Study H-853 March 11, 2005

First Supplement to Memorandum 2005-10

State Assistance to Common Interest Developments

On March 9, the Assembly Housing and Community Development Committee and the Assembly Business and Professions Committee held an informational hearing on "the Role of State Assistance and/or Oversight of Common Interest Developments." The principal focus of the hearing was discussion of the Commission's draft recommendation on *State Assistance to Common Interest Developments*.

This memorandum provides a brief description of the hearing. Written materials submitted by the presenters are attached in the Exhibit, along with a few letters that we received from individuals, as follows:

OVERVIEW

The hearing was very productive. It was well-attended by committee members, had an interesting and varied panel of presenters, and had an audience of perhaps 30-40 individuals that included many CID homeowners. The staff renews its thanks to the committees who hosted the hearing and commends the

Assembly Housing Committee staff, in particular consultant Lisa Engel, for their excellent work in organizing the event.

The hearing was moderated by Assembly Member Gene Mullin, chair of the Assembly Housing and Community Development Committee. The entire Housing Committee was present, including vice-chair Bonnie Garcia and members Joe Baca, Loni Hancock, Jay La Suer, Simon Salinas, and Alberto Torrico. The Business and Professions Committee was represented by its chair, Gloria Negrete-McLeod, and committee member Bill Maze. Senator Alan Lowenthal, of the Senate Transportation and Housing Committee, also took part.

The panel of witnesses included:

- Nevada Senator Mike Schneider and the chair of the Nevada Commission on Common Interest Communities, Michael Buckley
- Kristin Triepke of the California Department of Consumer Affairs, Tom Pool of the Department of Real Estate, Herschel Elkins of the Department of Justice
- Private attorneys with CID practice experience: Curtis Sproul and Dan Mulligan
- CID homeowner advocates: Marjorie Murray and Arnold McMahon
- Sandra Bonato of the Executive Council of Homeowners (ECHO), Skip Daum of the Community Associations Institute (CAI), and Karen Conlon of the California Association of Community Managers (CACM)
- Six CID homeowners: Carole Hochstatter, Bonnie Laderman, Eva McLain, Patrick McLane, Larry Robinson, and Norma Walker

The Commission was represented by its chair, William Weinberger, and Assistant Executive Secretary Brian Hebert. The agenda for the hearing is attached at Exhibit p. 1.

The staff feels that our two main goals were accomplished. We received useful feedback on a number of points relating to the political feasibility of the proposed law (discussed below) and we were able to educate the committee members about the specifics of the proposed law and the rationale behind it.

NEVADA EXPERIENCE

Nevada Senator Schneider was the author of the bills that created the Nevada Ombudsman (1997 Nev. stat. ch 631) and the Nevada Commission on Common Interest Communities (2003 Nev. stat. ch 385). Senator Schneider was very

positive about Nevada's program of state assistance and made the following points:

- Prior to creation of the Ombudsman program, there was no empirical data on the number of problems occurring within Nevada's CIDs. However, individual Legislators regularly received calls for help with CID problems. Whenever a newspaper report would connect Senator Schneider's name with work on CID issues his office would receive a flood of calls. This anecdotal evidence suggested a demand for assistance that seemed to be borne out when the Ombudsman service first began operating; in its first months it received several thousand calls for assistance each month. There was also a significant decrease in the number of CID homeowner complaints received by members of the Legislature. The calls that were received were referred to the Ombudsman.
- It became clear that the Ombudsman could not resolve some disputes because it lacked law enforcement power. In response, Nevada created the Commission on Common Interest Communities, which is authorized to enforce the law. In its first 14 months of operation, the Commission received 340 affidavits requesting investigation of alleged statutory violations.
- Senator Schneider asserts that oversight has increased property values by protecting homeowners from mismanagement and abuse.
- When asked if Nevada's program has deterred volunteer service on association boards, Senator Schneider asserted that the opposite was probably true. Board members seem to welcome the services provided (especially the educational opportunities). He also suggests that improvement in the education of board members has led to a reduction in the cost of liability insurance, making it affordable to some boards that previously could not afford it.
- Nevada is growing very rapidly and it is expected that most of the new housing stock will be in CIDs. Senator Schneider feels that it is important to provide assistance to those homeowners.

CONCERNS EXPRESSED

While the overall response from the committee members seemed mildly favorable, there were a number of concerns expressed by witnesses and Legislators (discussed below). This included an indirect suggestion from the Department of Consumer Affairs that the current administration would not support an expansion of government:

> While the Department does not take positions on proposals, I do have a few general things to say. While the Governor has expressed

> his commitment to addressing one of the biggest CID issues, which is the non-judicial foreclosure process for failure to pay delinquent homeowners assessments, *the creation of a new bureau does not appear to be consistent with the Governor's interest in reducing and streamlining government*. Additionally, in light of the CID bills that have been enacted recently, it is possible that the proposal may no longer be necessary.

See Exhibit p. 38 (emphasis added).

Concerns About the Need for the Proposed Bureau

Empirical Evidence

In the opening testimony, the staff noted that there is a lack of empirical data on the number and nature of problems occurring within CIDs in California. The proposed law would help to provide that data. The Bureau would be required to compile statistical information on requests for assistance. It would report its findings to the Legislature annually. Senator Lowenthal stated that this was one of the most important purposes of the proposed law.

Assembly Member La Suer questioned the staff closely on whether there is sufficient data to justify a state program of the sort we are proposing.

The staff explained that there is *anecdotal* data suggesting a widespread demand for CID assistance in California. Agencies and legislative staff that have CID-related responsibilities report receiving CID homeowner calls on a regular basis (the Commission probably receives one or two contacts a week, on average). As reported by Senator Schneider, news coverage increases these contacts significantly. One Sacramento Bee article that mentioned the Commission's work on state assistance to CIDs prompted over 30 calls to the staff over a span of a few days.

Arnold McMahon, of the American Homeowners Resource Center, reported that his organization's website receives 78,000 hits per day (2.2 million hits per month). On average, AHRC receives five homeowner complaints each day. CACM reported receiving around 20 inquires from its members each month. Marjorie Murray reported receiving CID homeowner inquiries on a regular basis.

Reports from California experts are somewhat inconsistent. Curtis Sproul asserts that very few CIDs have serious problems. He suggests that there is no need for the proposed Bureau. See Exhibit p. 39. By contrast, ECHO feels that there is a significant need for the proposed law. See Exhibit p. 12. In the past, groups like CAI, CACM, and the Department of Real Estate, have predicted that

an agency set up to handle CID homeowner inquiries would face an extremely large volume of calls.

We do have some empirical information from other states. In 2004, Florida processed around 2,000 cases involving an alleged violation of the law governing condominiums and housing cooperatives. Florida has approximately 1/3 the number of units that California has. If the Florida numbers can be extrapolated to California, this would predict 6,000 law enforcement actions each year in California (one action for every 6 associations, annually).

In Nevada, 340 affidavits alleging statutory violations were received in 14 months, an average of 291 complaints per year. Nevada has 1/10 the number of units that California has. If the Nevada numbers can be extrapolated to California, this would predict 2,900 law enforcement actions each year (approximately one action for every 12 associations, annually).

Florida and Nevada do not have empirical data on requests for *informal* assistance, but anecdotal reports suggest a heavy demand. Senator Schneider described the Ombudsman receiving thousands of calls each month. He reported that public meetings on the proposed Ombudsman had filled convention-sized halls. After Florida announced the appointment of its condominium ombudsman, the appointee started receiving calls at his home, continuously. A large number of homeowners searched out his residential phone number to ask for help.

Can data from other states be extrapolated to predict workload in California? Herschel Elkins of the Department of Justice believes that it cannot. He reports that repeated multi-state investigations of consumer fraud by businesses operating nationwide demonstrate that there is no reliable connection between population size and the number of complaints. There are too many other factors that can affect consumer response. See Exhibit p. 26. Mr. Elkin's assertion is consistent with the variation in complaint data from Florida (one per 600 units) and Nevada (one per 880 units).

He also noted that the number of complaints received does not necessarily indicate the scope of a problem. Mr. Elkins recounted his involvement in the creation of the Bureau of Automotive Repair (BAR). At that time, there was no empirical data available on the scope of any problems that consumers were having with auto repair shops. Nonetheless, once BAR was created there proved to be widespread demand for its services. Today it handles over 20,000 consumer complaints each year.

Even if we cannot use inter-state data to precisely quantify the probable workload of the proposed Bureau, it does confirm that there is a sizable and ongoing demand for services of the type proposed. Florida has been enforcing condominium law for over 25 years and still has a significant caseload each year. There is no obvious reason why California CIDs would need state assistance any less than CIDs in Florida or Nevada.

In any event, it seems likely that opponents of the proposed law will base their arguments in part on our inability to conclusively quantify the demand in California for the proposed services.

Recent Reforms Adequate

Several witnesses asserted that the proposed law is premature. Recent reforms to the Davis-Stirling Act should be given a chance to operate and may be sufficient to solve the problems that the proposed law would address. Statements along these lines were made by Kristin Triepke of the Department of Consumer Affairs, Dan Mulligan, Curtis Sproul, Skip Daum of CAI, and Marjorie Murray of the CID Bill of Rights Coalition.

This has never struck the staff as a compelling argument. It may be that recent improvements to ADR in CIDs, especially the requirement that CIDs provide members with an internal dispute resolution process, would help to resolve some problems that could also be pursued through the proposed Bureau. However, there would undoubtedly be many cases in which the internal process is not sufficient. In those cases, the disputants would benefit from the additional option of assistance provided by the Bureau.

Also, the proposed law's education, law enforcement, and data collection functions are new and do not duplicate any existing provision of law.

Fix Existing Law First

Both Skip Daum of CAI and Marjorie Murray of the CID Bill of Rights Coalition suggested that the proposed law should be deferred until substantive deficiencies in existing law have been corrected.

If the concern is that action on the proposed law will interfere with Commission work in addressing other problems in CID law, it should not be a significant problem. Work on the proposed law is substantially done and we are preparing to start work on the next set of CID issues.

