a CID be required to utilize every avenue of resolution available under their governing documents and the Davis-Stirling Act, before a complaint is filed with the Bureau? How will an owner or volunteer board member be able to discern (as lay people) what kind of dispute should be brought before the Bureau?

Like any argument between 2 entities – the best way to resolution is to work it out between themselves. However, the concept of the CID Bureau administering complaints of violation of laws vs. simple neighbor disputes evoked quite a discussion among our TF members. The Civil Codes are murky and can be interpreted in many fact patterns that a violation of law has occurred, when in fact it hasn't. No set of governing documents (CC&R's, Bylaws, Operating Rules, etc.) for the 36,214 Associations is the same. It will be a real challenge for the Bureau to sort through the fact patterns and determine if indeed a violation of law has occurred, or is mediation simply in order to resolve a dispute. In the case of the DRE, with its licensees, the law is much clearer regarding whether or not a licensee has violated the law. There is also the inherent problem for the Bureau to prosecute unpaid volunteer directors, and the further problem of Directors & Officers insurance carriers backing off from covering claims and writing policies if the Bureau penalizes volunteer directors.

There is a significant amount of overlap and interplay between the CC&R's, Civil Codes, Corporation Codes and Business & Professions Code. Sorting through the points and authorities of a case when having to refer back to these different sources (plus operating rules and regulations, architectural guidelines, codes of conduct, conflict of interest policies, board policies and practices, etc.) will make investigations and adjudications difficult and lengthy, which translates to "expensive" when all is said and done. It should also be mentioned that the appeals process may be challenging with so many levels of authority in the documents. Just how many people will the Bureau need to properly investigate all these complaints, verify the facts and research the appropriate authorities? There are additionally innumerable

[15] Civil Code Section 1363.840

sets of governing documents that are still not in compliance with current Civil Codes. Will the Bureau have the responsibility and authority to require an association potentially assess its owners for legal fees to hire an attorney to update their governing documents?

CACM contacted several insurance firms who specialize in insurance policies for CIDs to inquire as to the number of claims and/or incidents of wrong doings of a board of directors. It is apparent that an oversight agency should be substantiated by the actual incidents of claims against boards and management firms.

To date only one firm responded to our inquiry. The LaBarre Oksnee Insurance Agency, with offices in Aliso Viejo, San Diego and Palm Desert, cited that with over 2,500 association clients in their portfolio, the ratio of claims is less than 1 percent. CACM will continue to pursue additional data with other insurance firms that provide coverage for CIDs.

Concept: The bodies of laws that govern CIDs continue to be cumbersome and confusing to volunteer directors and owners.

Professor Susan French of the UCLA Law School in her background study report to the CLRC in November 2000 provided the following comments in *Section III, Criticisms of Current California Law Governing Common Interest Communities.*[15]

- *The Law Is Too Complicated and Hard to Understand: The prime culprit here is the Davis-Stirling Act, which is almost impossible to read, even for people with legal training. It is poorly written – some parts virtually incomprehensible; others are extremely difficult to wade through."*
- *B. The Coverage Is Very Uneven: The statute covers some areas in excruciating detail and pays little or no attention to others. There is little attempt to state general principles governing duties of the association to members, for example, but there are elaborate provisions with respect to disclosure of insurance policy details."*

She goes on to state in *Section IV. Recommendations for Study,* the following: "*The Davis Stirling Act is so unwieldy, disorganized and loaded with micromanagement minutia, that serious consideration should be given to starting over with a new framework on which a more comprehensible and comprehensive law of common interest developments could be constructed."*[16]

The CLRC has done a good job with its first step in providing some re-organization and titling sections of the Davis- Stirling Act. However, CACM encourages the CLRC to continue an in-depth review and simplification of the Act, as well as defining the interrelation of the Act, Corporations Codes and other bodies of law that govern CIDs.

Professor French also suggests the following to the CLRC in her report. *"In conclusion, California law governing common interest developments could be substantially improved by simplifying, clarifying, and expanding the scope of the current statutes and by providing more affordable and available means to ensure compliance with the law and resolve disputes among CID members and boards."*[17]

Question: Has there been enough "clean-up" of the Davis Stirling Act to be able to have a minimum expectation that owners and volunteer board members are first and foremost, able to understand and effectively implement the Act? Why create a Bureau of CIDs that will be required to work within the context of enforcement and adjudication of a confusing and micro-managing body of law?

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15. *California Law Revision Commission Background Study, Scope of Laws Affecting Common Interest Developments,* Professor Susan French, UCLA Law School, November 2000.

Consideration: CACM would strongly urge the CLRC to continue the obvious and necessary process to simplify the language in the Davis Stirling Act for owners and volunteer directors in California CIDs. With simplification and significant comprehensive changes, many of the analogous disputes between owners the boards may be able to resolve themselves. How can any regulatory agency expect consumers and volunteer directors to "obey the rules" if the rules provided are not easily understandable? The revisions for simplification would additionally provide the Bureau the opportunity to garner more appropriate and consistent information on the types of disputes and to adjudicate those disputes with laws that are comprehensible. We need clarification for the lay person.

Concept: What is the number and types of complaints received by our elected officials regarding CID disputes?

CACM felt it was necessary to explore this concept to consider the perceptions of legislators with constituents who provide monetary influence, voting influence and ask for help when they have a dispute with their association. Since it is the legislators who have initiated the numerous revisions to the Civil Codes and other statutes, typically as a response to a constituent complaint, this insight is important to the concept of a proposed Bureau. If a Bureau is established, the legislators will be referring their constituents and their complaints to the "one-stop shopping" place for results.

Attached to this paper is *Addendum "A"* which is a copy of a letter sent to various legislators with CIDs in their districts, asking for their assistance in gathering data.

To date, we have had few responses due to the holidays, and term limits as district complaints were purged or new members who have no records. We anticipate that additional information will be forth coming after the holidays and we will continue to provide the CLRC with feed back on this ***Concept***.

1.**Assembly Member Simon Salinas (D-28th AD – Monterey**): Darlene Dunham, District Director responded they rarely have complaints. His district represents 280 associations, which total 21,000 units.[18]

2. **Assembly Member Kevin McCarthy (R-AD 32)**: Treva Elliott responded that they have never received any complaints in the 2 years the member has been in office. This District represents 307 associations, which total 64,000 units.[19]

3. **Simitan's Capitol Office**: They do not keep records of how many complaints are received but state the complaints are in their "top 10" issues. They did comment that many of the complaints are from seniors who complain about any type of change and the complaint is general (the seniors don't like change) rather than specific.

Concept: How are other states dealing with their CID issues?

CACM is continuing to gather data from other states to provide input to the CLRC. We will provide a supplementary report to the CLRC with our findings.

_____

16. Ibid
17. Ibid

Concept: How does the CLRC envision the education arm of the Bureau functioning? In our in-the-trenches experience, it is difficult to motivate volunteer board members to attend a simple training program specifically designed for directors, due to their (1) lack of interest; (2) time constraints; and (3) "it's the job of the community manager." Their motivation usually occurs when there is trouble in the community.

The CLRC proposes in Memorandum 2004-39 that one of the primary responsibilities of the Bureau would be to "maintain an informational website, distribute publications, and conduct training classes. It would maintain a toll free number that CID owners and officers could use to request information or advice. The goal would be to educate community association officers and homeowners s to their legal rights and obligations and to provide training in effective community association management.

CACM agrees with the CLRC that "Education can prevent or reduce the severity of mistakes and misunderstandings that might otherwise result in costly and rancor disputes."

We would suggest to the CLRC that the term "effective community association management," is an inaccurate approach in the training of CID volunteers. *The board's job is to govern their community.* Leadership, effective policy making, delegation of authority (not responsibility) and the overall role of a fiduciary is the real job. The board is the link between the owners and the organization and utilizes the necessary resources to implement their decisions. The resources are other volunteers (i.e. committees), and third party contractors which includes professional community management, legal counsel, risk management professionals, etc. that implement to directives of the board.

The CLRC also proposed "within 60 days of assuming office or providing services as a managing agent, a community association director or managing agent shall certify to the Bureau, in writing, that the director or managing agent has read …the declaration, articles of incorporation or association, and by-laws of the association.." [18]

Some Associations employee individuals as their "on-site" manager yet the proposed code do not address this avenue of community management. Larger communities may also employ a "covenant enforcement employee," who may be delegated the responsibility by the Board of the overall implementation of enforcing the governing documents and architectural rules for the community. Again, adherence at this level is not addressed in the proposal.

As part of the CACM manager certification program, we train our manager members in the numerous legal definitions of managing CIDs. We additionally require adherence in our

Professional Code of Ethics and Standards of Practice to the following, *"The Member (manager) shall comply with all lawful provisions of the client's governing documents."*[19] We suggest that "adherence" to this provision be provided to the association by incorporating a statement in Civil Code Section 1363.1, "Managing Agent Disclosure" rather than an additional statement to the Bureau.

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18. CLRC Tentative Recommendation H-853, September 2004. §1380.230, Director and Managing Agent certification.
19. CACM Professional Code of Ethics and Standards of Practice, Section 1-04 Compliance.

Final Considerations

Many individuals in our research expressed some fears that cite inefficient governmental bureaucracies instead of providing self-reliant methods of mediating disputes at the local level for CID issues. Many controls and resolutions of CID issues *already exist* in Civil and Corporate Codes, as well as the governing documents (including CC&R's, By-Laws, Rules & Regulations, Architectural Guidelines, Collection Policies, ADR Requirements, Codes of Conduct, Roberts Rules of Order, etc.

Others asked if making the Bureau a part of the DCA is inviting more bias against CIDs and in favor of the "little guy" who (1) doesn't want to abide by the rules, understand his contractual obligations under the governing documents (including giving up certain individual rights), (2) does not pay attention to information provided annually by his CID; and (3) feels "victimized" by an "unfair" system that punishes those that "get out of line."

