

Third Supplement to Memorandum 2005-2

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

We have received further written comments regarding the tentative recommendation. They are attached in the Exhibit as follows:

	<i>Exhibit p.</i>
1. Anonymous (Jan. 19, 2005)	1
2. Judy Semerjian (Jan. 19, 2005)	8
3. Sharon Stephens (Jan. 20, 2005)	9

The staff has not had an opportunity to fully analyze these comments but will bear them in mind in preparing any future material on this topic.

In very general terms, the import of the comments is as follows:

Anonymous

“Anonymous Person” makes a number of observations and suggestions, including the following:

- (1) A private foundation should be established to provide education, rather than a state program. The foundation should summarize case law.
- (2) The Bureau should not give legal advice.
- (3) If legal advice is not given, then filing fees and penalties resulting from adjudication should be sufficient to cover the costs of the Bureau.
- (4) The Bureau should be given broad discretion to enforce the law. Specific jurisdictional powers need not be specified.
- (5) The Bureau should provide an indexed reference of its enforcement decisions.
- (6) The Law Revision Commission should solicit confidential input from corporate attorneys on the merits of the proposed law.

See generally Exhibit at 1-7.

Ms. Semerjian

Ms. Semerjian would like to see state oversight of businesses that provide services to associations, such as reserve study preparers and insurers. “Basically,

an entity that is a homeowner advocate to insure proper services are provided and that there is a good stewardship of funds.” See Exhibit at 8.

Sharon Stephens

Ms. Stephens describes problems she has experienced in her association. She is concerned that attorneys and property managers can dominate volunteer boards. See Exhibit at 9-10.

She supports the idea of Internet publication of a citation for violation of CID law. She also emphasizes the importance of education and of fair election procedures. *Id.* at 10.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

EMAIL FROM ANONYMOUS (1/19/05)

Mr. Hebert,

Re: CLRC Memo 2005-2 State Assistance, Comments

1. I see from your report in the web that the ECHO lawyers were quiet while the professional management companies executives are making their comments based on what they know to be the law. As to the individual homeowners, their manner of sounding of grievances only show that they are natural victims in court at the hands of the professionals.
2. I did not read the whole report. However, just looking at pp.25-26, I can see that the comment wrongly cited Corp.C. ` 303 which requires 10% of the shareholders to ask the court to remove directors. It would seem that general commercial corporation's provision is not to be cited for mutual benefit corporations whose ` 7000-8000 series (Not in 3 digits) has different provisions' regarding how directors are removed.
3. The 10% requirement would not be appropriate or relevant in the condo context. What I would do is to use the 5% requirement in a mutual benefit corp. section of that code, namely, ` 7710.a if the condo has less than 100 shares, raise the issues about wrongful acts and do so in the name of the associations. At the same time assert the right to be the association as plaintiff, as provided by Code of Civ. Proc. ` 382.
4. As you know, most of the people would not know that. The corporations lawyers would know, but are afraid to say because they have to represent clients' interest. Clients can be from either side. Therefore they are quiet and letting the professional managers say what they like in public about law.
5. I therefore think there should be a way to get professionally prepared opinions confidentially by using the prestige of CLRC. Just send corporations lawyers an invitation. Send me one too, for I am well prepared to discuss on condo laws.
6. I can see that many untrained people have the habit of citing law for their own purpose. There is danger of reasoning with irrelevant laws. The victims got more victimized while the "victors" are undeserved.
7. The danger must be realized in that a) legal practitioners keeping quiet due to clientele loyalty and livelihood, b) property managers freely expounding limited knowledge in legal relevance for the sake of actuating private motives and c) homeowners asserted their rights based on ignorance of legal remedies and confusion.