Alternatively, the concern may be that defects in existing law would undermine the proposed law by making it difficult or unfair for the Bureau to do

its work. The latter seems to be Ms. Murray's concern. She has stated before that it would be inappropriate to create an agency to enforce laws that are fundamentally unfair to homeowners. However, it is not clear what unfair laws would be enforced by the Bureau. Generalized assertions that existing law is unfair, without specific examples that can be analyzed and addressed, is not a compelling argument for delay.

The staff feels that the proposed law and improvements to existing substantive law can proceed side by side without serious detriment to either effort.

Local Dispute Resolution Programs

Ms. Murray also suggested an alternative to the proposed law that she sees as superior: collect a per unit fee from homeowners and use the money exclusively to subsidize mediation through local dispute resolution services. Those services could collect data on caseload and report it to some centralized authority (e.g., a legislative committee).

One important obstacle to that approach is the fact that local dispute resolution services only exist in 31 of California's 58 counties. This means that exclusive reliance on the local dispute resolution programs could not provide a complete statewide solution; 27 counties would not be served.

Nor is it clear how local efforts would be funded, overseen, and coordinated. These details could be worked out, but it is not obvious why a state program that relies exclusively on local mediators would be superior to one that provides a range of mediation alternatives (which could include use of local mediators).

In response to a question from the Housing Committee chair, the staff explained that the proposed law would not preclude the Bureau from contracting with local dispute resolution services to handle some cases. This would provide one way in which the Bureau could have a local presence in remote parts of the state. **This option should perhaps be stated expressly.**

Concern About Enforcement Powers

Remove Enforcement Powers?

Another significant concern raised at the hearing was the appropriateness of Bureau law enforcement, especially enforcement against individuals personally.

ECHO supports the Ombudsman-type functions (education, dispute resolution, and data collection) but does not support enforcement. CAI supports

education and might also support the other Ombudsman functions, but would not support enforcement. CACM supports education, but believes that enforcement is premature. Curtis Sproul, who expressed general doubt about the need for state assistance, indicated that limited Ombudsman functions might be useful.

Assembly Member Torrico expressed concern that punishment of directors could deter homeowners from voluntary service on association boards.

Politically, it appears that a proposal that includes enforcement powers would be supported by AHRC and some individuals, but would be actively opposed by CAI, CACM, ECHO, and others.

If the enforcement provisions are removed from the proposed law, leaving only the Ombudsman functions, it would be supported by ECHO, and perhaps also by CAI and CACM. There would probably also be greater support in the Legislature for an Ombudsman-only approach.

AHRC and some individual homeowners would probably be very disappointed by deletion of the enforcement provision, but it is unclear whether they would oppose an Ombudsman-only proposal. After all, an Ombudsman would provide many services that don't exist today and might well be the first step toward a full-service assistance Bureau once the basic concept of state assistance has been tested.

If enforcement powers are removed, the staff recommends that language be added requiring that the Ombudsman make a recommendation to the Legislature, as part of the sunset review process, on whether its powers should be expanded to include law enforcement.

Expand Enforcement Powers?

On the other side of the coin, Arnold McMahon of AHRC, and homeowner Patrick McLane urged that the enforcement power be expanded to include enforcement of governing documents. See also the comments of Eva L. McLain and Mel Klein in favor of expanded enforcement jurisdiction. Exhibit pp. 18-19, 21.

Mr. McMahon noted that the Montgomery County, Maryland CID adjudication system has authority to adjudicate disputes based on CC&Rs. He suggests that this shows greater leeway in dealing with constitutional separation of powers issues than is found in the staff's analysis. However, the reservation of judicial power is a matter of *state* constitutional law. Different states have

different constitutional language and different judicial interpretations of those provisions. The fact that some states are less rigorous about application of the substantive limitation on administrative adjudication does not mean that California would follow suit.

In analyzing decisions in other states (including Maryland), the California Supreme Court acknowledges that its holding is stricter than decisions reached in other states:

> All of the foregoing sister state decisions support an expansive view of constitutionally permissible administrative powers. *Indeed, some contain broad statements that in our view may well accord too little consideration to the "substantive limitations" principle discussed above.* We explain below the guiding principles we glean from these decisions.

McHugh v. Santa Monica Rent Control Board, 49 Cal. 3d 348, 377, 777 P.2d 91, 261 Cal. Rptr. 318 (1989) (emphasis added).

Scope of Enforcement Powers

Some of the points in CAI's letter to the Housing Committee were based on a misreading of the proposed law. The letter suggests, incorrectly, that the Bureau would be barred from considering governing documents in any way. In fact, the Bureau would be able to answer questions and mediate disputes involving governing documents. It would only be barred from *enforcing* a governing document provision.

General Skepticism About Chosen Approach

Dan Mulligan, an attorney with experience in CID foreclosure cases, feels that the proposed law would do nothing to address the most serious problems in CIDs: (1) the difficulty homeowners have enforcing association governance laws and (2) the over-use of foreclosure.

He is correct that the proposed law would not change existing substantive law governing foreclosure. However, an Ombudsman or law enforcement function could do considerable good in resolving foreclosure problems that result from misunderstanding, miscommunication, or a violation of existing foreclosure procedural requirements (which would include some of the recently publicized cases involving foreclosure for very small amounts). The purpose of the proposed law is to foster understanding of and compliance with the law, not to address existing substantive defects.

Mr. Mulligan's main concern seemed to be that the Bureau would be influenced too heavily by groups representing the CID service industry. As a result it would stop being an advocate for homeowners and would instead serve the interests of attorneys and property managers. Others have expressed similar concerns in the past.

There is no way to guarantee that the Bureau will have any particular enforcement philosophy. The risk that a regulatory agency will be seen by some as too sympathetic to regulated parties (or not sympathetic enough) is a political issue. It cannot be resolved by law.

What can be done is to guarantee that an agency is publicly accountable, through application of such laws as the Public Records Act, the Political Reform Act, the Administrative Procedure Act, etc. Those laws would apply to the proposed Bureau. The Bureau would also be subject to sunset review and be required to report to the Legislature annually.

Mr. Mulligan also objected that Bureau mediation would be ineffective because associations would not be required to participate. That is one of the strengths of the law enforcement function. It provides an incentive to cooperate with informal dispute resolution, in order to avoid enforcement action. However, even voluntary mediation efforts are far better than nothing. Those who choose to participate have a good chance of resolving their differences. Those who choose not to participate are not harmed.

Finally, Mr. Mulligan objected to the procedure for review of Bureau enforcement decisions. He feels that administrative hearings are unhelpful because administrative law judges are not competent adjudicators. Review of their decisions by writ of mandate would be unsatisfactory because it would only involve review for abuse of discretion.

Miscellaneous Issues

Cost Spreading

Curtis Sproul believes that the proposed law is unfair in that it requires all associations to pay equal fees, even though they would not all receive equal benefits from the proposed Bureau. He maintains that many larger associations have sophisticated dispute resolution and decisionmaking procedures in place and are able to maintain arm's-length relations that help to keep problems from becoming rancorous. These larger associations are unlikely to need the dispute resolution and enforcement functions as much as other associations.

That may be largely true. While the Bureau would provide some benefits directly to associations (e.g., education and data collection), the mediation and enforcement functions would directly benefit only those associations that are having problems.

On the other hand, all associations will benefit indirectly from general improvement of the CID community as a whole. For example, Senator Schneider testified that enforcement and training in Nevada had led to a general decrease in director and officer insurance rates for CIDs. Fewer horror stories should lead to fewer abrupt changes in statutory law. Precedent decisions resulting from adjudication would provide helpful guidance on unclear points of law.

In any event, the use of a funding mechanism that spreads costs equally to all CID homeowners is likely to provoke some opposition on the grounds that it is unfair to well-run associations.

Volunteer Directors as Laypeople

Marjorie Murray disagrees with a central premise of the proposed law's rationale, that many problems result from the fact that CIDs are run by laypeople who may lack the specialized knowledge necessary to avoid problems. Instead, she maintains that most CIDs are run by property managers who exercise all of the board's powers, serving as de facto boards. She states that this occurs because boards must rely on their managing agents and have "nowhere else to turn."

This seems to be an oversimplification. Many small associations cannot afford professional managers. In associations that do have management assistance, the degree of deference to managers will vary depending on a number of factors; personalities, relative competence, contract terms, etc.

If directors are relying too heavily on managers because they have "nowhere else to turn," the proposed law would seem to provide a useful alternative. Directors would have somewhere else to turn for advice and information.

State's Responsibility

Mr. McMahon noted that many CIDs are created because local governments do not want to undertake responsibility for maintenance of features such as roads, storm drains, street lights, etc. A CID can be set up so as to impose those costs on homeowners within the development, rather than on the local government. He argues that governmental pressure to form CIDs, in order to shift social costs to them, imposes responsibility on the government to help when CIDs run into trouble.

Election Supervision

Mel Klein sees the proposed Bureau election oversight as a half-measure. Why not simply have the Bureau run the election? See Exhibit pp. 19-20. That would help to preserve the secrecy of ballots and thereby reduce the risk of voter intimidation. The staff is reluctant to involve the Bureau too deeply in setting up and running elections, but **it might be appropriate to include vote counting as part of the Bureau's election supervision power, in order to preserve ballot secrecy.**

Norma Walker recommended that the threshold for petitioning the Bureau for election supervision be lowered from 15% to 5%. Note that 5% is the threshold required to call a special member meeting to take actions such as recall of a director, so there is some precedent for use of that figure.

Permanent Removal

Mel Klein suggests that the proposed law should be more aggressive about removing directors. If the Bureau finds, by clear and convincing evidence, that a director has violated the law in a manner involving malice, oppression, or fraud, why remove them for just one year? Mr. Klein suggests that the person should be barred from holding office permanently. Also, why should conciliation efforts be required if there is a finding of malice, oppression, or fraud? See Exhibit pp. 20-21.

Comments on Staff Draft Recommendation

Bruce Osterberg has commented on the various aspects of the staff draft recommendation. He supports a fractional fee for developer-owned vacant lots. He also supports a filing fee for Bureau services. See Exhibit pp. 10-11.