Some also asked the following, "What happened to self-reliance and taking responsibility for the consequences of your actions? " What happened to "cooperation, compromise and conciliation in the best interests of all parties?" Some suggested the concept, "when in doubt, the government will bail you out."

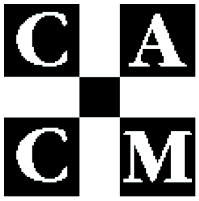
Of course the ever present "cost" to each owner in a CID was expressed as a concern. Many senior communities are vigilant against any reason to raise assessments. A $10 per unit per year fee is in many cases, impossible for the senior to afford as well as smaller associations that may not have the resources. In recent years items such as increased insurance premiums by as much as 400% have caused many associations serious financial woes. $10 may not seem like a lot of money but to some it is. As we asked earlier, who foots the bill when CIDs don't pay their fair share to fund the Bureau?

We also discussed that the proposed Bureau of CIDs could provide a much-needed, centralized source of accurate information, training and advice for board members and homeowners. It could relieve CID's from having to administrate often petty complaints not based on fact, but emotion. It would assist in the education of the consumer, who is often intimidated by the bureaucratic attitudes of volunteer directors, many of whom abuse their power as a director for vindictive or selfish reasons. It would hopefully provide a low-cost, easy to use resource for information and action to hear bona fide complaints against associations, their boards, managers and attorneys.

We strongly urge the CLRC to make this step to the creation of a new agency a methodical and careful one. We suggest long range planning FIRST, before legislation is enacted, to ensure the financial viability of the Bureau and to promote effect management of an anticipated large staff and volume of activity. This is a bold step for all California consumers.

Lastly, there is a concept that the legislature clearly intended when enacting the Davis-Stirling Act - the principal of equitable servitudes – doing what is best for the many rather than few. Let's be sure this step is for the good of the many.

ADDENDUM A



California Association of Community Managers, Inc.SM

SAMPLE LETTER

2171 Campus Drive • Suite 260
Irvine, CA 92612-1430
949.263.2226 • 949.263.3789 Fax
800.363.9771
info@cacm.org • www.cacm.org

November 17, 2004

Honorable [ ]
California State Assembly
State Capitol
Sacramento, CA 95814

Re: Request for Information regarding Common Interest Developments

Dear Assembly Member [],

The California Association of Community Managers ("CACM") is a non-profit association dedicated to ensuring professionalism among community management companies. With more than 9 million California residents residing in common interest developments ("CIDs"), quality management of CIDs is critical.

The California Law Revision Commission ("CLRC") is currently undergoing a study on common interest developments. To assist the CLRC in this study, CACM has convened a Blue Ribbon Task Force to review issues surrounding the CID community. *Because your district contains many CIDs, CACM is gathering empirical data on how many complaints, and if possible what kinds of complaints, you have received from your constituents living in CIDs.*

In order to be responsive to the complaints your constituency may have, CACM would appreciate any information you could provide us. The information will then be relayed to the California Law Revision Commission to help aid them in their study.

This information can be relayed to:

Jennifer Wada, CACM Legislative Advocate
Public Policy Advocates
(916) 441-0702
Jennifer@ppallc.com

CACM is dedicated to promoting the quality of life for your constituency living in CIDs.

Sincerely,
Karen Conlon, CCAM
President
California Association of Community Managers

EMAIL FROM HARVEY DALKE (DEC. 28, 2004)

I welcome the opportunity to get envolved in establishing an agency to police HOA s. I have several condos Village Greens located between Palm and Hamilton streets and Greenholme Dr.

The directors have hired a management co. called Estates Association Services Inc. These people have no known physical address. They work out of a P. O. box. They will accept no mail that requires a signature. They are continuously assesing fines for frivolous and non existent violations. They billed me for nailing three slats on a rear gate claiming that my tenent had broken it. The slats fell off as the wood holding them was dry rot. I was cited for having stained glass in a front door even though this was the origonal installation as were many other units. On two occasions they attemted to tow my vehicle because the D M V doesn't issue the renewal tag the same day as the fee is received. These same people however have no regard for the C,C,and R s as the are applied to themselves.The rules are that document pertaining to association business are open to review by the membership. I requested a copy of the contract we have with the management co. and was denied. I believe this was also a violation of a state law which Lowenthal put through last year. The rules also require that a large expendature must be voted on by the members. They spent two or three hundred thousand on roofing last year without approval of the members. I am not certain because their deals are secret, but I don't think they got more than one estimate. To my knowledge there has never been an honest audit of their finances.

I have looked to the Secretary of State and also the real estate board for relief but am advised that there is no one that regulates these people and my only recourse is in civil court.

I would like to sugest that the oversight bureau fund itself lin the same manner that the Dept. of Corporations is funded and would not be an additional burden on our treasury.

I hope that we are succesful and remain eager to help you in any way I can.

Harvey Dalke

EMAIL FROM LLOYD SMITH (DEC. 28, 2004)

While I still believe there is a great need for some form of CID Oversight Agency one question plagues me. How will the administrator for such an agency be chosen? I shudder to think that it may be a political appointment, in all likelihood that would burden homeowners with an individual from a specialty law firm or CID management company. At the other extreme many if not most of the

so called HOA advocates have a personal axe to grind and in my opinion would be equally unsuitable to head up such an agency.

A perplexing problem and I'm sure it has been considered, I suggest more consideration be given it and some method of selecting an unbiased agency head be included in the recommendation.

Sincerely
Lloyd Smith
1956 Discovery Village Ln
Gold River, CA 95670
916 635 5565

EMAIL FROM ROBERT D. SAUNDERS (DEC. 29, 2004)

I wish to express my enthusiastic support for your Tentative Recommendation for State Assistance to Common Interest Developments. It is a sorely needed measure to address an area which is currently out of any effective control

Although I became aware of your proposal through Mr. Hebert's posting on the American Homeowners Resource Center website (<http://www.ahrc.com>www.ahrc.com), I wish to disassociate my response from any coming through that organization, which I consider to be too radical to be an effective voice for homeowners in CIDs.

I am not one who decries homeowners associations in general. I had served four years as the first president of a new 178-unit CID in Orange County prior to retiring to our Palm Desert condo in a 1200-unit CID. During my tenure I learned the vast powers granted to HOAs and took care to keep our Board focused only on issues affecting the common welfare of our residents, to the extent of ignoring inconsequential violations of the CC&Rs. Even with that attitude I experienced the vilification of as substantial number of homeowners who resisted any attempt to enforce CC&Rs which infringed upon their unfettered desire to use their property in any manner they wished, including such things as basketball backboards set in the streets, dogs running free and private landscaping in common areas. This experience taught me that not every complaint from a homeowner in a CID is worthy of official inquiry. Some people are not constitutionally ready to live in a CID and ought to have been warned before buying into one. Once there, however, they must abide by duly adopted CC&Rs and Rules and Regulations or leave. I find that most of the postings in the AHRC website seem to come from the latter category who just won't conform.

That said, I still find much to be concerned about the governance of CIDs, based in part upon occurrences in the HOA in which I now live. To my surprise I have found that there is no governmental oversight of CIDs once their initial documents

have been approved by the Department of Real Estate, other than private legal action. I am not talking about dispute resolution. I am addressing the flagrant violation of state laws governing the actions of HOA organizations. Since the Attorney-General has declined to take any role in this area, HOAs have been free to disregard such niceties as having members vote on changes to the CC&Rs.

For example, our HOA Board decided to revise and update our 20-year old CC&Rs to delete out-dated references to the developer and to reflect changes in the Davis-Sterling act which rendered some provisions unenforceable. Its attorney decided to use a cookie-cutter set of CC&Rs he had prepared for other associations, but tailored to our particular association. In doing so, he made several changes affecting the relationship between the HOA and the owner of the Country Club around which our condos are built and to which we make significant monthly payments. Several of these he made with the knowledge that the consent of the Club was required, but he made no attempt to solicit such consent. One of these changes would have reduced our monthly dues to the Club by two-thirds! When this item was called to his attention after the proposed revision had been sent out for membership approval, he conceded that this was a mistake, but he declined to recall the proposal and reissue a corrected one.

After the membership approved the proposed revision (which they could not have fully comprehended in the absence of a detailed explanation of the changes), the attorney changed the provision relating to the reduction in monthly dues to the Country Club and deleted several other provisions that would have required the consent of the Club and then recorded the altered document. This action clearly violated the state law requiring a vote of the membership for changes to the document that they had just approved. Yet our Attorney-General declined to take any action beyond writing a letter to the HOA calling its attention to this apparent violation. Despite a non-responsive reply from the HOA attorney, there was no follow-up.

While it may seem insignificant, this example clearly demonstrates that there is no state oversight over compliance with its laws regarding the organizational conduct of HOAs. Private litigation is entirely ineffective in such a case, because no homeowner or group of homeowners is financially impacted. Certainly some number of homeowners must have voted in favor of the proposed revision, influenced in part by the apparent reduction in monthly dues to the Club (a sore point in this community because of the lack of any quid pro quo from the Club to the homeowners), but there is no way of measuring whether this would have made a difference in the result. On these facts no homeowner is sufficiently aggrieved to expend substantial funds to litigate this issue, especially in the face of the huge awards reportedly made by the courts in favor of HOA's attorney fees.

Your proposal adequately addresses the issues I am concerned with. I see no need for the proposed Bureau to adjudicate disputes over HOA governing documents, beyond issues relating to their validity under State law. However, it would be beneficial if the Bureau responded to such complaints by explaining the

authority of the HOA to enforce such documents, thereby satisfying the complainants that the HOA actions were proper and pointing them in the direction of seeking to change the governing documents or leaving the CID. Also, the proposed educational program of the Bureau could lead HOA's into a direction away from inane actions, such as requiring leashes on cats.