8. The solution for such a bad mixture of a-c can only be available through public education. That duty should not be at public expense but by setting up a public foundation under IRC 501 subdivision c, or a special corporation. The task is to compile all appellate cases where a HOA is party, if not expressly a party, being a real party in interest as a matter of law.
9. The legal practitioners expert in corporate governance are not in the employ of HOA but big corporations. Small law offices representing either side of the HOA disputes practically have no reference source to prepare case other than researching case by cases based on statute citations. That was already doing the best, which is to fly a plane by the seat of the pants, although most carefully. Most are not even doing that but just to plead and argue according to client's wish to the extent of the client's money, not to the full extent of the law.
10. That legal practice scenario on condo law makes the task of compiling a book that covers all condominium cases, with subject index, an urgent one. A new compendium of cases can be solving the existent condo law compendium that only cite statutes. Similarly the Cal Code of Regulations have no case interpretation of written laws. It is the appellate interpretation that counts in legal decision. The compiling task should be given to the nonprofits not to public servants who will need tax appropriation.
11. In the proposed judicial task bureau, all pleading and arguments should be written and be later classified into categories. Example is shown in immigration administrative court that has volumes of decided cases, making judicial review easier. At present, the law is that those who have more money have more rights. That has to be changed for there are millions of affected people whose cases are not worth the money as individual cases but worth a lot in terms of society effect.
12. There is no technical expertise required in finding those cases (California cases) in the age of electronic research through such legal Internet links as Westlaw, Lexis.com, and Findlaw.com., the third one is free without subscription fees.
13. The older method of using the West Publishing's digest and "key" reference system was what I used to use. That was when I have not formed a structural concept on particular point of law. Now I use electronic method because I know the search words more precisely as experience grow. Nevertheless, electronic research can still be quicker and more direct for less trained people. Library research requires more research ability.
14. The question of whether the proposed bureau should have power to decide on a dispute as to who should lose and who should be punished is not a hot or relevant issue for drafting the proposed law.
15. The legal professionals or those who study the working of the constitution would know what Delegated Legislation is. It is established practice for the legislature to pass an act, but let an administrative bureau to create its own sub-laws to carry out the intent of the act passed by the legislature.
16. What we have seen already in practice are such bureaus exercising decisions and imposing orders and fines as result of the Labors Relations Act. There are other

- bureaus dealing with granting or forfeiting benefits in the areas of workman's compensation, social securities disability benefits Those court functions carried out by administrative bodies are result of delegated legislation. Some of the hearings officers are lawyers, as I understand for they are trained in the law of due process so that their decisions are in accordance with law of fair hearings or law of natural justice.
17. Therefore, it is not necessary to decide exactly what judicial power and to what extent the propose bureau should or should not have, although the anxiety of unknown is surely present. The homeowners probably would not be too anxious in this issue.
 18. Again, there are some who are concern about whether and to what extent the proposed bureau can order the parties to stop or to do something or to declare the meaning of the words in the CC&R and Bylaws. All these are judicial power in the form of equitable jurisdiction, as opposed to legal jurisdiction (Awarding money damages).
 19. Equitable relief and legal relief are the left and right hands of judicial power. Judicial power of administrative body (Bureau) comes from the wordings of an act of the legislature. It is for the legislators to decide on whether to give delegated legislative power to a bureau, according to the wordings of the legislation.
 20. Therefore, since we are not a legislative body, but are only public opinion, I think it is not effective nor appropriate to decide whether the bureau has judicial power and to what extent. It really depends on the legislative act. The Davis Sterling Act has already set the policy. I therefore think the bureau has judicial power and the question of limiting the bureau's power to settle dispute is not an appropriate one. The reason is that we have the legislative custom or convention of delegated legislation in existence.
 21. In other words, it is a foregone conclusion that once you have a bureau to settle dispute, you cannot decide whether or to what extend it can exercise its function to award damages or equitable relief, although you do have the right to appeal and the right to be represented by attorney (If the insurance company decides to defend the directors under the condo's D&O liability insurance, and also pay for a Cumis Counsel represent the homeowners for homeowners are suing in the name of the association as provided under CCP ` 382 and Corp. C. ` 7710).
 22. That Cumis Counsel for the homeowners in case there is lawsuit between the directors and homeowners regarding errors, omissions and breach of duty (E.g. directors' violation of bylaws is breach of duty) is because the association is the named insured in the condo's D&O Liability policy just as much as the directors. Insurer has duty to provide lawyer for action between co-insured.
 23. The D&O of HOA are really limited in their power to fight in court if the "ultra vires defense" provision of the Corp. Code (among the provisions of the mutual benefit corporation sections, 7000-8000 series, see its index under ultra vires defense).