CONCLUSION

Some will oppose the proposed law regardless of its scope, due to (1) general opposition to expansion of government, (2) belief that the scope of the problem does not justify state involvement or is not sufficiently well documented, (3) belief that the proposed law should be deferred until after existing law has been substantively reformed, (4) or opposition to a cost-spreading per-unit fee. This opposition probably cannot be addressed other than by abandonment of the proposed law.

Others will oppose the proposed law because they feel that the enforcement element is too harsh or should be deferred. Education, in particular, should be provided before anyone is punished for violating the law. This opposition could be neutralized or even shifted to support by removing the enforcement provisions.

Strictly as a matter of policy, the staff is reluctant to remove the enforcement provisions. Limited enforcement assistance would be appropriate and useful and has been carefully constrained to avoid an overly punitive approach.

Practically speaking, it may be that opposition to enforcement would be the deciding factor in determining whether the proposed law is passed by the Legislature. No Legislator has stated that enforcement is an essential part of the proposed law. At least two members of the Housing Committee expressed reservations about Bureau enforcement power.

As a political compromise, removal of the enforcement power probably makes sense. Reforms often proceed incrementally, and it is better to take half a step forward than none at all. The creation of an Ombudsman empowered to provide assistance with education, mediation, and data collection would be a significant improvement over the status quo. It would also establish an administrative structure that could be adapted to other purposes in the future (e.g., law enforcement, oversight of foreclosures, state supervision of reserve funding). Note too that elimination of enforcement functions would reduce the cost of the program and might allow for a slight reduction in the per unit fee. That probably would not eliminate all opposition based on cost concerns, but it might help.

However, even an Ombudsman approach might not be approved by the Governor, because it would still involve an expansion of government. Perhaps concern about government expansion could be reduced somewhat if the proposal were reshaped to be more of a pilot project. The staff still disfavors a geographically limited pilot, but the duration could be shortened (e.g., from five years to three). A "CID Ombudsman Pilot Project" might be a more acceptable approach than creation of a "CID Bureau."

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

INFORMATIONAL HEARING AGENDA (MAR. 9, 2005)

Assembly Committee on Housing and Community Development
and
Business and Professions

Informational Hearing on the Role of State Assistance and/or Oversight of Common Interest Developments

Wednesday, March 9, 2005
9:00 a.m. – 12:00 noon
Room 444, State Capitol

I. Welcome and Introductions

- Gene Mullin, Chair
  Assembly Committee on Housing and Community Development

- Gloria Negrete McLeod, Chair
  Assembly Committee on Business and Professions

II. Overview of the California Law Revision Commission (CLRC) proposal to provide state assistance to common interest developments

- William Weinberger, Chair
  California Law Revision Commission

- Brian Hebert, Assistant Executive Secretary
  California Law Revision Commission

III. Nevada Commission on Common Interest Communities

- Senator Mike Schneider (Nevada – D) – authored legislation to create the Nevada Commission on Common Interest Communities

- Michael Buckley, Chair
  Nevada Commission on Common Interest Communities

IV. State agencies that currently provide various forms of consumer protection and what role should the agencies play in regard to CIDs?

- Kristin Triepke, Deputy Director, Division of Legislative and Regulatory Review
  Laura Zuniga, Assistant Deputy Director
  Department of Consumer Affairs

- Tom Pool, Assistant Commissioner Legislative Liaison
  Department of Real Estate

- Herschel Elkins, Special Assistant Attorney General
  Department of Justice

V. Private attorneys practicing CID law: Feedback on CLRC Proposal

- Curtis Sproul, Attorney at Law
  Law Firm of Weintraub, Genshlea, Chediak, & Sproul

- Dan Mulligan, Attorney at Law
  Law Firm of Jenkins & Mulligan

VI. CID homeowner advocacy groups: Feedback on the CLRC proposal

- Marjorie Murray, Chair
  CID Homeowner Bill of Rights Coalition

- Arnold McMahon, Executive Director
  American Homeowners Resource Center (AHRC)

VII. CID advocacy groups: Feedback on the CLRC proposal

- Sandra Bonato, Chair
  Executive Council of Homeowners (ECHO)

- Skip Daum, Administrator/Advocate
  Community Associations Institute/California Legislative Action Committee
  (CAI-CLAC)

- Karen Conlon, President
  California Association of Community Managers (CACM)

VIII. Public Comment

IX. Closing Remarks

LETTER FROM CAI/CLAC TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMITTEE (FEB. 26, 2005)

February 26, 2005
TO: Gene Mullin, Chair
Assembly Committee on Housing and Community Development
Gloria Negrete McLeod, Chair
Assembly Committee on Business and Professions
CC: Brian Hebert, Esq., CLRC
FR: Skip Daum, Administrator/Advocate
RE: Informational Hearing on Establishing a Common Interest Development Bureau (CIDB)

Your staff has asked several questions and this presentation is in direct response although the discussion merits much lengthier dialogue.

Please briefly describe the concerns of the group you represent.

CAI is a non-profit professional organization representing and serving the homeowners' associations.

Its mission is to enhance the CID lifestyle, and assist community associations in promoting harmony, "unity in community", and responsible leadership through education and advocacy. CAI's California members include owners, managers, board members, association lawyers, CPAs, vendors and the associations themselves. A more definitive description of its purpose, members and services is attached.

As to the concerns about the CID Bureau (CIDB) being proposed by the California Law Revision Commission (CLRC), I will highlight several but begin by stating that CAI believes there is great merit to further educating owners, volunteer board members, community association managers and association attorneys about running a community association corporation, board activity, and California CID laws which all here agree are difficult to follow and have been amended approximately 45 times in 20 years. The continuing education aspect of any proposal will be supported by CAI. Indeed, CAI publishes 114 educational materials, videos, and CD's, and regularly conducts seminars around the nation in furtherance of the goal. CAI also compliments the CLRC's attention to the ombuds service; we see that as a viable and valuable first step.

Please regard these comments, and others submitted in my December 30, 2004 letter (attached) as being respectfully and proactively submitted. Also enclosed is an appendix of real world cases that the CIDB can foresee being asked to handle, with obvious difficulties.

Please comment generally on the proposed Bureau.

The CLRC proposal continues to evolve through very diligent and honest thinking and objective perspectives yet is far from complete in defining its purpose, scope, structure, mechanisms, authority, jurisdiction, staffing, budget,

data collection means and objectives, and over all effectiveness measurement tools.

Dozens of questions arise, indicating the need to continue developing the proposal. No policy is better than the manner in which it'll be implemented and so establishing this full service bureau is not ready for passage.

We'd suggest taking one step at a time, collect experiences and data, improve the initial offering to the consumers and associations, and go from there.

First, fast track the information service by completely re-writing the Davis Stirling Act (again!) in lay terms. Publish it, along with FAQ's on a website. Educate the 180,000 board members and other parties ahead of start up date in order to stem the confusion about the laws and to avoid the inevitable tsunamic wave of consumer calls the day the bureau opens for business.

Simultaneously, re-write the Department of Real Estate's booklet on buying into a HOA. Former Senator Barbara Lee's SB 254 intended to do this in 1997, but was dropped when she was elected to Congress. We supported that legislation.

What has been overlooked is the list of associations compiled at the Secretary of State; the Legislature should send educational information about new laws to them directly because there are thousands of associations that are not professionally managed and may never learn of the new law. That was the premise for recently establishing the SOS data base; it should be used to curtail ignorance of the law and thereby reduce the caseload.

Once the above steps are in place, open the doors and offer the information, learn what questions and concerns come in, then design more services based on the experiences gained. Learn what staff levels and qualifications are going to be needed the very first day that the bureau's doors open. Failing to phase in the CIDB will create a huge backlog of cases as well as backlash among consumers, waste the parties' money, and result in major criticism.

Consider offering information and mediation services before venturing into arbitration, enforcement, fines, related court actions, etc.

Do you have any suggested alternatives to a Bureau as proposed by CLRC?

Yes. Attached are references to 100 existing dispute resolution programs in 30 California counties that are on the official California Department of Consumer Affairs website. While they focus on various issues, they have existing systems that are both local to the parties and effective enough to stay in business. Establishing a State Bureau is an answer that the State Legislature predictably envisions, but local communities should rely on localized service. It may be cheaper, more accessible, and would relieve the State from setting up offices throughout the State... an aspect that the proposal needs to consider. Would CIDB staff in Sacramento travel to an HOA office in Eureka to resolve issues, or stay here, removed from its customers? Where would the mediation meetings take place… in Sacramento?

If you have concerns with particular components of the proposal what are they?

Access to the CIDB needs to be very specific in terms of whom may access it for information and other services. It should be entirely unbiased and allow both

owners and their associations and board members access for equal treatment. It needs to also spell out whether an association's agents, employees, vendors, and CID developers have access to which services. Will the Department of Real Estate's jurisdiction over community subdividers conflict with the CIDB?

Training of staff needs to be prescribed. Inadequate training will yield inconsistent answers to consumers and possible litigation. Indeed, "interpretations" by staff may induce unlawful action by the party, not to mention providing legal advice by non-attorneys. Secondarily, if the staff cannot refer to an association's governing documents and only rely on statutes, there may be wholly incorrect and inconsistent answers provided where the law says one thing, or is silent, but the CID's rules stipulate that barring any specific law on a topic the rules prevail; in the current proposal the staff must remain "blind" to the association rules and the answer may mislead the owner. A majority of cases, we predict, will involve rules, covenants and governing documents that the CIDB is barred from using as its basis for decision making under the proposal.

The CIDB's charge needs to be more specific as to what it can and cannot do; prescriptive authority will avoid presumed authority and overreaching action.

Current law insufficiently defines books and records and we testified to this fact during hearings on AB 104 last session. The CLRC's proposal would allow subpoenas of undefined documents, books and records.

Publishing actions and decisions really needs to be carefully considered. Innocent actions by a board member or association do not merit the public recrimination that such an idea espouses; would an individual homeowner also be published for his/her actions? This idea would seriously serve to dissuade neighbors from volunteering to serve their community. (Perhaps sellers' disclosure statements are the more appropriate method for this information.)