My only concern about your proposal relates to the qualifications of the Bureau chief and the composition of the Advisory Committee. The much maligned CAI is accused of co-opting Nevada's ombudsman. Whether or not this is true, it is important that your proposal avoid the appearance of being aligned with the group that profits from its employment by HOAs-professional community managers and attorneys. While they have much to contribute to the Bureau and should both be represented on its Advisory Committee, it is the control which they presently exert that is the basis for much of the current problem with HOAs. Some balance between the paid staff (both managers and attorneys) and homeowners should be guaranteed.

In conclusion, let me philosphize about HOA Boards. Board members are homeowners, too. It is only when they get elected to the Board that they sometimes get the idea that they are better than their fellow homeowners. It seems to me that this happens when managers and attorneys hold sway over Board members, indoctrinating new members to stay in line with previous policies that they have instituted. An outside agency, such as your Bureau, can serve as a mentor for new Board members. Instead of taking instructions from the management company or the HOA attorney (as is done in our association), new members should be "trained" with materials produced by the Bureau. This will help insure their independence from the staff.

I have written several State legislators regarding this problem to no effect. I am copying this email to two them to urge their support for your proposal.

Robert D. Saunders
248 Serena Drive
Palm Desert, CA 92260-2158
Ph.: 760-340-6335
Cell: 760-799-3540
Fax: 760-437-3935

EMAIL FROM CAROLE HOCHSTATTER AND NORMA WALKER (DEC. 30, 2004)

These comments are from Carole Hochstatter and Norma Walker after 14 years of experiences residing in, and trying to participate in, The Vineyards Homeowners Association, and Pacific Management Company since 2000, owner

Jim Antt. It has been our sad experience that only faces change on boards not the ability or attitudes.

When we were unable to reach resolution with our association board of directors, even when Norma was a board member, we began searching for a vehicle to lead our association into compliance with law, and documents. Our Internet searches lead us to the CLRC in 2002.

The facts remain; most association's volunteer members are not trained to maintain property or follow law, and association documents. A willingness to be a board member is not enough. There are laws to protect homeowners, but no sanctions in the law.

We believe the CLRC needs to agree to form an oversight bureau to make sure that the laws that have been enacted since 1984 are followed by all. Prof. Susan French wrote in the: Scope of Study of Laws Affecting Common Interest Developments, questions and difficulties with Davis-Stirling, and the other myriad codes, and case law confronting CIDs in California. Little has changed. CID homeowners who are interested in maintaining their property values have the same difficulties mentioned in Prof. French's study.

C. Securing Compliance with the Law Is Difficult

> There is no regulatory agency charged with overseeing CIDs once they have passed beyond the DRE's control over the initial sales stage. If association boards fail to carry out their responsibilities or fail to comply with the law, owners have little recourse except to the courts. There are ADR provisions applicable to disputes over enforcement of covenants and restrictions in the declaration (Civ.Code § 1354), but they do not apply to disputes over management of the community or failure to comply with the statutes. Resort to judicial proceedings is often very expensive and can be very risky for an owner because the association may have greater resources to spend on legal talent, and the owner who loses is often liable for the association's attorney fees. Of the comments received, several expressed strong concerns over the difficulties homeowners face when association boards fail to act or act improperly.

The Protections for Individual Rights Are Weak

> Civil Code § 1354 provides that restrictions contained in a declaration are enforceable unless unreasonable. "Unreasonable" was interpreted in Nahrstedt v. Lakeside Village Condominium Ass'n, Inc., 8 Cal. 4th 361, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994), to mean restrictions that are arbitrary, in violation of public policy, or in violation of a fundamental constitutional right. This limitation on allowable covenants is very close to that adopted in the Restatement, Third § 3.1), but there is nothing in Davis-Stirling comparable to Restatement § 6.7 or UCIOA § 3-102(c), which limit the extent of the association's power to adopt rules and regulations affecting use, occupancy of, or behavior in separately owned lots or units

Davis-Stirling was written by those groups other than homeowners, for those who had a vested interest association contract. Enforcement of the law was left to the Courts. So much for the individual homeowner.

Tentative Recommendation #H-853 -September 2004 page 14, line 13 through 35 looks at some strategic opportunities to negotiate difficulties which have been provided by any number of anecdotes, including our own.

Hope is rising until page 20 comes along. That this Bureau would have only the ability to hear and adjudicate the law, homeowners and Board of Directors would then be in the same legal situation they are presently. Builders/developers receive from the DRE approval for the initial CCRs which most often are purposely vague so that buyers will not see the future difficulties of enforcement which give lawyers a fertile field for litigation. When Board of Directors of Associations do not comply with CCRs, is litigation still the only answer.

If we follow Article 4. Operating Rules section Civ. Code #1357.110-1357.150, the procedure used to make the rule made by a Board of Directors would be the jurisdiction of the Bureau, but not the rule. Is this separating of procedure and rule a sensible way to make CIDs more livable or more difficult?

We cannot speak to the constitutionality of the adjudicative authority of the proposed Bureau with regard to CCRs; however, without the inclusion of the CCRs, the Bureau would defeat its purpose in our opinion.

Nonjudicial foreclosure in CIDs bars homeowners from the same protections that they have from their mortgage company or their county tax assessments. Without a standard written into Civ. Code # 1356.1 there is room for any or all manner of misuse of the Code.

The argument that without nonjudicial foreclosure associations will be at the mercy of “knee jerk reaction” as Beth Grimm has written is foolish in the least and overstated in the most. The Governor vetoed AB 2598 saying that the bill went too far. Available to associations is Small Claims Court to collect assessments before they become so large as to necessitate foreclosure. Nonjudicial foreclosure remains without any safeguards to homeowners.

It appears even HUD is concerned about non judicial foreclosure as is evidenced by: FR Doc 04-24989. Non judicial foreclosure seems to cause difficulties across the nation. FR Doc 04-24989 suggests assessments be a part of escrow accounts; this would address those with mortgages, however, it would not address those association members who own their property outright.

Using a dollar amount to limit non judicial foreclosure is not a reliable nor in some instances does an equitable standard since each association have a different assessment. A more equitable standard would involve a time frame. How would a Bureau move on such disputes when associations currently have a rule, no rule, or a contract with a law firm to handle overdue assessments? The burden of proof of non payment should rest with the collector of assessments.

Even with the passage of AB 104, the financial records of associations are seldom readily available to the homeowner. The law, and our personal association,

now give homeowners the right to view and copy financial documents; however, it is most often not done in the time frame required or the complete record requested. Some of our larger associations are having great difficulty receiving their financials even with the order of a judge. Lawyers are sending threatening-sounding letters which seem to be to cause fear in homeowners inferring that homeowners need a reason beyond being a member of the association to request financial records.

Homeowner associations that are not self managed usually allow their accounting books and records to be managed by an intermediary company instead of the Officers of the association. Times, and events have shown that the, "THE CHAIN OF COMMAND" in most Homeowner Associations are blurred from the Board to the management company to the Attorney to the vendors. Individual homeowners end up with no right to know about the financial health of the association, no bid contracts, automatic renewable contracts, assessments raised without a zero based budget, a symbiotic relationship (THE CHAIN OF COMMAND GROUP) with the Board of Directors, secret meetings, meetings called potential litigation, and lastly the name calling of concerned (TROUBLE MAKERS) homeowners who ask questions. Without oversight, members of the community are being cheated of their right to participate in their community affairs.

It is well known throughout the CID industry that volunteer board members hire the Management Company who also is helpful with finding the HOA Attorney; then the two are both retained for use by the Board. The attorney is usually used by the Management Company for most of their clients. Homeowners often have the mistaken notion that the association's attorney also represents the homeowner when in fact the attorney represents the board.

Who is sanctioned when members are overcharged? Who is sanctioned when the excess funds of the corporation are retained by the board? Who is sanctioned when the IRS tax revenue ruling 70- 604 is not used by the board? This ruling could benefit the members, and possibly lower the assessment for the coming year in two ways: refunding the excess to the members or apply the excess membership income to the next year's assessment. Will there be standards for associations to use in making annual budgets? Do homeowners benefit if a budgeted line item is overstated?

Are small associations to be ignored because they are not in the law? Homeowner association Board of Directors are difficult to change, because "reasonable" nominating and election procedures are not followed as stated in Corp. Code #7521 through 7616. When these codes are not followed, how is the Bureau going to be prepared to adjudicate the matter? Small associations are not even mentioned in these codes.

SENATE BILL No. 1581 Introduced by Senator Battin, February 19, 2004 states: "The people of the State of California do enact as follows: SECTION 1. (a) The Legislature finds and declared the following:

(1) Elections conduced in common interest developments are rife with fraud and procedural inconsistencies. . . .” SB 1581 by Sen. Battin seems to be inactive; therefore, how would the Bureau deal with election conflicts?

We have these and other questions about the procedures that will be used by the proposed Bureau. If the new Bureau is just to be another layer of government that will not aid individual homeowners to have an equal footing with Board of Directors, then what is the point of the exercise?

Sincerely,
Norma J. Walker
Carole Hochstatter

Community Associations Institute-
California Legislative Action Committee

Mr. Brian Hebert
Assistant Executive Secretary
California Law Revision Commission
(via email)

December 30, 2004

Re: Proposed Legislation to Create a Common Interest Development Bureau

Dear Brian:

Members of our legislative committee reviewed the proposed legislation to add Chapter 11 to Title 6 of Part 4 of Division 2 of the California Civil Code to create a Common Interest Development Bureau.

A threshold question is whether it makes sense to create a Bureau whose function is partly to resolve disputes when the legislature has just enacted AB 1836, which the CLRC supported, containing the new Civil Code Sections 1363.810 through 1363.850 which provide for new dispute resolving requirements. Shouldn't these provisions be tested to see if they work before mandating a new layer of dispute resolution is added by the Bureau?