24. There are also other laws severely limiting D&O's power to use HOA's money to oppose actions that the association and its members do not want to oppose but rather to accept (For example, suit for violation of bylaws by directors)
25. One of those laws or legal authorities is the case authority of Mitchell vs. County Sanitation District where such defense cost including appeals costs have to be personally paid by the officer due to opposing or defending a writ of mandate action without without proper authorization.
26. Lawyers who represent the board in law suit between directors and association homeowners or members are required to resign if representing the board "might" harm the association.(See, Cal Code of Professional Conduct, r.-3-300 and r. 3-600).
27. Bureau must rule according to law or legal advice of counsels for the bureau. There is no issue of how much it will cost in applying the law.
28. That is why I do not understand about the argument that if the condominium population is large, the cost of the bureau is large even if only 2% comes to seek help. The question is "what kind of help"?
29. **The question of funding the bureau** to assume the task of policing a population of millions is a very valid question. But unfortunately, the approach in estimating funding is totally wrong. Statistical speculation is not the right approach for it is not recognizing the working of the legal system.
30. The bureau should not be giving legal advice for that involves immense staffing. Let the pre-paid "legal" insurance industry handles it. They are most glad to give advice for a small monthly premium but dread litigation which cost is not insurable in the business sense.
31. What the bureau should do is a) judicial hearing and b) work with nonprofits to compile decided condo cases for educational purpose.
32. **The bureau's income sources are** 1) Collecting fines allowed in the Civ. Code for the board's failure to give "full" copies of the CC&R and Bylaw to new members of the condo which is \$500 per offense 2) Failure of the board to give annual notification of ADR procedure or right to members, 3) Any authorized fines based on ruling making power under delegated legislative power of the bureau. Again, do not let public civil servants work alone on fines collections. 4) Filing fees from the parties (Say half of that of the Superior Court) 5) Court cost for frivolous litigation before the bureau, applying the standard in collecting fines based on Civ. Code ` 128.5 which statute is constantly expanding to become more and more precise and effective to police frivolous cases. 6) At present, many of the attorney fees award for violating statutes, such as attorney fees award for winding a mandamus action that commands production of HOA books and records, are not effective in scaring offenders. The reason is that the attorneys may not be asking for that in court so that the fees will not necessarily be collected for the winning client. That becomes the Sixth source of income of the bureau. The bureau collects such fees for the winning party and deduct an

- trustee's fee for the collection. The attorneys of the winning party will estimate the amount.
33. The collection of attorney fees for the winning party usually the homeowner (Based on statute allowed fees such as for mandamus action that command performance of a duty to comply with law or bylaws regarding election procedure and financial reports and budgeting quarterly review, and for commanding CPA review of book accounts or action to command production of books and records for audit) is an income source for the bureau that can oversee that and collect a trustee's fees.
 34. That is a public service as a trustee because quite often "statute allowed" attorney fees for the winning party often escape the winner for that collection usually requires a separate motion's hearing to determine. The homeowners are better protected if there is a "Trustee" in the bureau's staff to oversees the effectuation of the attorney fees collection for the benefit of the winning party (Usually the homeowner). The procedure can be borrowed from the LASC superior court trustees, or the Probate Division's trustee.
 35. There is no need to worry about insurance premium for HOA's directors and officers liability insurance to be rising. When the board is sued. The insurance company has duty to provide defense (And Cumis lawyer for the opposite side) and duty to settle (Based on objectively assessed damages). The end result is only requiring the wrongful party to disgorge after initial appearance in court (Filing an answer to the complaint), or after investigating the claim.
 36. The defendant board has duty to show books and records to the insurer and obtain evidence from the claimant, namely, the homeowner who claims in the right of the association, as a normal claims investigation procedure. Thus, if the insurance company goes through the proper procedure as above, the premium would be competitive.
 37. The insurance company has the right to refuse to insure particular individuals as directors (Based on having adjudged to be offending the law while serving)s/ That is constitutionally permissible under freedom to contract. The insurance company has right to decide whom to insure or who is insurable. The long term effect is that, in condo election, the directors must be insurable or bondable just like any important employee of a company who has to have clean record.
 38. **THERE IS NO EQUAL STANDING IN BEFORE THE LAW** when it comes to the relation between trustee (Directors) of others' money and property maintenance and the beneficiaries (Fee paying members) that depends on the trustworthiness of the trustee. **THE LAW IS THAT THE TRUSTEE IS NOT ASSUMED TO BE INNOCENT. TRUSTEE HAS TO PROOF HE IS INNOCENT. THERE IS LEGAL ASSUMPTION THAT HE IS HAVING UNDUE INFULENCE ON THE BENEFICIARY.**
 39. The saying that this proposed legislation is too much on the side of the homeowners is due to lack of understanding of trust law, or law of trusteeship, or