Do you think the fee proposed by CLRC to fund an oversight agency is appropriate for the services that will be provided?

Is $5.00 appropriate? $10.00? Again, first steps will determine future needs. Whatever the amount, it should be an amount that the owners do not need to approve as part of their association's zero-based annual budget since the fee would be state-mandated.

That brings up the entire subject of whether the continual changes in law and mandated procedures upon 34,000 communities should be a mandated cost provision in every HOA bill just like cities and counties get; if CIDs are characterized as minnie municipalities then the State should pay for what it forces them to expend. Of course, most owners will probably regard this fee as unneeded and an additional property tax.

Doing the arithmetic, if Great Britain handles 27,000 cases in one year with only 7 personnel (p.16) that equates to 15 cases per work day for each person, or roughly 2 per hour. If we expect about the same number of cases, do we really need $15 to $30 million for as many staff? Perhaps a per case fee is more appropriate and still far less expensive than court action.

Additionally, if the CIDB isn't phased in properly, consumers will resent paying for it. If the bureau will serve 30,000 complainants out of 7,000,000 contented residents, this 'CIDB Assessment' is shifted onto those who have no

problems and not the 'users' of the proposed system. A user fee should be considered.

Do you think homeowners would be more interested in an Ombudsman that can provide solely information and education or an agency that will enforce the law?

Yes. The vast majority of owners don't have disputes with their associations. They will all appreciate the information if it in a readily understandable format with FAQ's.

In conclusion, CAI commends the effort and diligence in formulating the proposal. Politically, it can be charged with anomalous incidents, hyperbole, media hype and pressure. We must all keep in mind the millions of homeowners who are NOT complaining about their communities and who may never need the service, but who might appreciate having a source for it at some time. To better assess the need, the structure, the services and the concerns of all the parties, a more strategic approach must be taken… not a new law that launches the CIDB as currently sketched out.

Appendix by Beth Grimm, Esq.

"Comments have been made to the California Law Revision Commission that it would be able to sort out the calls that are coming in and address those that can be satisfied by citation to a law regulating common interest developments in California. However, having compiled information about the collective experiences of those attorneys and managers who hear homeowner complaints every day in the course of their work, we present the following examples to illustrate the intertwined nature of the law and governing documents. We focus on areas we understand to be the ones most complained about. However, it is our belief that you can take many sections in the Davis-Stirling Act and find potential problems with simple recitation of the law, without regard to what is in the association's governing documents.

Here are some very common examples:

1. COMPLAINTS ABOUT REGULAR AND SPECIAL ASSESSMENTS: If a homeowner calls the bureau and has a complaint about the association imposing a special assessment to pay for deferred maintenance or replenish reserves, or for some capital improvement, the CID Bureau will have to turn that person away. The CID bureau could recite Sections 1365, 1365.5, 1366 and other sections in the Davis Stirling Act that deal with reserves and assessments/assessment increases. However, most documents have some limitations on a board's ability to arrange for capital improvements and the voting requirements are commonly different than those provided in Civil Code Section 1366(b) for special assessments. Those statutes set forth disclosure requirements related to reserves and limits on imposing assessments without a vote of the members. However, the statutes do not require full funding of the reserves, and do not address the legal impact of a board's failure to "foresee" the potential problems that result in substantial assessments. Even the simplest painting project can lead to extreme costs because once the buildings are analyzed to see if it can be painted as is or needs preparation because there is often a problem arising in deterioration of the siding. One would

have to review the documents to find out if the siding (or other major expense item) is the responsibility of the Association or the individual Owner. And the documents often lack sufficient clarity on this. The Davis-Stirling Act says that associations must obtain a reserve study every three years, identify the components and collect funds for future costs, and give "integrity" to the reserve account (without defining what that word means). Handing out the statutes will not end the inquiry many assessment complaints. They do not provide a remedy for the homeowner who calls into the CID Bureau complaining about a special assessment or increases in regular assessments or complain of the board's exercise of its fiduciary responsibilities.

2. MAINTENANCE ISSUES: Many complaints over maintenance issues would have to be declined. Civil Code Section 1364 defines maintenance responsibilities in all forms of CIDs, but defers to governing documents when the governing documents address maintenance. The Davis-Stirling Act provides in Section 1364 a scheme relating to responsibility for repair, replacement and maintenance of damage by wood destroying pests or organisms. However, this particular statute contains the phrases "unless otherwise provided in the Declaration of a common interest development." This means that the CID Bureau would not be able to answer any questions about repair, replacement or maintenance of components or with regard to wood destroying pests and organisms without review of the governing documents of the association. The CLRC has received testimony of Owners with ongoing disputes with their associations over maintenance responsibilities. Water leaks and water damage issues are one of the biggest issues in the industry today, and differences of opinion as to who is responsible for what. The statutes do not provide answers. An owner may feel that an association is responsible to repair the interior of their unit after a roof leak, or to replace the siding on their planned development lot improvement, and the documents may say otherwise. An owner may complain that the Board does not have the right to dictate the standards for maintenance of the individual homes, yet that authority can be found in the governing documents (not the laws). The CID Bureau can expect many calls with complaints about maintenance responsibilities, but it is likely those will not be able to be handled since analyzing what is in the governing documents is an integral part of the inquiry.

3. INSPECTION OF BOOKS AND RECORDS. This area constitutes a substantial portion of complaints from homeowners. The Davis-Stirling Act, at Civil Code Section 1365.2.5 provides that owners have the right to inspect accounting books and records of the association. Civil Code Section 1363.05(f) also provides owners rights to examine accounting books and records and membership lists, by reference to Corporations Code Section 8330 et seq. These statutes need to be reconciled before answers can be given. However, the legislature in both instances specifically refused to define "accounting books and records" (even though asked by CAI/CLAC to do so, and even though being presented with several possible definitions). Therefore, when an owner calls in with a complaint about not being able to see certain books and records, the CID Bureau will have to decline to get involved in the dispute because reciting the

statutes does not end the inquiry. Most often, the disputes arise particularly over the words in the statute, and how far the definition of "accounting books and records" extends. Many associations, in order to achieve consistency, have adopted their own definitions of what they believe the legislature meant by "accounting books and records." It would not make sense to ignore the association governing documents (which include rules and policies) in this area of complaint.

4. DISPUTE RESOLUTION PROCEDURES/HEARINGS RELATED TO ENFORCEMENT. The Davis-Stirling Act provides for specific dispute resolution procedures under Civil Code Section 1363.810, et seq., all the way through 1363.840. These statutes provide for IDR (Internal Dispute Resolution) and ADR (Alternative Dispute Resolution) processes. These statutes are expected to encourage the association to meet with homeowners to try and resolve disputes before they get to court. However, Civil Code Section 1363(g) and (h) provide the legal requirements for disciplinary action that may be imposed when a board is attempting to enforce the governing documents, and though different in nature, raise the question as to what the board's fiduciary obligation is with regard to processes. When an owner has done something that ostensibly is a violation of the governing documents, he or she often disagrees, and ends up in an ongoing dispute with the Association (leading a to complaint of the nature that would likely end up with a call to the CID bureau). That is how disputes arise, and so these statutes require reconciliation AND ALSO tie directly into the documents which would define obligations and responsibilities. If an association schedules a hearing for an enforcement action, and the owner asks for an IDR process under Civil Code Section 1363.810, then the board needs to decide whether to do this in one meeting or two, as the hearing statutes do not have the same requirements as the IDR process. Are the CID bureau personnel going to be able to sort out these types of questions? What is certain is that reciting a law will not end the inquiry in disputes over enforcement of the governing documents.

5. ARCHITECTURAL CONTROL. The new Civil Code Section 1378 requires that an association must adopt as fair and reasonable procedures to review architectural requirements. The calls that the CID Bureau is likely to receive will probably concern disputes that arose over a particular improvement, and the association's course of action with regard to dealing with that improvement, rather than the process itself. This will require review of the documents to determine what the limitations are on the improvements. And even with regard to the process questions, in order for anyone in the CID Bureau to resolve any kind of dispute, one will have to review the governing documents. It may be that the governing documents set forth procedures that qualify as fair and reasonable under Civil Code Section 1378 - that statute requires adopting policies and procedures (which are all part of the governing documents). Maybe not. This integration of law and governing documents will severely limit the CID bureau's ability to address any architectural issue.

6. RECONCILING VARYING LAWS RELATING TO ACCOMODATIONS FOR THE DISABLED. Civil Code Section 1378 addresses architectural changes that must be consistent with any governing provisions of law including the Fair Housing Amendment Act. The CID Bureau is not charged at this point with

determining whether something qualifies under the Federal Fair Housing Amendments Act, but staff will have to be trained to reconcile the two. And will staff be able to reconcile statutes that have differing provisions about the same concept? Civil Code Section 1360 deals with modifications of a unit by an owner and facilitation of access for the handicap. Will the CID Bureau staff and personnel be able to reconcile 1360 and 1378 with federal law, and also determine whether any of these provisions are contingent upon what the governing documents have to say about improvements without reviewing the governing documents? Probably not.

7. PETS. Civil Code Section 1360.5 says that owners are entitled to have at least one pet within the common interest development "subject to reasonable rules and regulations of the Association." In order for the CID Bureau to resolve any problem relating to the keeping of a pet, it will need to familiarize itself with the rules and regulations of the Association, and determine if they are reasonable. It will not be able to do this if limited to enforcement of the law. It will not be able to determine what is reasonable with regard to rules without industry experience and familiarity with the standards. The point is that the law itself is not the end of the inquiry.