The Community Associations Institute and the delegates to its California Legislative Action Committee are aware that problems and conflicts can and do exist in the operation of community associations and that these problems and conflicts can be difficult to resolve. Although there are more than 7,000,000 residents in 3,000,000 homes in 34,000 associations, litigation is relatively infrequently initiated to resolve issues. Litigation is both time consuming and expensive and the expense can often prevent property owners from challenging rules, etc., and community associations from enforcing them.

The concept of the Bureau and its powers as envisioned in the legislation seems to be based on the theory that the association may be overstepping its express authority in dealing with its members or other occupants when conflicts arise. While this may be true in some cases, conflicts also occur due to the flagrant disregard of the governing documents by individual owners or occupants who may not wish to act in the interest of the community as a whole. Our committee agrees that any effective method to deal with such problems would be beneficial so long as it truly balances the interests of the individual homeowners as well as the community at large.

There is a wide variation in HOA sizes and types; some have almost no common area, very low assessments, and governing documents which have few restrictions and architectural controls and almost no impact on their members. Others have extensive

common area and restrictive governing documents which directly impact their members on a daily basis. There are older rural associations with assessment structures set up in the 1960s or 1970s that have low assessment limits and which still contain thousands of vacant lots. On a per lot basis the payment of the fee levied to run the proposed CID Bureau could be deemed unfair to some owners and a major budget problem as these associations find it almost impossible to obtain owner approval for any purpose much less to pay a government imposed fee. Thus, any fee structure should allow the fee to be added to the association's budget without having to obtain approval of the members.

Will the Bureau be able to handle the volume of complaints that it is likely to receive? As any one working in this area knows, besides the legitimate issues that arise, there are substantial numbers of members who raise complaints simply because they do not like the policies of the association or because the association opposes something that the particular member would like to do or has been doing. These members often cause an association and its volunteer directors and officers a substantial portion of their time and it would be unfortunate if a Bureau became another method by which these members can cause delays and costs for legitimate association activities. Thus the question arises that if the Bureau has the power to fine or otherwise punish associations should it not also have similar powers to deal with members who are acting outside their legal rights?

In addition to the issues raised above our committee has the following specific comments to the proposed legislation.

- Proposed Section 1380.120. There is no exact definition in the industry for "master association" and "sub association". There are some larger associations which clearly control subordinate associations in one way or another and some master associations which simply have smaller associations, such as the associations of condominium projects, within their areas. These definitions will have to be revised or no one will be certain what is included. Also taking this section at face value, neither the master nor the sub-association would have to pay the fee letting all multiple associations off the hook for paying fees. Who is responsible for the payment? This whole section needs to be revised.
- Proposed Section 1380.140 should simply refer to Section 1373 so that there is no danger of the definitions becoming different if one is later amended.
- Proposed Section 1380.230. This may seem like a good idea but it seems likely to be overlooked by large number of directors in small associations that do not have professional management. The requirement may also discourage people from serving. Also the fact that someone reads CC&Rs and the Davis-Stirling Act does not mean that there is a full understanding of them. It might be much more useful to require attendance at courses which explain the statutory set up and how to understand CC&Rs. Some larger associations and master associations have multiple sets of CC&Rs for various parts of the project. What is actually required here?
- Proposed Section 1380.310. There is nothing about this Section that limits its purpose or application to associations, directors or officers. Is the intent of

this section to allow the Bureau to also act against members or occupants who violate the law? Our committee feels that if any system is going to work the remedies must be available against anyone who is in violation and not be a one way remedy against the association and its volunteer directors and officers. Caution must be exercised in the statute so as to not chill volunteerism.

- Proposed Section 1380.310(c). The Davis-Stirling Act was designed to provide for owner/member control over associations. We do not think it is a good idea for a CID Bureau government official to be able to remove officers or directors who have been elected by the members. If any such removal is to take place it should only be done after a hearing before a judge, not an administrative body. This is a power that no government agency has over corporations anywhere in the United States. The provision, "…order additional equitable relief as appropriate." is very open ended. This provision should be limited as to the exact types of relief may be involved.

Finally, some additional questions needing to be explored more fully in order to determine whether a CID "oversight" Bureau in our State would benefit all stakeholders. It depends on the language in the legislation that authorizes its existence:

1. The Bureau's scope, role, specific jurisdiction and authority.
2. Specifying whom should serve on the Bureau; should they be political appointees, volunteers, paid staff ? Owners, Realtors, board members, attorneys, public (non-HOA) members, determined by income bracket, senior status, trustees, managers, or even legislators themselves as ex-officio members?
3. What experience or expertise should they have?
4. How large will the Bureau become? With 7,000,000 owners, will it be inundated the first day that it's open for business? How large a staff will be needed?
5. How much will is cost to operate? Will association fees be interpreted a new tax on owners? Should only complainants pay the fee?
6. Should the Bureau have authority to fine owners, board members, and the HOA?
7. Will the Bureau really reduce litigation? Should its rulings be binding? What recourse shall each party have after the bureau decides an issue?
8. Will the Bureau's staff in Sacramento fly to Eureka or Temecula to get first hand investigative work done and to meet with the parties or will it be a telephone contact from some cubicle in Sacramento?
9. Will penalties for board malfeasance be equal to penalties for owner malfeasance?
10. Will fines that are levied be paid by members through assessments?
11. Will the Bureau be a paper tiger?
12. Will the Bureau serve more as an ombudsperson for owners than boards?
13. Will the Bureau provide legal advice or lay opinions to persons?
14. Will the Bureau have the right to obtain any records from the HOA and/or owners?
15. Will the Bureau have jurisdiction on new or phased developments?
16. Will the Bureau have jurisdiction on commercial condos?

17. Will the Bureau have authority to interview managers and board members? May these persons have counsel present?
18. What data are currently available, or needing to be gathered and analyzed, to justify creating this Bureau?

CAI-CLAC is hesitant to support the proposed formation of the CID Bureau at the current time and looks forward to exploring the issues with the CLRC and other stakeholders.

Respectfully,

Skip

Skip Daum
Administrator/Advocate
916 658- 0257
caiclac@aol.com

www.responsibleneighbors.com
www.clac.org

FAX

To: California Law Commission - 650-494-1827
Attention: Brian Hebert
Re: Input on Proposed Ombudsman
Date: December 31, 2004

From: Janice Wolf
5 Pembroke Lane
Laguna Niguel, California 92677
Telephone: 949-489-2078
Fax: 949-489-1497

I believe there is a much needed and useful tool not yet introduced to the thousands of home buyers who are looking to invest in homes within a CID. I am familiar with the requirements of HOA's having to provide perspective buyers with a years meeting minutes as well as the HOA audit and budget information. However, to many individuals this information means little. The dynamics of a Homeowners Association, Condominium Association, Common Interest Development, or Mutual Benefit Corporation, can be complex and far reaching. The health of the Association, stability of the board, professionalism of the management company, etc., can, and does, effect property values.

When deciding to make the significant purchase and investment of a home, consumers would be well served by a rating agency. Such an agency could utilize the states existing CIDs' information to rate them much as Moody's or Standard and Poors, and supply consumers with valuable ratings relative to the financial and liability health of the Association they are deciding to buy into. This could also provide a tool to be helpful in assessing which CIDs are not in compliance with State Laws and Regulations, both regarding Stirling Davis and the California Corporations Code. I can illuminate on further thoughts regarding such a service if you believe this concept has merit relative to the introduction of a State Ombudsman or any agency related to such an oversight program.

EMAIL FROM CAROLYN GUSTIN (DEC. 31, 2004)

As a long time resident of and current president of a large condominiums association, I urge you to avoid creating any more levels of government. There are ample ways to address problems and reach settlement. The LAST THING anyone needs is more bureaucracy -- more commissions, agencies, etc. It will only confuse and unnecessarily complicate matters.

Less government, in this case, is more!! CGustin

EMAIL FROM STEVEN SHUEY (JAN 2, 2005)

I found you via the web page, California Law Revision. I was directed there by an emailed newsletter from Davis-Sterling.com, A publication of <http://app.bronto.com/x/trackclick.php?id=10460099_3e3e877a_44376&url=http://www.adams-aucoin.com/>Adams & AuCoin, LLP January 2, 2005. I appreciate the opportunity to share my views.

I am the general manager of Desert Island Condominiums in Rancho Mirage, California. I have been there for 30 years, having started at the bottom of the totem pole, now having been the manager for over 12 years. This is a community of 226 homes with in 3 homeowner associations and 1 master association. I am proud to say that everyone (less the 2% factor) gets along with one another and those who do not, keep quiet. I have 22 board members I deal with and all of them get along.

I enjoy the community association management profession and do what I can to instill good living principals to the communities of the Coachella Valley (Palm Springs area). I write an article for the Desert Sun newspaper that is published every other week (I share the column with a co-author, Gen Wangler of Fiore, Racobs & Powers who is published on the alternate weeks). I also, periodically host a TV show on the local Time Warner Cable Channel, a program we call CAI Report that airs daily with changes weekly. This is said to let you know of my interest in the issue at hand. It is an issue close to my heart.

As a result of the articles in the newspaper, I get folks who call me wanting help to solve their personal issues. A very small few of them are interested in recommending an "ombudsman" or an "oversight commission" for homeowners associations. These few, in my personal opinion, are not suited for homeowner association (CID) living. Even so, they did bring to me issues that are plausible, and possible, and if true, could be reason to have some form of commission to ensure that boards of directors are doing their job fairly and honestly.

The real question in my mind is, how will such a commission or ombudsman be funded without penalizing the good associations that have no need for it?

Could a commission or ombudsman help resolve issues that homeowners have with their associations? I suspect it could, but I think it would soon be overwhelmed - likely with complaints that could have been and should have been resolved internally.

Then the question is... who would decide what issues are handled by the commission?

I am a proponent of mandating qualified professional management in some form (to associations of a predetermined minimum size). In this, I recommend that managers be forced to "do what is right, do it because it is right, and do it right" (and get properly compensated for it). This also may mean the term "qualified" should mean "certified" or "licensed".