- principles of equity and trust. I do not expect any one for not knowing. I blame those who know and kept quiet.
40. The bureau has filing fees for hearings (Although cannot fine the party for contempt of court or impose sanction for bad behavior as regular courts can). That should cover the cost. More case becomes more money. The bureau has no expense other than an adjudicating officer. The parties pays for their own lawyers if they want representation. The panel of jury is s\$30 per person per day, and I am not sure whether the parties have right to a jury when the bureau is only an administrative court.
 41. I think the thought of having the bureau answering questions of law is a redundant function. There are a lot of Prepaid Legal Service that are totally dependent on giving unlimited time for advice at a small monthly fee. Those Service will charge extra if are asked to represent the insured in court.
 42. Therefore, the function of the bureau should be limited to adjudication, not legal advice, competing with private law practice. Besides, it is contrary to legal ethics to advice opposite sides of the case. It is hard to track which side the caller is on because sometimes homeowners are supporting the directors.
 43. What is the bureau for? The answer is simple, "To protect against victimization, by the board on homeowners or by the homeowners ganging up on the board to take the board's place, neither scenario is good for peaceful living and safe investment."
 44. About investment, for those who say the offending directors' being disciplined by the bureau and be on public list would scare away investors from investing on condos, I have an opposite conclusion.
 45. My opposite conclusion is that making offenders name public attracts investment on condo because it shows bad guys get caught at public expense, no need for investors to fend for themselves. That is an investment without risk. The condominium is a safe neighborhood to invest for it is well policed.
 46. For closing, I would rather stop looking for the attorney general's source. Attorney generals intervene on corporations that have no owners, such as charitable public corporations. We are neither charitable nor public but strictly private and for maintenance purpose on private properties. On that note, I think the CLRC should invite not only corporation lawyers to donate time for the CLRC, but also those professors who teach political science and governments to start to talk.
 47. **In conclusion, there is no cost factor to talk about in establishing the bureau.** Those who know why (Legal practitioners who are specialized in litigation and appeals, or specialized in corporations, prepaid legal insurance providers and even homeowners insurance providers) should speak out and tell the truth. They can and should speak the truth to the CLRC confidentially.
 48. The AHRC and the CLRC can send out questionnaire to survey lawyers in this county that handle condo case in court and see what they say about the published comments of 2005-2, and ask them whether they want to be known or to be

- confidential in giving opinion. Give them a choice. Those who have condo board as clients will prefer to be quiet for they are more obligated to defend client's privilege.
49. Generally, however, lawyers like to appear in county court not administrative courts for the judge in administrative courts are specialists judges. Only lawyers representing homeowners like to go to administrative courts if there is one where justice is speedier and more expert.
 50. On the other hand, consider the fact that those who are representing clients pursuing their rights in the name of the HOA will be most vocal. That does not mean that is not good. You want a lawyer to be vocal on societal issue.
 51. **From government's viewpoint, the testimonies of homeowners' being so abundant is evidence of the gravity of the problem, and evidence of their lack of resources and need for government help.** Nearly all government departments wash their hands. Government usually is concerned about millions of people's problem, their family offspring with the same problem for they cannot afford single family dwellings.
 52. The staff of CLRC may be heading into a completely different direction if the staff is working towards these a-e,
 - a) If the bureau is to be composed of lay people's commission of property managers and homeowners,
 - b) If the judicial branch of the bureau composed of legal professionals who are not too familiar with equity and trusts, litigation procedure, and the particular part of the Corp. Code, namely Mutual Benefit Corporations and applies general law to the condominium environments, and not being aware that trustees are presume to have exerted undue influence on the trustors (Condo association) and the beneficiaries (Homeowners) and that the trustees have the burden of proof when accused. The current assumption of common law principle that the board are presumed to be innocent until proven guilty of errors, omissions and breach of fiduciary duty , is result of legal professionals' lack of awareness of trust law and are more aware of civil liability of fraud and criminal liability of grand theft, both of which presume the accused to be innocent until guilty, thus putting the board and the homeowner on "equal footing" or "presumed innocence"), and
 - c) If the bureau is balked down in giving legal advise servicing millions, and,
 - d) If the bureau fails to give a choice to millions who are seeking protective shelter under law.
 53. If all of the above are evident, then the Governor will need more efficacy and more self-paying features as those set forth earlier in this letter to convince him that this will be a strong bureau for him to sign his name.

Sincerely,
Anonymous Person

January 13, 2005

TO: Brian Hebert
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739
650-494-1335

Law Revision Commission
20050109

JAN 19 2005

File:.....