These examples barely scratch the surface, but do address the most common complaints in the industry. They illustrate without a doubt that governing documents are an integral part of enforcement of the Davis Stirling Act. The same is true with regard to the Non-Profit Mutual Benefit Corporations Code. For example, the election statutes allow for proxies (if the Bylaws do not prohibit it) and voting by mail (if the bylaws do not prohibit it), and provide that Judges can reverse elections if he or she finds them to be unfair (but do not allow an administrative agency to reverse elections based on a technical difficulty or misstep). The general kinds of complaints that the bureau is likely to get with regard to elections is that the board did something that was unfair and sometimes the association has a complaint an owner did something that was unfair (such as collection of proxies using duress). One will have considerable difficulty in answering the bulk of election questions that come before the CID Bureau, if they involve a dispute between the owner and association about an election, without having the benefit of knowing what is in the Bylaws. The courts do not make decisions after reviewing only half of the evidence. The CID bureau will have to turn away elections questions that depend on what the documents say.

This is why the CID Bureau should, at this point, stick to a course of widespread education, ombudsman services (by someone well trained in the laws and well versed in the importance of the governing documents in various disputes), and answering people's questions about the laws and what they say.

The bureau will be benefited by a concerted course of study defining all of the calls that come in and which ones can be handled, and which ones cannot be handled. If we may be so bold, we would suggest that the CID Bureau will be able to address far less than half of the complaints that are made. If this proves true, the reputation of its effectiveness will begin to deteriorate quickly, and widespread exasperation over paying into a bureau with a $15-$30 million bureaucratic agency will surface. More study is needed. Through analysis of the types of complaints

that come in (the complicated nature of which can already be determined to some degree as illustrated in many of the letters that the CID Bureau has reviewed, and testimony it has heard), it will see that the questions and complaints are likely to involve more than the guidance in the statutes can resolve. A more pragmatic approach would likely yield more positive results from such a bureau over time, and services could be expanded slowly and more thoughtfully."

EMAIL FROM BRUCE OSTERBERG (MARCH 2, 2005)

Study H-853 March 2, 2005
Memorandum 2005-10
State Assistance to Common Interest Developments
(Staff Draft Recommendation)

Page 8 ^ Funding Issues

"Should an undeveloped lot be counted in determining the fee to be paid by an association?"

The developer who still owns unsold lots has the voting power to strongly influence (if not absolutely control) the Board,s actions and thus would not interact with the Bureau on a homeowner level. However, the Bureau could be a mechanism for the developer to redirect issues (legitimate or not) with existing homeowners, so therefore of real value to the developer. I suggest a calculated fee, perhaps: 1 + 1/10 times the number of the undeveloped lots.

Pages 9/10 ^ Filing Fee

"Mediation Filing Fee"

Absolutely, to help deter frivolous and vengeful complaints. But if the complaint is legitimate then it can be waived. Then waiving the fee would be a demonstration of: "The Bureau believes your complaint to be valid."

Pages 14/15 ^

"Under the proposed law, an association could request that the Bureau investigate and take corrective action against a homeowner who fails to maintain that person's separate interest or exclusive use common area, on the grounds that the failure is a violation of Section 1364(a). Should the Bureau enforce this obligation?"

My initial answer is yes, but the question arises — how? Revision of Section 1380.410(e) appears to be the answer.

Conclusion ^

I hope the Bureau,s posture could be paraphrased as:

"We listen to complaints from homeowners and directors for free, but if Bureau action is requested then a fee is required or the complaint must be described and supported in writing (paper, not email)." The fee is subject to being waived.

After the Bureau is created, the homeowners may be less inclined to participate in their HOA governance, believing the State will fix all the problems. This will create more and new problems. One way to discourage this might be to determine whether the homeowner's proxy was counted for the last Annual Meeting, with the answer being a factor of fee waiving consideration. Also the Bureau could take steps to promote honest HOA board member elections (or at least the appearance of). Homeowners will not participate if they don't trust the elections.

Bruce Osterberg

Of, By and For Homeowners

March 2, 2005

Members of the Commission
California Law Revision Commission
c/o Brian Hebert, Assistant Executive Secretary
400 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Comments on Tentative Recommendation
State Assistance to Common Interest Developments

Dear Commissioners,

The Executive Council of Homeowners – ECHO – represents more than 1,550 community associations in Northern and Southern California, as well as some 300 affiliate members who provide goods, services and products specifically tailored to the needs of community associations.

After years of support for the concept of state agency regulation of community associations, we are pleased to support the Commission's efforts to create a Common Interest Development Bureau. We believe such a Bureau is essential to afford uniform, statewide educational opportunities to directors and owners, particularly for a volunteer-led and legally complex system where so much is at stake.

We believe a further essential function of a CID Bureau is to provide fast, impartial and affordable dispute resolution services to all associations, their boards and owners. Experience shows that differences and disputes can arise in any community. The fees that would be collected from all owners to support the Bureau, when spent for sorely-needed education and for mediation, would return benefit to everyone.

However, for the reasons we discuss below, we are unable to support a CID Bureau with the enforcement powers that the Commission has proposed.

About ECHO:
Educating and Advocating for Community Associations

One of ECHO's core missions is to educate directors and owners. We do this by publishing a monthly magazine, judged to be one of the best and most informative in the state. We annually update and publish the full text of the Davis-Stirling Common

Interest Development Act and other statutes that impact community associations. ECHO's Community Association Statute Book is distributed each year to more than 7,000 directors and owners. ECHO conducts a dozen regional seminars each year, culminating with our annual seminar each June in Santa Clara. All feature training courses, course materials and educational lectures by a respected corps of speakers. Our programs are open to association directors (many of whom personally pay their own registration fees) and owners alike. We know enough about our member associations to know that they are aware of the law and generally do their best to apply it, and that disputes over statutory compliance in ECHO-member associations are largely resolved informally, through internal meetings and alternative dispute resolution. In short, we know that education works.

The Genesis of Our Support for State Agency Regulation:
The Uncertain Future of Common Interest Developments

As we have previously noted in testimony before the Commission, we have long advocated state oversight of common interest developments. Not only are volunteer-led community associations responsible for the maintenance and management of billions of dollars worth of real property, they take in an estimated $6 billion each year in essential assessments. We see many things about this important form of common interest housing that prevent it from working well when, with proper state oversight, it could.

Principally, our growing concern has to do with the widening gap in funding for long-term maintenance and repair of for-sale, common interest housing. ECHO research indicates that across 37,000 associations in California, the average percentage of present reserve funding is only 53%. This translates into a *current* cumulative reserve shortfall of more than $2 billion statewide.

The epic scale of this shortfall is socially and legally staggering, particularly when applied to condominium and other forms of attached housing. The importance of preserving affordable housing can't be minimized, yet as more and more communities find themselves with multi-million dollar repair needs, deteriorating homes, but little working capital, the need to assist communities with better long range financial planning could not be more critical. We see this as a future, naturally evolving, and statewide function of a CID Bureau, one where California can truly lead the nation.

The solution to these financial woes and the potential loss of affordable housing is founded in education and supported by a state agency setting voluntary but recognized standards for assessment levels and reserves. While not a complete parallel, these goals would be akin to the ways that agencies of government qualify securities, financial institutions, and insurers. We need to find a way to get beyond the natural disinclination of owners to assess themselves and to better ensure that common interest communities have enough money to fund anticipated repair projects, large and small. State agency regulators can help set thresholds and goals and educate directors and owners alike by emphasizing that well-funded reserves are another element of positive equity in one's home.

Solving this problem involves setting and communicating standards. The process requires offering directors and owners education and other resources for help.

SPECIAL CHALLENGES FOR STATE AGENCY REGULATION

Registration:
Where are all the CIDs?
Who to communicate with?

Beginning with the passage of the Davis-Stirling Common Interest Development Act in the mid-1980s, thousands of existing communities with common area "became" CIDs overnight. Many do not even know it.

The Act was retroactive – any community that met the statutory definition of a CID suddenly was one, and was just as suddenly regulated by a body of law that had at its heart mostly financial regulation, assessment authority, and disclosures. This began the practice over the past 20 years of legislative overrides and supplements of private covenants, the essentially "local" governing documents. Just looking at the CC&Rs is no longer enough, not by a long shot.

None of this is currently explained or communicated by the state. Except for experienced community association professionals and educational organizations like ECHO, there is no one to advise and assist CIDs, their directors (whose number statewide is at least 150,000 and on whose voluntary efforts the state wholly relies), or the millions of Californians who own property in common interest communities.

Having concluded long ago that state agency assistance must be available if the financial, operational and social health of CIDs is ever going to be effectively secured, in 2002 we proposed a registration requirement. The aim that year of AB 643 (Lowenthal) was to help California develop a database of information about CIDs, their associations and leadership so that, when the time came, an agency of government could develop and disseminate information about the law and its "dance with documents." Today AB 643 is embodied in Civil Code section 1363.3. The database is growing.

Education is Key

We remain convinced that education is the single most important element needed to assist community associations, their leaders and members. A CID Bureau is the key to providing that education on a uniform, statewide, organized level. For that reason, we are solidly committed to supporting the Commission's proposal to develop an agency with a solid education mission.

Education can enhance and instruct in many forms. We envision:

- Video and audio tapes and CDs for sale or rent
- Pamphlets on a wide range of common interest topics

- The Davis-Stirling Act and relevant provisions of the Corporations Code made available
- The Act correctly and competently explained in plain English for laypersons
- Checklists and forms for disclosures, proxies and typical corporate events
- Information about the availability of training programs, possibly even minimum levels of mandatory director education and certificates awarded upon completion of study courses
- Smart use of the Internet and an informational website
- A hotline to taped information and where to go to get more
- Ready access to relevant statutory law
- Topic-oriented précis of the holdings in relevant court opinions, telling the stories behind the cases so that they can be recognized and applied.

A concise summary of California law affecting CIDs is essential, as would an agency's annual update summarizing new legislation and its relationship to past law and existing governing documents.

We are *very* concerned that the draft tentative recommendation only makes the educational function of the proposed Bureau advisory. However, we understand that the Commission has instructed staff to change the language of the recommendation to make this a mandatory function. This, we believe, is essential to carrying out the Bureau's charge of "state assistance" to common interest developments and to set an even-handed tone for the Bureau's role.