Homeowners who buy into these CIDs need to fully understand what they are buying into. This may mean that the Real Estate Agent may need to take some responsibility for properly educating the buyer on the specific community in which the property is being purchased.

More issues as I see them...

The boards that are self managed, that is, who do not hire a professional manager or management company, seem to be the worst of the bunch. Sadly, even those who are managed with a management company or manager, sometimes make errors in judgment (and action) and the manager fails to force the board to do the right thing because (in my opinion) they (managers) feel that they could loose their job if they do not "act at the direction of the board".

There is competition in the community association management industry. Companies still want as much business as they can handle and will do what they need to do in order to get a particular contract. Sometimes this is because they are greedy, other times it is because they truly want to provide opportunity for their managers on staff to obtain a larger income. This results in more service being offered for less cost by a management company - to a point that a manager takes on so much (to obtain a minimum living wage) that he or she simply cannot do everything that is requested by the association. This results in poor performance by the manager and big complaints by the associations they serve.

Eventually, when it comes to providing qualified advice to a board of directors, the manager may take an attitude that says, "it is the board's responsibility in the end, and if they want to continue in the wrong direction, I cannot continue to fight them, I simply do not have the time; and I certainly do not want to loose this contract - I need the income it provides".

When this happens, the association board of directors may not truly realize that they are wrong in what they are doing. Of course, there will always be those who know they are doing something that could be seen in a bad light, but because the manager is "letting" them do it, it must not be so bad that they see they should change their ways. In such cases, the looser may be the individual homeowner who then gets angry - with no where to go with their complaint except to an

attorney who, likely, knows little about HOA law and ends up fighting a loosing battle.

Some boards, in an effort to insure they are doing the right thing, seek advice from their attorney. Others find that to be too expensive. When the board does not get qualified advice from either their manager or attorney, they are left to make decisions and do things on their own. This may be the cause of these problems experienced by homeowners (who are angry with HOA living).

I suspect a commission or ombudsman could resolve some of this, but I think it would soon be overwhelmed with complaints that could have been and should have been resolved internally. Sadly, these same poor (unqualified, volunteer) board members who are making the error in judgment will be the ones trying to resolve the matter. That is unless...

Perhaps there should be some way to force an independent, and more qualified person, to get involved in the internal dispute resolution. I am not sure how to make this work, but allowing the blind to continue leading the blind does not sound like much of a solution. Someone qualified needs to get involved somehow.

I guess, truly, associations need to understand that a failure to get along with one another will cost them money. Individual homeowners who insist on breaking association rules (because they think they are right and the association rule is wrong) need to be penalized in a way that does not penalize the association as a whole. Associations that make senseless rules that the community does not need or want, need to be stopped (this is already in progress, thank goodness). Old rules in the community that no longer work (due, perhaps, to a change in demographics) need to be changed. The association needs to be forced to make changes (periodic review of rules & other governing documents).

All of these thoughts lead toward costly handling by the association. Managers need to be compensated for their time resolving association issues if they are to be expected to get involved at all. Volunteer board members need to see the value of the time they spend resolving these issues or have the ability and be encouraged to turn the issues over to a paid management so that their personal lives are not encumbered to a point that they no longer want to get involved (serve on the board).

Determining if a commission should be formed will be difficult. If the decision is to form a commission, perhaps regional commissioners need to be appointed so that issues can be attended to on a more immediate timeframe with someone familiar with local issues.

As to the funding for a commission...

Some have said that a tax or fee should be applied to all HOA maintenance fees that would fund the cost for a commission. In my mind, this penalizes the associations that work well and get along.

How about forcing the party initiating the complaint to pay upfront fees that could be reimbursed by the loosing party following resolution by the commission.

At least this way, the complaint will need to be worthy enough to the initiator to want to gamble the up front fees.

More than any of this...

Education of the buyers and current residents in CIDs is of primary importance. Newspapers are writing all the bad news they can find on HOA issues (fueling those who are anti-HOA). Getting the news media to consider discussion of the good points of HOA living is near impossible. Our society is willing to pay big bucks to listen to problems on the news and read the problems in the newspapers. The organizations that are willing to put out the good news about HOA living are not being listened to (CAI & CACM).

I hope you find this information useful. My thought is... if you are involved in HOA issues at all, you likely already have considered all of these points, but at least I have been able to express my views.

Thank you.
Steven Shuey
Steven Shuey, PCAM, CCAM
For information contact:
Steven Shuey, PCAM, CCAM
General Manager,
Desert Island Condominiums
71-777 Frank Sinatra Drive
Rancho Mirage, California 92270-3144
(760) 324-1873 x223
Fax: (760) 324-6182

EMAIL FROM SUZANNE HAHN (JAN 3, 2005)

There should be an oversight committee with full authority for action should a homeowners association be proved to be flagrantly out-of-line with CC&R's and common law with the idea of protecting homeowners from power mad Board of Directors within homeowners associations. No homeowners within any association should be subjected to fascistic Board members in any manner, shape or form. The Commission should have full power to subject out-of-line boards of directors to the full power of a commission with the power to dismantle a board if necessary and have new elections if necessary. The politics may involve persons not willing to give up power for money reasons such as attorneys for the board and managerial persons who make a buck off the homeowners associations. The commission should have full power to dismantle these troublemakers as well. We are too permissive with boards of directors of homeowners associations doing anything they wish to do without notifying homeowners of intentions within the

homeowners association including changing CC&R's for some type of gain. Thanks for your ear in this matter.

S. Hahn

EMAIL FROM S. STEPHENS (JAN 3, 2005)

☞ **Staff Note.** In order to protect personal privacy and avoid republication of potentially defamatory remarks, the message below has been edited to remove the names of individuals and other identifying information.

Dear Chairperson,
California Law Revision Commission (CLRC)

PLEASE CONSIDER: My life in [name deleted] Homeowners Association, Cathedral City, California.

I have been falsely and illegally arrested five [5] times by the board, including at an Annual Board Meeting, with the help of a police force that has a vendetta against me since I won a criminal case against them.

I have been in the hospital numerous times because of their behavior toward me, the last time, after being falsely arrested, for four days. I have heart problems that only get worse when they harass, and batter me, (I have been hit by a board member in his car while on foot, and suffered two other batteries, and numerous assaults), along with a board member threatening my life numerous times.

They have stolen property off of my property, and deliberately turned off my electricity; I have police reports, but the police refuse to help us.

Two other women and their children have been so harassed and stalked that their children are in counseling, and afraid to play outdoors. The board has tried to kill their dog, and another woman did have her dog die after a board member threatened to kill it

Two women, [name deleted] and [name deleted] have moved out of the HOA because [name deleted] has been a threat to their children, chasing one down the street. He has also battered another resident, with no help from the police.

Through fraud, conspiracy, perjury, embezzlement and RICCO, and other immoral illegalities of operating as a corporation while suspended, they, [names deleted] along with the attorneys, [names deleted], and [names deleted] of [name deleted] Management company, have broken every law that regulates HOAs, and there is no government office to appeal to that will help.

They have held my checks for two months, twice, and then illegally started me into non-judicial foreclosure, and have done the same to another family, the [names deleted].

They have used invalid, CC&Rs illegally, for several months.

There is constant and continual selective enforcement of the covenants; the board can do whatever they like, but pick on certain homeowners to get them to move. Three of the board members are gay, and truly this is reverse discrimination.

Every homeowner in an HOA is an Intended Third Party Beneficiary of the attorneys, and the board, and that gives us certain rights. However, I was just in court with [name deleted] who perjured himself to the court and said "homeowners are not Third Party Beneficiaries." That was deliberate perjury!

ALSO, most HOAs are regulated by Corporations Code, as a Non-Profit Corporation, registered with the Secretary of State. [Homeowners association] was not registered for two years. Attorney [name deleted] also "lied to the court" and denied that they were suspended and continued on as a corporation anyway, including fining homeowners, and defending a bogus lawsuit. Every homeowner needs to be educated to look to make certain their HOA is registered with the Secretary of State and know that their HOA may do NO business, including bringing or defending a lawsuit, nor can they even fine homeowners while they are suspended.

These board members, attorneys, and management people get away with continually breaking the law because we have no government help, but also because homeowners do not do the necessary research to protect their rights.

Most homeowners need to be educated to read their CC&Rs, and to research the law that governs associations, and then come together to lobby their Assembly and Senators for their districts.

The Cathedral City Police will do NOTHING to help us homeowners! They will not even take police reports for provable criminal behavior such as stalking, and conspiracy. The City Council and City Manager will do nothing! The City Attorney will do nothing to control the out of control police department.

Sergeant [name deleted] of CCPD [to save himself from a complaint] conspired with our association board to go to the District Attorney, Deputy District Attorney [name deleted] to drop the charges against a board member, [name deleted] related to a drug family in the community who deliberately hit me with his car while I was on foot. Because of this conspiracy, the DA never filed against [name deleted]. However, they have now turned over a complaint to the Bar Association. Still, Sergeant [name deleted] and his cohort [name deleted], and the board of directors goes unpunished

When two of us women went into court to request a restraining order against [name deleted], told us, "Everything I am reading here is illegal, and if the police won't help you two, go to the District Attorney and have him and them prosecuted!" We did not have [name deleted] properly served, so the case was not heard, but the judge said, "I would love to hear this case!" He told [name deleted] that he could "see him sitting there, all puffed up, with his head in the clouds filled with the power he thinks he has!" And that is true, all of these board members are

on a power trip, and they care nothing for the law as they know most of us do not have the money to take them to court.

Finally I got fed up and called the California Attorney General who told me to call a Grand Jury against both the Cathedral City police, and the District Attorney's Office

I wrote a scathing complaint, telling both the District Attorney, and the CPPD what I was going to do Finally the District Attorney called me and said, "If you have the evidence you say you have, we will prosecute.