FROM: Judy Semerjian
509 Dunbarton Cr.
Sacramento, CA. 95825

SUBJECT: Oversight Bureau for Homeowner Associations

We need an entity that has oversight, not only to provide a statewide perspective, but to provide advice and consultation and to make association management accountable for their actions with regard to such things as: vendor contract development and enforcement; firms conducting reserve studies (procedures to follow, components & standards etc) are certified; selecting insurance carriers offering reasonable rates to the association and more. Basically, an entity that is a homeowner advocate to insure proper services are provided and that there is good stewardship of funds.

Examples:

- I am very concerned about the severe increase in dues at my homeowner association. In 1988 the homes were 11 years old and the dues \$140.00 now they are \$390. There are 590 units so this adds up to a lot of money (in the millions annually).
- When I bought my home, I had to pay an assessment for replacing the roof and the home was only 11 years old. In 2002, the association started the cycle of putting on a third roof and the homes are not quite 30 years old. The builder did not install the roof properly.
- When the homes were built, the builder (Powell) was allowed to put in a heat resistant system (electric) that has since been banned in California. Homeowners were not getting heat and had to change out their systems to either heat pumps or to gas.

Mr. Brian Hebert VIA FAX:650-494-1827
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RE: Letter of Beth Grimm, P.L.C.

23 January 2005

Sharon Stephens/ E-mail: sstephens.1@juno.com
27-135 Shadow Crest Lane
Cathedral City, CA 92234
760-325-5425

As a homeowner that has suffered greatly at the hands of a rogue board, and unethical attorneys, with no place to go for support, not even the courts, where I will be up against an attorney who "knows" how to beat a pro per homeowner every time, it would be quite beneficial to have an agency and an Ombudsman to regulate and oversee associations.

I live on \$810. a month, and I have yet to find an attorney who is willing to do any pro bono work on my behalf. I must appear at every court appearance as a pro per, and I have found I must study the law as thoroughly as any attorney – and with no help there either.

Does Ms. Grimm do pro bono work?

Our association is run by a board of directors who have literally battered me and other homeowners, with little help from a police department, whom we are wanting to sue, (in fact we have a board who has provably conspired with police and a Deputy District Attorney), and broken every law that regulates HOAs. They have committed fraud, conspiracy, embezzlement, extortion and RICCO. They have illegally removed funds from the Reserve Fund, put an illegal assessment on homeowners, and even paid legal fees for a man who was not even a homeowner! Yes! There has been much *malice, oppression, and fraud* with regard to Section 7237(g).

Where to go? The police have refused to write a criminal report; we have asked the District Attorney. We shall see.

Most homeowners I have spoken with have not even read their CC&Rs, let alone understand them, and then there is the ongoing apathy of owners who really don't want to be involved and just go along with management and the board in whatever they do – *right or wrong!*

Few know that homeowners in associations are Third Party Beneficiaries, and that the attorneys owe a fiduciary responsibility to them, not just to the board. Few people understand that the way an association is to be run, is from the bottom up; the homeowners telling the board what to do, then in turn telling the attorneys and management what to do.

In reality, it is the attorneys, in most cases, telling the board and management company what to do, and the board ends up as no more than a puppet government.

The attorneys, and management then have an out by saying, "We were only doing what the board wanted us to do."

In our association, after two years of informing the law firm of the perjury, fraud, and illegalities, we finally were able to get the attorneys "let go" by their own law firm, but still, we have no idea of what we will face in the future with this firm. I am due in court with them on the 25th of this month, and they have refused to communicate with me.

Our association, was *suspended as a corporation*, by the Secretary of State for two years, and in this period of time the attorneys defended a lawsuit I brought against the board for using invalid documents. I didn't ask for any money, it was only an injunction to stop using the documents. When I had heart trouble, and dismissed the case, mistakenly "with prejudice" the attorney jumped right on that, and has since stolen, through "attorney fees," over \$20,000 from me.

I had no idea at the time that they could not defend a lawsuit while suspended; it would have been nice to have this information available. That is why I am in court on the 25th.

Yes! WE need public website that can make these sort of *crimes* public. It can be monitored of course, but why should these sort of criminals go unreported? That would not be *excessive punishment*, but rather a way to inform and educate others to what their rights are as homeowners.

Education is of course needed, but not only for managers, and boards, who seldom then pass on that educational experience to homeowners.

Elections need to be handled according "Election Code". We have seen so much fraud in this area, where there is obvious bias to "get the right people" into office.

I could go on, but I am on my way to the Law Library to study, or stumble through, more on what I have recourse to do, legally.

Respectively,