Conciliation and Mediation

In keeping with the Commission's premise of state assistance, we fully support the proposed conciliation and mediation function of the Bureau. We too have attended many Commission meetings where owners bemoan the actions of their boards. We have enough experience in community association affairs to know that there are two sides to every story and that the Commission is only hearing one. We fully agree with staff's premise that most disputes arise out of simple misunderstandings and misperceptions about the law by one side or another.

Working with and mediating among parties who disagree on what they think the law requires is not only an excellent form of education, it provides a nonpartisan forum that seeks resolution and the restoration of harmony among neighbors and is not bent on winning or punishing either side. Where there is no communication of the law, where the law lies in so complicated a field, and where the law touches so many persons and involves sensitive issues of home and community, it is very appropriate that the state supply a corps of neutrals who are well-versed in community association law, to quickly and competently address complaints. The American Arbitration Association's experience is that when parties mediate, they reach settlement 80% to 95% of the time. In our experience, the number of successfully mediated outcomes in association disputes is also very high.

Parenthetically, we think the CID Bureau could be used as a consumer-protection body to review the adequacy and correctness of notices and procedures in nonjudicial foreclosure of assessment liens. While the courts would always be the arbiter in a contested foreclosure, the legislature appears to be looking for some official body capable of confirming, before sale, that basic foreclosure notice and other procedures have been met. The CID Bureau could do so.

Enforcement

As stated above, we believe the focus of a CID Bureau is rightly and properly focused on education and resolving disputes. We do not believe that a system founded on volunteerism and then left to wander without help for decades is appropriate for citation, censure, and punishment. We certainly believe in accountability for directors and associations. However, determining accountability and liability is best left to the courts, both for the constitutional concerns that the Commission has advanced as well as to preserve the local volunteer structure of common interest communities.

We are very concerned that volunteers will no longer lead if the Bureau invests a significant amount of resources to punishment. We agree with the state's original plan for common interest developments that local decision-making by persons elected from the community is best. There are trade-offs, obviously, in the state's expectations of precision in that decision-making. The balance lies in inspiring capable community leadership through education and, when disagreements arise, resolving them through education, discussion and compromise, with the courts as a last resort. At the very least, an enforcement structure that parallels itself on strictures applied to state-examined and -monitored *licensees* is patently inapplicable, heavy-handed and unacceptable in a system led by volunteers.

Our concern in this regard is underscored by the reality that statewide registration of community associations has been slow. There is little publicity for the program, and in that light we feel inordinately successful that nearly one-third of the estimated 37,000 CIDs in California have registered. However, two-thirds have yet to hear the word or, if they've heard it, to recognize that they are a common interest community that must register. Clearly, the Bureau's first charge will be to publicize the registry, identify and locate unregistered communities, explain which ones are required to register, communicate with them, and get them on the program. Without comprehensive registration, the educational function of the Bureau will be meaningless. Those who most need the information don't even know they're regulated.

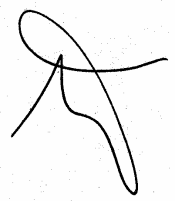
Realistically, the financial stability of the Bureau (and from there, its ability to educate and to offer conciliation and mediation services) depends on contributions from enough associations. Adding enforcement as envisioned would be very expensive and help only a few. Alternatively, the yearly fee that each owner of a separate interest would pay would fund effective problem-solving that benefits all if the CID Bureau focuses on making education and dispute resolution services available to all.

Now is not the time to focus on enforcement powers, noncompliance, fines, citations, and public pillorying of communities. The state has never tried to educate directors and owners; the system rests on the shoulders of part-time volunteers; the layers of private documents and legislation that must be understood are very complex and are easily misread and misapplied; legislation is often not clearly written and too frequently not instructive or labyrinthine. We believe that problems that arise out of questions of statutory compliance can generally be solved by imparting correct information, by working through disputes, and through the Commission's own future review of the Davis-Stirling Act.

We have several new statutes this year regarding dispute resolution. We urge the Commission to give the new legislation, including the new meet-and-confer statutes, time to work. We think you will find that they largely do. We urge the Commission, in the spirit of fairness, to set aside the discussion of enforcement powers and to form an effective, competent and well-trained Bureau whose focus is on educating community association leaders and owners and conciliating and mediating disputes. From there, we hope future efforts will frame standards and principles that will help keep community associations fiscally healthy and whole. We wholeheartedly support such a Bureau.

We appreciate your consideration of our views and, as always, your and Mr. Hebert's many courtesies.

Very truly yours,



Sandra M. Bonato, Esq.
Chair, ECHO Legislative Committee

cc: The Honorable Gene Mullin, Chair, Assembly Committee on Housing and Community Development
The Honorable Tom Torlakson, Chair, Senate Committee on Transportation and Housing
Lisa Engel, Consultant, Assembly Committee on Housing and Community Development
Mark Stivers, Chief Consultant, Senate Committee on Transportation & Housing
Oliver Burford, ECHO Executive Director
Members, ECHO Legislative Committee
Kerry Mazzoni, ECHO Advocate, Government Strategies, Inc.
Karen Conlon, President, California Association of Community Managers
Jennifer Wada, CACM Advocate
Skip Daum, CAI-CLAC Advocate

EMAIL FROM EVA L. MCLAIN (MARCH 3, 2005)

I am in favor of the implementation of an Oversight Committee. I concur with Patrick McLane's comments that the Oversight Committee should also be mandated to hear complaints regarding CID Governing Documents, particularly CC&R's and the interpretation of those documents. I also concur with Patrick McLane's position that the Oversight Committee should have enforcement powers.

Currently, Homeowner Associations pay large amounts of money to attorneys to write, interpret, and re-write such Governing Documents. Attorneys often recommend to HOA Board's to pursue legal action against alleged violators (homeowners) of the Governing Documents. The homeowner then has to make a choice of "giving up" or employing a private attorney that would end up costing the homeowner thousands of dollars to bring resolution to the problem. In addition to the cost of legal action, the fines being tallied each day by the Association (for each day of violation) add even more financial hardship to the homeowner. In many instances, it is less expensive for the homeowner to pay to "re-construct" the alleged violation than to pay the costs of fighting the HOA through the judicial system. THE CHOICE IS TO "GIVE UP"! Neighbors turn in neighbors to prove their case before their HOA Board. Harmony within the CID becomes splintered. Meanwhile, the attorney bill continues to escalate through an open-ended contract, with no hourly cap, through the law firms contract with the HOA.

HOA Board's also take the interpretation of their contracted attorney as "law" when such interpretation may not be the intent of the legislators in their enactment of the Davis Sterling Act. Many HOA Board members do not exercise their own judgment in making decisions, nor do they do their own research, nor do they challenge the attorney's position before making a final decision. As stated above, homeowners have no recourse but to "Give up" or pay an exorbitant amount of monies to a private attorney for their defense. Again, in most cases, the choice for the homeowners is to "Give up". Attorneys win in either case – they drain on the resources of the HOA when they prosecute and drain on the resources of the HOA when they defend. Homeowners lose – either way. Homeowners become powerless. Homeowners are then blamed for "draining on the resources of the Association" and "lowering property values" – thereby splintering the relationships between homeowners, neighbor against neighbor.

It seems the State of California has a successful Agency in place whose structure could be used as a guideline in the formation of the Oversight Committee. That Agency is the Public Employment Relations Board.

Homeowner dissatisfaction is not with the CC&R's and other Governing Documents. It is their frustration with a bureaucracy where a majority vote of the members of an HOA Board, upon recommendation of their attorney, make decisions, often without doing their own research on the matter, without applying the "reasonableness" test, are not flexible, and are not consistent in the application of the Governing Documents. Homeowners are financially impacted and currently have no affordable jurisdiction

for resolution. Homeowners are often told by the HOA Board "If you don't like it – move". In my opinion, such attitude will not only cause property values to decline, but will not bring resolution to a problem and will not promote harmony within the CID!

The Oversight Committee would afford the homeowner a fair, impartial, and affordable resolution to problems.

I urge the CLRC to seriously consider adding the Governing Documents into the language of the Bill and to implement the Oversight Committee for the benefit of homeowners living in CID's throughout California.

The State of California has already identified the need for oversight agencies within many departments. These "oversight agencies" have been established by the State to provide California residents a place to take their problems for investigation and resolution. Homeowner's living in a CID should have no less – and should be provided with a State Oversight Committee for the affordable and impartial resolution of CID homeowner problems. This would be a "win-win" situation for everyone.

While the cost to the Association for an Oversight Committee may be considered costly, in my opinion, the savings in legal fees that are currently being paid out to HOA attorneys would reduce the actual annual budget of an HOA with a resultant effect to either maintain, or reduce, homeowner dues.

I would appreciate my name being placed on your mailing/E-mail list to receive information on the CLRC Oversight Committee legislation.

Thank you for the work you do on behalf of homeowners living in CID's.

Sincerely,
Eva L. McLain
2403 Scenic Court
Rocklin, CA 95765
(916) 630-9216

EMAIL FROM MEL KLEIN (MARCH 3, 2005)

Fair Elections:

Proposed section 1380.310 provides that a monitor shall have authority to conduct certain election oversight activities. This falls short of the alternative I would prefer, one that would authorize an independent party to actually conduct the election, start to finish.

What is left uncovered in the proposed legislation is possible bias in arrangements leading up to the election, confidentiality of shareholder ballots once the monitor has departed the scene, as well as manipulative conduct in the election that could escape the monitor's oversight.

The confidentiality aspect is a particularly sore spot. The CLRC must be aware that the situation of shareholders voting in a CID election is far different than that of shareholders voting in a general corporate election. In the case of a CID vote, if

Directors discover that a shareholder voted against them, they are in a position to exact retribution, and this can have a seriously intimidating effect. I think it is vitally important that a monitor be empowered to remove ballots from the control of the Board.

I think this an unnecessarily halting step towards reform. Why have an independent party there to monitor the election, when it would be far more reassuring to have that person conduct it? Why be satisfied with a report on the election, when a perfectly viable alternative promises a fair election then and there? What legitimate complaint could anyone have to procedures that can do no harm, and might do some good?

Penalties:

This second issue is one I've raised before, so raising it again is probably just whistling into the wind. I do so only because it seems so utterly justified.