I have the evidence, and it is being presented to the District Attorney next Monday, and then...

IF we had an Ombudsman program in California, who has the authority to step in when these sort of complaints begin we would be far ahead of the problems escalating into what they have in [name deleted] HOA.

These are like "little internment camps of the new world order" and we have no help from the very government who has helped to set them up

I fear that if something is not done to regulate these places, there will be many more victims of violence, and perhaps even deaths

The media, Desert Sun News and their television station refuses to help by running stories of the horrors of HOA life, even though we have presented them with many, many examples, including elderly persons in their 70s and 80s, who have been made homeless by unethical attorneys and boards.

PLEASE, Help us

Give us an Ombudsman program that is not run by CAI, or CLAC! They are the biggest part of the problem as they support all of these illegalities by boards, attorneys, and management people.

With regards
S. Stephens

Kathleen Willoughby
11608 Long Ravine Court
Gold River, CA 95670
916.638.3046
k.willoughby@sbcglobal.net

January 04, 2005

California Law Review Commission
C/o Brian Hebert
McGeorge School of Law
3200 5th Ave.
Sacramento, CA. 95817

Re: CID Law Revisions

Dear Commissioners,

Responding to your invitation for input from interested California residents, enclosed are my 100 recommendations to, and various document reproductions for, the California Law Review Commission during their current review of California Common Interest Development (CID) laws.

It is my hope that lawmakers and commission members will review these recommendations and realize how far from lawful operation this industry has strayed, and read the American Homeowner Resource Center web site, thereby fully appreciating the enormity of sufficiently modifying the law in order to correct abuse of it. Almost anything this commission may recommend and lawmakers may adopt will be circumvented by CAI and CACM cabal, unless you recommend in the strongest terms to disband CID law thereby returning Fourth Amendment rights to California homeowners.

A proposal to create an ombudsman agency to regulate the Common Interest Development industry is utterly improper given the extraordinary California budget deficit and debt, and because of the demonstrably low ethics of an entire group of lawyers and over-scheduled judges who have subverted existing CID law into their own six billion dollar 'special district'!

It would be best for the millions of California residents of Common Interest Development communities for lawmakers to abandon the CID construct entirely. I urge you to make this recommendation during your next meeting on January 21, 2005.

Respectfully,

Kathleen Willoughby

Kathleen Willoughby

California Law Review Commission:

1. Make it very clear with easy reading English charts and graphs, not text only, the hierarchy of controlling legal authorities of CID communities for use by elected directors.
2. Provide online access to a law library or law school site for obtaining lawful legal information using key word searches during board meetings
3. Require copies of all corporation documents to be given to directors by management CACM and have the director's sign off on receipt of all pertinent documents individually enumerated.
4. Require directors to submit contemporaneous draft minutes immediately after a meeting and post them online.
5. Mandate that actual numbers of votes be announced and distributed to members in writing and included in the minutes for director elections.
6. All votes outside of executive session must be recorded including names of directors in the minutes unless the vote is unanimous.
7. Mandate a time commitment from directors with a written agreement similar to jury service.
8. Mandate CACM or managers will accept volunteer members/owners to be present in a 'helping' capacity in the business office during business hours.
9. Mandate a process which is open and requires recorded vote of directors by which the physical presence of an attorney for review/ supervisory etc. services are retained and under no circumstances may an attorney provide service at 'no charge' or invoice a master association for services rendered to a sub association and vice versa.
10. Clarify with a diagram the differences between AGM and director meetings, and prohibit Dias configurations and other constructs which prevent speakers from facing members.
11. Catalog examples of harassment used by CACM and CAI attorneys against directors and provide these to directors to sensitize them to the scientific coercion they will be subjected to.
12. Sanction a 'form' for ballots and for proxies, mandated to be used throughout California.
13. Specifically prohibit the illegal combination 'form' proxy/ ballot.
14. Mandate that parcel may belong to and be governed by only one association governed by one elected board. Prohibit simultaneous memberships in two or more associations with elected directors.
15. Specifically prohibit Community Associations from subsuming Owner Associations.
16. Clarify for directors the differences between associations governed by corporation code and those governed by Davis Stirling.
17. Clarify which codes apply to which types of associations; confusion over this is CAI and CACM primary leverage over uninformed volunteer elected directors.
18. Provide access to a web site giving California elected directors ability to view hierarchy of law by keyword search.
19. Mandate that CACM/management companies or staff provide accessibility via computer for directors to gain and apply this information during their term.

California Law Review Commission:

20. Secretiveness by CACM or staff management of not informing directors as well as members of crime logs, or dollar bids from contractors and other crucial information must be prohibited.
21. Prohibit sole source contracts in CA CID communities.
22. Withholding from elected directors of pertinent information on CID law and general law is rampant by CACM. /management. Example, federal law on installation of roof top solar systems overrides restrictions by HOA, but that is never divulged to 'volunteer' directors. Example a CACM unlawfully discriminates against bridge playing members by mailing a letter to them restricting their use of the handicap parking in the Community Association Building's parking lot. Example: Management used association dollars to negotiate with cellular telephone companies to install a tower in a common area near a main park and elementary school, knowing full well that the governing documents prohibit commercial use of the property. Example: A CACM protects a sub contractor from having to psy a lawful claim for negligence by forwarding the claim to the association insurance carriers and law firms on retainer, never allowing the elected directors to vote on the action. Example: A CACM/manager hides from elected directors operating license suspension as well as cash flow problems and lapsed worker comp. insurance policy of a contractor under contract with an elected board. Example; A CACM manager lies to elected directors regarding a contractor's inability to purchase wholesale trees with a story of embargo due to disease.
23. Legal opinions obtained by and paid for by a CA CID assoc. must be shared with elected directors of linked associations bordering each other. CAI and CACM conspire to provide 'make work' for attorneys with this secretiveness. Example; One Corporation may pay for a legal opinion on 'good neighbor' fence height but the CACM keeps the information secret when there is another request for same from another corporation within the same community to ensure additional legal fees will flow to their favored CAI attorneys.
24. Community associations governed by Davis Stirling but unlawfully and through subterfuge and deceit subsumed Independent Corporations/Owner Associations governed by Corporation Code, thus creating jurisdictional conflict and conflict of interest between the Community Association and the Owners Associations.
25. CACM and elected directors after Jan. 2004 proposed employing a rules czar and rules enforcement policy without adherence to law effective Jan. 01, 2004 regarding rules changes.
26. Prohibit CACM activities geared for 'make work' for the CAI attorneys.
27. Prohibit CACM activities that effectively favor sub –contractors or Staff over their employers, the homeowners/members of the Association.
28. Prohibit CACM activities directed to intimidate and control votes of boards of directors rather than provide efficient administrative and reference services.
29. Prohibit CACM/management retaliation toward whistleblower owners or directors by harassment discrimination and slander, facilitated by layers of confusing laws. Example: a

homeowner/legislator sat in the office of a CACM manager and advised against continued extensions to a voting deadline for approving or disapproving modified governing documents. The owner received letters from a director who sat on two boards, thus demonstrating conflict of interest. The dual director favored the 'restatement/modification' for the community association to be approved and as a director of the owner association as well as landscape chair, he sent to the 'complaining' owner letters stating his front yard tree was going to be removed by the association. Example: A conflict of interest director simultaneously sitting on the Community Association board and the Owner assoc. board produces lists of owners/members who had not voted on the document restatement he favors, so he directs committee and directors of the Owner association to personally visit and procure votes for the Community assn. document restatement along with directions that his own verbal endorsement of the restatement be communicated during the personal visits. He requests the lists be permanently disposed of after the visits are accomplished.

30. Prohibit CACM, CAI attorneys and Tyrant Directors refusal to provide information requested under the 2004 legislation intended to allow homeowners to see salary and benefit information of the staff they employ.
31. Prohibit CACM and CAI attorneys and unethical directors to conspire with local government officials to prohibit tax funded municipal services from being delivered to owners: example is Neighborhood Clean Up services, vector control spraying, and municipal bus service.
32. Prohibit CACM and CAI attorneys and unethical directors from conspiring with local government officials to receive service at a higher level than is lawful. Example; CACM/manager regularly make phone contact with county waste management officials to ensure refuse truck drivers performing their route do not delay thereby causing contractor personnel to pay overtime, to porters for rolling/returning refuse barrels back to the service gates at each home. Example; prevent vector control services ...harborage in overgrown plant material....
33. Mandate that ingress or egress to community buildings and parking lots after 5:30 p.m. weekdays not be within 100 feet of a residence.
34. Mandate a procedure for soliciting legal services in line with public sector practice; mandate ethical, honest, bids at a fair and competitive price.
35. Mandate that attorneys or CACM management may not attend Director or Member meetings without a prior direct vote of the board and with 30 days notice.
36. Proscribe for members [not just directors] of Owner or Community Associations with method of legally undoing misleading and or fraudulent actions taken by CACM management and CAI Attorneys, especially for illegally produced document restatement.
37. Clarify for CID communities that CACM management, staff, or elected directors may not interfere with members/ residents /citizens rights to receive municipal services derived from living in the municipality and paying the municipality for the service.

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38. Mandate that vote/ballot/proxy counting activities during an AGM be performed in the same room as the meeting is held and with at least five volunteer or randomly selected member observers as well as any number of volunteer observers.
39. Mandate that Community associations develop and maintain an interactive web site which advises in real time of community news especially regarding security breaches and crime logs.
40. Mandate that Community and Owner associations form legislative committees to monitor CID laws and recommend modifications to the legislators.
41. Mandate that any elected director may add an item to the agenda for a director meeting by submitting the written agenda item to the president or other officer who prepares the agenda.
42. Mandate that any elected director may call and host a director meeting for a specified issue when notice requirements are met.
43. Mandate that all written correspondence to any member or business entity under contract be dated and signed by an officer of the corporation using his official full signature.
44. Mandate that Directors and officers of HOA's may use only one signature to represent themselves and keep it on file for members to view.
45. Mandate a clear sanction procedure to follow when an officer does not follow a board directed action taken during a regularly scheduled or called director meeting.
46. Mandate that HOA's designate a specific space on the front door or the front face of a community facility for posting meeting and agenda notice.
47. Mandate that CACM and CAI attorneys may not use euphemistic or misleading language when referring to legal issues: {policy's and rules} [document modification and restatement] are not interchangeable terms.
48. Mandate that if a director submits a resignation letter, it may not contain conditions and resignation must be immediate not to exceed 12 hours and all papers and effects belonging to the association must be contemporaneously relinquished.
49. Mandate that directors may not discuss official business with outside persons, especially directors from other associations, for the purpose of modify implementation of official action previously voted in director meetings.
50. Mandate that only an officer of a corporation may prepare the agenda for regular director and annual general meetings and must sign the agenda before it is distributed to the other directors.
51. Clarify whether minutes must be taken and retained and distributed to the owner as well as directors during hearings for rules violations.
52. Mandate that if a director resigns within 30 days before an AGM, the board may not appoint anyone to fill the position; rather it must be filled through election.
53. When half of a community reaches 15 years out from new construction, mandate that members approve through vote, modifications to building or home improvement materials whether or not materials are previously approved or disapproved by boards of directors.

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54. Mandate that a CACM /manager may not reject a candidate/owner who requests placement on a ballot for election during the annual voting or the AGM, nor modify in any way the personal campaign statement provided by the candidate.
55. Mandate that CACM/ management may not alter the date of an AGM for any reason when the governing documents use the term 'shall' describing the date /time period to hold an AGM.
56. Mandate a non cryptic written description within the minutes of why an executive session is held and what types of things were discussed and which Director Agendized the items, and whether a solution or vote was taken, which directors or guests, or staff was present and which directors voted or abstained. It should be very clear whether non director persons are present during voting. Executive session items should receive a number so that members may know how many times an item is discussed or whether the session is being used for intimidation. Mandate procedures so that executive sessions may not be used as intimidation tools.
57. Mandate that upon the verbal request by one elected director or by one percent of members in writing that all CID director meetings be voice recorded and the recording retained and produced at the request of any elected director during any regular or called director meeting.
58. Mandate that service bid requests and bid openings take place in the presence of three directors, and in line with public sector bid requests and bid opening procedures.
59. Mandate that operating budgets which exceed $250.00 for committees' administrative costs be approved by members not simply by directors.
60. Mandate that names of officers of Community and Owner associations be provided to the governing authority within a municipality, in order to prevent persons with no legal standing from contacting the municipality regarding official business or services to the CID community.
61. Mandate that original minutes of a director or member meeting be held by an officer of the corporation and the officer convert the minutes to their final form which may be copied and distributed by the administrator or CACM.
62. Mandate that minutes of a director or member meeting be taken by an elected director and never by a staff member, and that staff and CACM may only duplicate minutes and in no circumstance change the minutes even for something as minor as a grammatical error.
63. Mandate a substantial fine for any person who is not an elected director for changing minutes under any circumstances, or for destroying minutes or for not keeping approved minutes if the personnel are remunerated for administrative services.
64. Mandate that only true AICPA audits may be obtained for association financial statements and must contain the signature of the auditor, and that unaudited financial statements may not contain any indication or inference that the auditor has approved or submitted the document.
65. Mandate that CACM or other staff must use full signatures and dates when they approve an invoice for payment or approve a work order or purchase order; conversely prohibit the use of stamps or initials.

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66. From a chart describe for directors exactly what issues may be considered during an executive session and offer examples of issues which do not fall within the parameters.
67. Mandate that contract terms and conditions may be established only in a director meeting and in no circumstance may a staff person or a retained attorney change any aspect of a contract.
68. Mandate that an administrative task be performed annually that determines whether contractors maintain valid licenses to operate in CA. and that the contractors display as required by law all licenses and insurance coverages as well as posted notices required by law including Cal OSHA requirements.
69. Mandate that anyone employed directly or indirectly by a HOA be a legal worker in the USA.
70. Mandate that no person employed by a CID accept gifts of any kind from contractors or directors.
71. Mandate that salary and benefit information for employees of a community or an owner association be provided to elected directors during the AGM.
72. Mandate and clarify the law on third party interference in contracts within CID {contract administration and enforcement must be done by the awarding entity] Director's sign contracts with service contractors and there is no provision in law or in the contract for the supervision of the implementation of the contract's terms and conditions to be performed by CACM and staff of the CID association.
73. Mandate that terms of contracts may not be waived or altered, augmented by CACM, staff or any person not a party to the contract.
74. Mandate clear fines and consequences for interfering in a contract.
75. Mandate that CACM or management companies keep accurate name and contact information and records of owners as well as renters and make visits to the home to obtain the information for the records if other means of mail, phone calls are unsuccessful.
76. Mandate that elected directors keep records of owners and offer their own contact information within official documents.
77. Mandate that HOA's must annually conduct a tour of the physical premises of community owned building for the property insurance company, and that elected directors must be present during the inspection tour.
78. Clarify whether CID organizations; owner association or community associations are quasi- public organizations under the law.
79. Clarify in a chart form the lawful regulations for altering association reserve accounts.
80. Mandate proactive actions for board members to take whenever they may receive a letter from a member who claims discrimination or harassment from elected directors or their employee staff; prohibit elected directors from destroying written complaints submitted to them.
81. Mandate 360 degree evaluations of staff by elected directors during a noticed meeting for that purpose.

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82. Specifically prohibit and mandate a substantial fine for staff and CACM and CAI attorneys from threatening to personally bring legal action to an elected board of directors or partial group of directors or individual director.
83. Specifically prohibit CACM and staff from participating in any way in recall elections of an elected board, even from reviewing procedures or supplying materials.
84. Prohibit CACM management from forcing staff to work more than eight hours per day or to work split shifts in order to attend evening meetings or parties or from acting as recording secretary during a director meeting.
85. Mandate a method for staff to propose agenda items to an elected board. Prohibit actions of a CACM manager to keep these proposed agenda items from the knowledge of the elected board.
86. Mandate that administrative, management, and legal retainer contracts be bilateral, reciprocal, and in writing and distributed to elected directors.
87. Mandate that under no circumstances may owner information be guarded, supervised, maintained, by non bonded, temporary personnel who are not specifically listed with the D and O or casualty insurer. Under no circumstances may CACM, staff turn over any office functions to their own family members.
88. Mandate that under no circumstances may staff allow owner information and association documents to be unsupervised during business hours, proscribe monetary fines for this offense.
89. Proscribe a clear and simple and understandable code of conduct for staff and directors for posting in a prominent place and prohibit additions to the document, or use of alternative codes of conduct or suggested behavior for staff or directors.
90. Mandate immediate resignation of CACM staff if they are arrested in the USA or are determined by vote of half of the directors to have given erroneous advice on CID law, or if they are deemed to have provided a forum for an attorney to dispense erroneous legal advice on CID or civil law, or if they are determined to have manipulated or circumvented votes, contracts, or work orders.
91. Mandate from CACM, staff and elected directors written mission statements which include staff and elected officer duty statements which reflect the purpose of formation taken from official articles of incorporation; develop a management plan which clarifies goals, roles, responsibilities and reporting communication structures.
92. Mandate that all employees who serve at the pleasure of the board, tender their resignation at the end of the last regularly scheduled director meeting of the calendar year.
93. CID law should mandate that professional landscape planting recommendations from staff or those retained by staff to Boards of Directors must be certified by the head of the official local agricultural extension office for suitability for the location the plant material is to be installed. CACM management may not rely simply on an approved list of plant material from the county extension service because specific climate or soil conditions may render a particular horticultural variety improper notwithstanding it's inclusion on a general plant list for the county.

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94. Specifically prohibit CAI attorneys from obtaining membership lists of CID developments.
95. Specifically prohibit CAI attorneys from mailing to elected directors such items as invitations to seminars, or informational meetings to be held on the property of the CID.
96. Specifically prohibit CAI attorneys from representing in any way that they represent or are retained by an association when there is not a valid contract reflecting same.
97. Specifically prohibit CACM managers from using association funds for the purpose of dissemination of political opinion regarding bills awaiting signature of the Governor of the Sate.
98. Mandate actual invoicing formats required to be used for submission to CID communities by contractors.
99. An oversight ombudsman agency must operate under the assumption that the CACM, CAI attorneys require supervision, restraint and control in exponentially greater amounts than do elected volunteer directors of CID communities.
100. Recommend that California's 36,000 CID developments be disbanded; mandate that the actual numbers of inclusionary housing units approved in every jurisdiction be equal to the number of approved building permits for market rate housing units considered as CID.

EMAIL FROM ED LEVINE (JAN. 6, 2005)

Re: Proposal for The California Law Revision Commission to create an oversight bureau for homeowners associations.

I don't feel that homeowner associations need another government entity to watch over them. These are self-governing adult organizations whose members have purchased private property in a community that relieves the individual of some of the responsibilities of home owning. We are not public housing in the true sense of the term, yet the state legislature feels compelled to control how we operate. For instance the Davis-Stirling Act.

It seems that whenever a homeowner has a particular problem with enforcement of the rules and regulations, and makes a big fuss the legislature wants to step in with more governing. A good example of this took place a few years ago when someone complained to their legislative representative about alleged prejudicial statements in a CC&Rs document.

We received a directive that our CC&Rs must be presented to a member of the legal profession for review at a cost of several hundred dollars, and a that a statement on red paper shall be placed in front of the documents stating that they did not contain prejudicial statements!! In my opinion that was a red flag for some unscrupulous person to nit-pick the documents and possibly file a nuisance lawsuit.