I refer to the question of penalties that might be imposed on a Director found to have acted with malice, oppression or fraud. As you have it, such person can be denied office for a period of up to one year. This seems entirely and completely inappropriate. It is as if what you are concerned with is penalizing the Director, when what should be first and foremost on your mind is protecting the community.

When you have a Director who is found to have acted with malice, oppression, or fraud, even once, that person must be considered as unfit to serve on the Board, period, whether this year or ten years from now. You are not denying that person a livelihood… you are not denying that person anything but a privilege… and insofar as the CID is concerned, another person can serve instead. Why do you think that it is so important to reinstate that person's right to serve, even when that presents a risk to the entire community? You seem to be ready and content to have a person guilty of malice, or oppression, or fraud, against members of the community, to continue in, or return to, a position of trust and authority in the same community! I find this totally baffling.

I could understand that the State might practice tolerance in the case of a director guilty of lesser, but still very serious, violations of office, such as abuse of power, or abuse of discretion. But a director guilty of malice against other members of the community? Or oppression? Or fraud? It is hard to believe that you would ever again allow such a person to serve in a position of trust. It is both unnecessary and unwarranted.

On a related point, the only time penalties seem to come into play is when the matter cannot be settled in the conciliation stage, and the agency writes a citation, and for that matter, a citation can only happen when the complaint involves a matter of law.

What if, in the conciliation stage, the agency concludes that a Director has acted with malice, oppression or fraud? Do you just let it go, provided the Director settles, or in the case of a dispute involving the governing documents, the Director tells you to get lost?

This is a clear license to oppress, to commit fraud, to act with malice. A Director with such intent knows that, if charged, all that is required is that he or she agree to stop, and there are no consequences.

I firmly believe the emphasis in reacting to cases of malice, oppression or fraud should be on protecting the community, not on taking punitive actions against the Director, and so, whenever such conduct is discovered, no matter what the context, the certain consequence should be a permanent ban on that party from service in the CID; again, not as punishment, but as a necessary means of protecting the community. Forget about the fines; just remove the person, permanently. Let someone else serve. I completely fail to understand what purpose is served in allowing such persons to serve, and I think doing so presents an unacceptable danger to the community.

Disputes Involving the Governing Documents:

Finally, and very briefly, I understand that a Director acts as a fiduciary. If it is true that the responsibility of a fiduciary is considered a statutory responsibility, might an agency be empowered to act on behalf of a shareholder in opposing the decision of a Board when the Board is judged to have abused discretion or authority, even when the authority exercised involves matters described in the governing documents, because in doing so the agency enforces statutory, fiduciary, responsibilities of the Board?

This might justify legislation authorizing an oversight agency to at deal at least with some disputes involving the governing documents, those where abuse of discretion or authority is observed. And these are the cases most of us are most concerned about.

EMAIL FROM NORMA WALKER AND CAROLE HOCHSTATTER TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMMITTEE (MARCH 6, 2005

Dear Chairman Mullin and Committee Members:

We are homeowners who live in a homeowners association. We support the proposed bureau bill in its intent; however, we believe that several changes would be of greater benefit to us. In his book, 2005 Condominium Blue Book, by Branden E. Bickel and D. Andrew Sirkin, page 29, “Where the association has formally established policies or procedures, they must be uniformly applied and followed. HOWEVER, the fact that the association has permitted or approved a certain activity or alteration by a particular owner at one time does not necessarily mean that he association must permit or approve that same activity by the same or a different owner at a later time. Further, there is no governmental agency with authority to oversee homeowners’ associations. Association duties and standards must be enforced by owners and lenders through the court system or through some alternative dispute resolution process such as mediation or arbitration.”

Are small associations to be ignored because they are not included 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. . . ." Senator Battin has introduced SB 61 in 2005. This bill does not address nominating procedures; the proposed bureau bill in its election section does not address nominating procedures either. The proposed bureau bill also sets the bar a 15% of homeowners to trigger assistance for homeowners. That seems an unreasonable high amount. A better suggestion might be 5%.

When five percent of our member petitioned for a special meeting to discuss questions about our quarterly review and our tax fillings, a quorum could not be made. The Vineyards Community Association President, Roberta Teglia, then sent a letter stating in part: "On behalf of the Board of Directors, I would like to sound a cautionary note. Homeowners, before signing a petition requesting a meeting of the general membership, should ascertain in their own minds whether or not the subject matter of the proposed special meeting could not be better dealt with at a regularly scheduled meeting of the Board of Directors. Each time such a meeting is demanded by petition, we must rent space sufficient to our membership, and if the attendance of management personnel, our accountant, and our attorney are required, we are billed for their professional time." Yet, the questions asked have not been answered.

Thank you for your attention.

Norma Walker The Vineyards Community Association, Bakersfield, CA Carole Hochstatter The Vineyards Community Association, Bakersfield Camille Laird Riverlakes Homeowners Association, Bakersfield

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EMAIL FROM CAI/CLAC (MARCH 7, 2005)

Florida's Common Interest Development dispute resolution and ombudsman program provides vitally important education of HOA board members and homeowners. Above all else, an educated consumer constituency can greatly allay disagreements before they escalate. I think this model may be worth considering for our State.

In January 2002, Community Associations Institute (CAI)—under contract with the Department of Business and Professional Regulation (DBPR)—developed five courses for the purpose of providing training programs for condominium and cooperative association board members and unit owners in accordance with sections 718.501(1)(j) and 719.501(1)(k) of the Florida Statutes.

You can find these statutes online at http://www.myflorida.com/dbpr/lsc/condominiums/laws.shtml.

The five courses are:

1. Regulation of Residential Condominium Associations in Florida
2. Condominium Association Operations
3. Cooperative Association Operations
4. Financial Management of Condominium Associations
5. Conflict Resolution (can be renamed Alternative Dispute Resolution)

In terms of course logistics, CAI uses its network of seven Florida chapters to serve as marketing and registration centers for the scheduled courses. With chapters serving Broward County, the Orlando area, the Gold Coast, the North Gulf Coast, South Gulf Coast, Suncoast and West Florida, CAI has an organizational presence throughout the state of Florida. (California has eight CAI Chapters.) Volunteer leaders from each of those chapters, who are also active experts and leaders in the community association industry, assist in staffing, instruction, and course promotion.

Laura Hagan, the executive director of the Clearwater-based CAI Suncoast chapter, serves as the Statewide Coordinator for this project. Ms. Hagan finalizes all meeting space requirements and contracts for each of the courses (for this contract period, that is 74 courses in English plus the 10 courses in Spanish). Each course facility is prepared for at least 75 participants. Based on data received regarding past attendance, CAI makes necessary arrangements to accommodate areas with high demand. She also works with CAI staff to schedule courses and instructors, and arrange for a CAI chapter representative to be present throughout each course to conduct registration, ensure appropriate room set-up at the meeting facilities, and assist the faculty members in distributing materials. Each course registrar submits a complete attendee roster and all course evaluations back to CAI for processing within 48 hours of the course.

To date, the five courses have been very well received. Currently, CAI is averaging nearly 50 students per course and is receiving an average course evaluation score of 4.3 on a scale of 1-5 (with 5 being the highest).

It may be that California should consider training board members and homeowners, and eventually training in local dispute resolution forums before assuming all the responsibility and cost.

Respectfully,

Skip Daum
Administrator/Advocate
Community Associations Institute-
California Legislative Action Committee
(916) 658- 0257
(916) 658- 0252 fax
Visit: www.clac.org and www.responsibleneighbors.com

LETTER FROM HERSCHEL ELKINS TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMMITTEE (MARCH 7, 2005)

My name is Herschel Elkins. I am Special Assistant Attorney General for Consumer Policy, Coordination and Development. I have been engaged in consumer protection for the Attorney General's office since 1965, when I was chosen to head what was then called the Consumer Fraud Unit.

The committee has asked five specific questions.

(1) What role does your agency play in relation to CIDs?

The Attorney General has no direct involvement in relation to CIDs.

A. CIDs are non-profit entities and the Attorney General has authority to file actions or intervene in actions for violations of various non-profit statutes. Upon complaint of a member, director or officer, that a corporation is failing to comply with the provisions of this chapter, Chapter 5 (commencing with Section 7510), Chapter 6 (commencing with Section 7610) or Chapter 13 (commencing with Section 8310) of the Corporation Code, the Attorney General may, in the name of the people of the State of California, send to the corporation notice of the complaint.

If the answer is not satisfactory, or if there is no answer within 30 days, the Attorney General may institute, maintain or intervene in such suits, actions, or proceedings of any type in any court or tribunal of competent jurisdiction or before any administrative agency for such relief by way of injunction, the dissolution of entities, the appointment of receivers or any other temporary, preliminary, provisional or final remedies as may be appropriate to protect the rights of members or to undo the consequences of failure to comply with such requirements. In any such action, suit or proceeding there may be joined as parties all persons and entities responsible for or affected by such activity.

Since no budgetary provisions have accompanied this authority, and because of the very large number of non-profit corporations, the Attorney General's office has limited its activities in this field to non-profit entities which are also charitable in nature. This would not normally include CIDs.

B. The Attorney General and district attorneys and some city attorneys can file actions under Business and Professions Code §17200 against anyone engaged in any business who violates any law, including laws relating to non-profit companies and laws relating to CIDs. Our office has investigated violations of law in more than 120 consumer fields.

(2) What type of customer service component/consumer complaint does your agency currently have?

The Attorney General's Public Inquiry Unit (PIU) receives consumer complaints. In regard to CIDs, depending upon the circumstances of each complaint, PIU may contact the Board of Directors and ask for comments, or inform the consumers that they may wish to contact private counsel. If any pattern appears to emerge against any company, the Consumer Law Section is advised of

the complaints. In regard to complaints regarding CIDs, whatever PIU otherwise does, it sends a copy of the complaint to me or to Special Assistant Attorney General Taylor Carey. We share the information.

(3) Does your agency keep any kind of data on the types or number of calls you receive from CID homeowners?