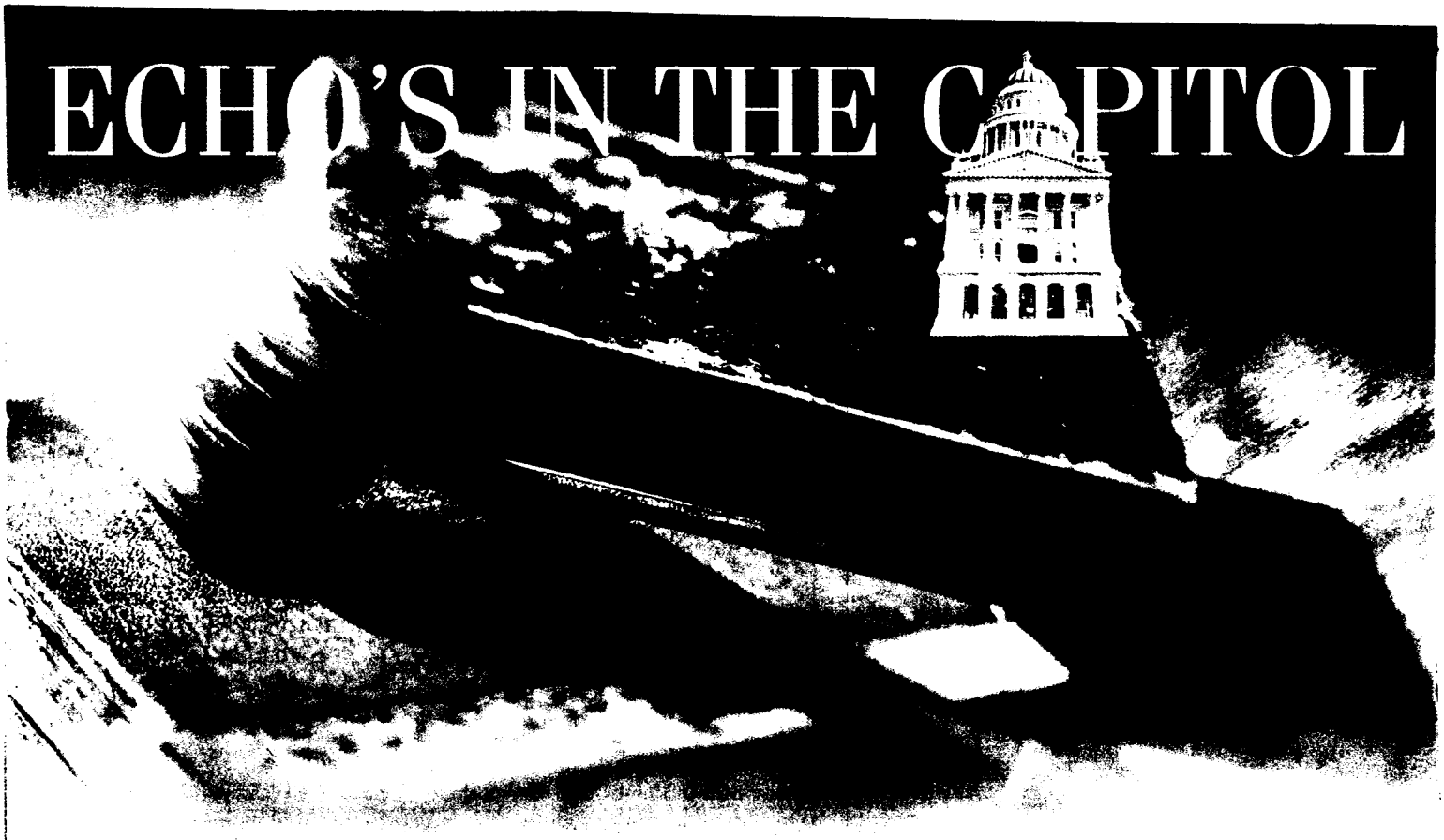
Considering the large number of homeowner associations I don't see how an oversight government bureau is going to be able to monitor and assist in disputes. Let them work out the problems for themselves. It is unfortunate that sometimes the end result is a lawsuit. I grant you that some governing boards may be somewhat militant in applying the rules and regulations, but there are times when a hard line must be taken when an individual takes the attitude that he or she does not have to comply. The membership can take action to change or delete these rules and regulations if they believe they are too strict.

I have lived in a community of eighteen units for fourteen years, and have served on boards and committees many times because there are so few willing to serve. In addition very few take the time and effort to become familiar with the governing directives. They prefer to make up rules to suit their purposes.

In regards to Ms Faltys' problem with the leash law for her cats, she has my sympathy.

I tried it with my six-month-old male cat, and he wanted no part of a leash.

Sincerely,
Ed Levine, Phone: 916-481- 5758



Is it Possible the State Will Come to the Rescue?!!

By Sandra M. Bonato, Esq.

Every year it's the same, it seems. So many bills, so many new laws. So much to learn, and so much that's not intuitive.

Plainly put, life in common interest developments has gotten very complicated, and there's at least one big reason for it.

For nearly 18 years, California has struggled to regulate community associations through the Davis-Stirling Common Interest Development Act, a body of huge, one-size-fits-all statutes. Yet we all know that communities are unique as snowflakes and their residents a diverse mix. How much longer can we possibly assimilate and apply this annual barrage of new laws and still have a system that works with any satisfaction for directors and owners alike?

Isn't there a better way to help each individual community—whatever its characteristics—than through broad sweeping laws that emerge (largely anecdotally) out of the political hotbed of the capitol? When will relief come our way?

Well, would you believe maybe sooner than possibly hoped.

We've all been mightily distracted this year dealing with (ever more) statutory proposals, including measures that cut deeply into the financial ability of associations to operate and flourish.

While we were busy, the California Law Revision Commission, as part of its years-long study of community association law, has been reconsidering one of its earlier proposed methods of avoiding community disputes.

The idea? One that ECHO has been talking about for a number of years—promoting community association education and accountability through state agency regulation.

The main idea now back on the drawing boards would involve a "bureau" (as opposed to a "board") organized under the administrative branch of state government. Known in this nascent stage as the "Common Interest Development Bureau," the Commission is likely to propose that it be organized within the current Department of Consumer Affairs (or whatever organization heads up DCA after the governor's proposed

reordering of state administrative agencies). Given the red tape pandemic in state government, the Commission would fund the Bureau through a modest assessment of each community association.

The original basis for proposing a CID Bureau lies in the Commission's interest in dispute resolution—with educational opportunities for both boards and members, each will better understand their respective rights and obligations. With training and communication, opportunities for disputes will lessen.

Under the Commission's model, the CID Bureau could be a "go to" place for fast, fair and effective conciliation or mediation of disputes, once they grow. Programs like this work in other states, and the Commission is proposing a look into whether it could work in California as well.

CALIFORNIA'S COMMON INTEREST DEVELOPMENT BUREAU

The Commission's description of the rationale for the Bureau is well-stated and, we think, makes a grand introduction to the concept of state agency regulation. What follows is that rationale, as tentatively proposed:

"Legislative findings and declarations.

The Legislature finds and declares all of the following:

a) There are more than 36,000 residential common interest developments in California, comprising more than 3,000,000 dwellings. Common interest developments comprise approximately one quarter of the state's housing stock.

b) Managing a common interest development is a complex responsibility. Community associations are run by volunteer directors who may have little or no prior experience in managing real property, operating a nonprofit association or corporation, complying with the law governing common interest developments, and interpreting and enforcing restrictions and rules imposed by the governing documents of the common interest development. Homeowners may not fully understand their rights and obligations under the law and the governing documents. Mistakes and misunderstandings are inevitable and may lead to serious, costly, and divisive problems. The Common Interest Development Bureau seeks to educate community association officers and homeowners as to their legal rights and obligations. Effective education can prevent or reduce the severity of problems within a common interest development.

c) Under [current] law, the principal remedy for a violation of common interest development law [is] private litigation. Litigation is not an ideal remedy for many common interest development disputes, where the disputants are neighbors who must maintain ongoing relationships. The adversarial nature of litigation can disrupt these relationships, creating animosity that degrades the quality of life within the community and makes future disputes more likely to arise. Litigation imposes costs on a common interest development community as a whole—costs that must be paid by all members through increased assessments. Many homeowners cannot afford to bring a lawsuit and are effectively denied the benefit of laws designed for their protection. The Common Interest Development Bureau provides a neutral, nonjudicial forum for resolution of common interest development disputes. Many disputes can be resolved inexpensively, informally, and amicably through bureau facilitated mediation. As a last resort, the bureau has authority to issue a citation for violation of the law.

d) Anecdotal accounts of abuses within common interest developments create continuing public demand for reform of common interest development law. This results in frequent changes to the law, making it more difficult to understand and apply and imposing significant transitional costs on common interest developments statewide. By collecting empirical data on the nature and incidence of problems within common interest developments, the Common Interest Development Bureau provides a sound basis for prioritizing reform efforts, thereby increasing the stability of common interest development law."

So there, in a nutshell, is the concept and why considering it positively could have tremendous benefit for community associations and their members, not to mention a significant re-direction of anecdotal concern away from Sacramento and to a place where help, not more statutes, can be had. This is not, by a long shot, the full and final use of state government in setting fiscal standards for communities that we think are so important, but still an impressive first step toward ensuring cohesive communities and healthy communication between homeowners and those who have been elected to make hard decisions for them. From there it is a short step to include decisions that impact the pocketbook.

ECHO welcomes your thoughts on this very important subject and hope you will let us know your comments. For more specific information, log on to the California Law Revision Commission's website at **www.clrc.ca.gov**. We'll also be talking a great deal more about this proposal in 2005.

ECHO's traditional year-end legislative report will be published in the December issue of the *Journal*. Please look for it. EJ

Sandra Bonato is an attorney in the Alamo office of Berding & Weil. She is the chair of the ECHO Legislative Committee.