We keep no records by industry, just by company. If a call is received, the complainant is asked to send the complaint in writing. There is no practical way to retain telephone calls or use the information supplied by telephone. Very few complaints have been filed with our office. I have examined all of those CID consumer complaints, but because of the small number, it is difficult to generalize the major issues. However, the following problems appear to emerge:

1- People have heard about their ability to examine records, but are ill-informed about what records the board is required to show them. Records of management groups are not presently covered; there is a dispute as to what other records are covered. The terms "accounting books and records" are not defined. The statute requires confidentiality of the records, but consumers believe that the board warnings to members to keep the books and records confidential are attempts to intimidate. Some consumers complain about non-access, but the complainant usually does not examine the available records and we therefore do not know what is hidden. The copying of records is often expensive and also involves confidentiality issues. However, it takes time and expertise to examine financial records. An examination of the books and records, however, is generally unlikely to assist the members with their real concerns. The most common complaint seems to be financial mismanagement. The ability to examine records is very seldom relevant to the solution of consumer issues.

2- It is difficult to unseat a board. The members can replace the board whenever they wish to do so. However, in many HOAs, there are absentee owners who either give proxies or do not vote. Inertia is another problem. Many members do not want to be on the board. Boards are often controlled by cliques; dissident board members may not be listened to. A clique often ends up running the association because most people don't want to become involved. Fighting a board can be a struggle. The law makes it difficult to sue the board of directors for simple negligence, and unless gross negligence or fraud can be proved, and this is very expensive task, a lawsuit is not likely to be successful. In addition, the cost of attorneys to represent the board or the management company is likely to fall upon the very consumers who are complaining.

3- Personality disputes are certainly not uncommon. Some consumers claims that board members are run by cliques and attempt to punish complainers with fines for minor offenses. In addition, many people do not like to be told what they can and can't do with their property or their environment and they may not be able to adjust to the covenants, codes and restrictions or the rules and regulations.

4- Boards, despite their fiduciary responsibilities, sometimes contract with board favorites or relatives who may not produce the most desirable results.

5- Many expensive improvements are too heavy a burden for seniors on fixed incomes. Seniors may have purchased the property years ago and would find expensive improvements too difficult to handle. However, others in the CID may want to make those improvements and unless CC&Rs prohibit the improvement, the majority can decide to do so.

6- Claims of threatened foreclosure are strong disincentives for those who protest charges. Some HOAs use foreclosures instead of lawsuits to collect dues. Our office supported AB 2598 which was vetoed. If introduced again, it may be better if the bill covered only that subject and was not combined with other provisions. Although we have no specific recommendations for substitute language, some boards still believe that the foreclosure remedy is important in some instances, even when the amount is less that $2500, and the committee may wish to adopt different language.

7- There have been allegations that foreclosure sales were conducted at difficult to reach places or were actually faked and that the property was sold at very low prices. In some instances, the attorneys or the management company may be conspiring with others to sell at a low price and split the profit, but we do not yet have enough proof of that. Besides, the vast majority of HOA properties in foreclosure are not actually sold but are redeemed by the property owner.

The low prices, when they do occur, constitute a problem which might be addressed by appropriate legislation. The board has no incentive to obtain the top price and HOA property sales are normally not well-attended.

(4) Please comment generally on the proposed Bureau.

The Attorney General's office is not at this time prepared to take a position on the proposed Bureau. The report states that there is a CID ombudsman in Nevada who receives annually one complaint for every 100 CID dwelling units and that, by extrapolation, if a bureau would be established, there should be 30,000 complaints per year in California. Based upon our long-time multi-state committee experience, that type of extrapolation has never been validated in any consumer field. There are too many variables to consider. Although the extent of the problem has not been measured, it cannot be doubted that there is a problem and that, as indicated in the draft, education, mediation, and data collection are important.

(5) Do you have any suggested alternatives to a Bureau as proposed by CLRC?

Not at this time. However, our office is most willing to work with those most affected by these issues in order to held solve the problems in this field.

LETTER FROM ARNOLD MCMAHON OF AMERICAN HOMEOWNERS RESOURCE CENTER TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMMITTEE (MARCH 9, 2005)

THE ROLE OF STATE ASSISTANCE AND/OR OVERSIGHT OF COMMON INTEREST DEVELOPMENTS (CID)
STATE CAPITOL BUILDING
SACRAMENTO, CALIFORNIA
MARCH 9, 9 a.m. – 12.00 noon

INTRODUCTION

The AMERICAN HOMEOWNERS RESOURCE CENTER (AHRC) is a nationwide, grassroots organization dedicated to the preservation of the American home. It was founded in 1990 here in California. It has no membership fees, and nobody gets paid. It is run entirely by volunteers.

Approximately 7 years ago, it launched a website, www.ahrc.com Currently, it receives more than 78,000 hits a day, approximately 2.2 million a month, over 26 million a year, from all 50 states and approximately 72 countries. Its volume is increasing at the rate of approximately 100,000 a month, and is expected to top 3 million a month by year's end. It is rated by Google as the No. 1 website for homeowner associations. It is relied upon by homeowners, journalists, television stations, legislators and many more.

As AHRC proposed a bureau within the Department of Consumer Affairs to oversee homeowner associations in 1993, it welcomes the proposal by California Law Revision Commission (CLRC) to create such a bureau now. It is long overdue. It is now plain that the question is not whether there should be such a bureau, but what kind of bureau. AHRC believes that the CLRC proposal is a significant step forward. AHRC has several proposals to make it even more significant.

Before discussing those, AHRC would like to lay out a number of guiding principles that are fundamental to the success of such a bureau.

I. GUIDING PRINCIPLES

In all cultures and at all times, the home has been recognized as a very special place. It is the place where a person moves and has his being with those who are closest to him/her. It is not perceived as a financial commodity, but as a place where one lives out ones life in the fullness of ones being. This principle should be fundamental to all discussions involving homeowner associations.

As homeowner associations threaten this cherished concept in profound ways, public policy must be ever vigilant to thwart these threats. California – and other states – have created legislation that allows grasping hands to invade the privacy and sanctity of the home for too long. California – and all states – must ensure that homes are given back to homeowners, and that all those who seek to turn homes into cash registers for themselves, are stopped at the gate. As many cities and towns now mandate that housing development be in the form of homeowner associations, government bears an extra obligation to make

sure that what it mandates, does not become a monster for its citizens – in the way that so much of the Davis Stirling Act became.

As the proposed new Common Interest Development Bureau (CIDB) will be dealing with the homes of Californians, and as California homeowners will be paying entirely for it, homeowners are entitled to a majority vote on all matters affecting homeowner associations. It cannot be allowed to become another cash register for such industry groups as CAI (Community Associations Institute). AHRC has received disturbing reports from homeowners in Nevada, that their CID Commission is heavily dominated by CAI members. If true, this would represent a further disaster if it were imported into California. For 20 years, California homeowners have suffered under the Davis Stirling Act – an act that was written by a former national president of CAI – Katherine Rosenberry. The point here is not to belabor the past, but to make sure that its mistakes are not repeated.

As in any organization, private or public, the person or persons that run them, are crucial to their success. Likewise with the CIDB. If it is simply another sleepy bureaucracy, it will be a complete waste of taxpayers' money and a violation of their trust. Hence, it is imperative that whoever is chosen to head the bureau, be dynamic, committed to the concept of a home, completely divorced from industry pressure and honest. Only then will the problems of homeowner associations be capable of resolution.

II. SUGGESTIONS BY AHRC

1. All Inclusive Dispute Resolution:

• (a) The single most important suggestion that AHRC received from its members was that the dispute resolution powers of the CIDB be all inclusive. The elephant in the room that nobody talks about in this situation is the relatively small band of homeowner association lawyers who have made millions by dragging homeowners into court over absolutely ridiculous matters, and running up astronomically high legal bills - $140,000 for a parking ticket, $160,000 for a light on a tennis court, $227,000 over the raising of a wall by one block – the list goes on and on. When homeowners buy into a homeowner association, they should be purchasing just a home – not a lawsuit as well.

• (b) CLRC in its Staff Draft Recommendation states that "the Bureau would not have authority to enforce an association's governing documents". (page 4). The rationale for this limitation is "to avoid executive encroachment into powers that are reserved to the courts by the California Constitution" (page 5), and cites McHugh v Santa Monica Rent Control Board. However, Montgomery County, Maryland, seems to successfully avoid any constitutional collision, and to run a full dispute resolution program. Though Montgomery County is smaller than California, (it has 107,176 units compared to 3 million in California), the mere difference in size is not a logical argument against implementation of their approach. Since 1996, it has heard and closed 239 disputes, handed down 77 decisions, and had 7 appealed. None of those hearing decisions have been overturned on appeal. AHRC urges all concerned to study the Montgomery County experience – on-going since 1990.

• (c) An analysis of some of their decisions shows that situations involving such things as basketball hoops on driveways – situations which in California could have mushroomed into lawsuits reaching into 6 figures – were resolved expeditiously by their dispute resolution process. It is time to end some of the madness that exists throughout

the length and breadth of California. California is called the "Golden State", but for many homeowners in homeowner associations, that gold seems to go to CAI lawyers only. A home, not a lawsuit.

2. Serious consideration should be given to locating the CIDB in the Department of Justice, not the Consumer Affairs Department. It is critical that the person chosen to head CIDB be a civil servant, rather than appointed. In the Department of Real Estate, the commissioner is always chosen from the ranks of the real estate industry, even though the department is by law supposed to be for consumer protection. There is less chance of that happening in the Department of Justice.

3. Proposed Section 1380.110 (f) states that "the bureau chief may convene an advisory committee to make recommendations on matters within the bureau's jurisdiction". AHRC strongly recommends that "may" be changed to "shall". AHRC believes that it is imperative for CIDB to gain input from all those involved in CIDs, especially homeowners and those knowledgeable about homeowner issues. Voices for homeowners should be in the majority. Industry input may be helpful at times, but industry can no longer be allowed to dominate as they have in the past.

III. CONCLUSION

Much more can be said about the nuts and bolts of the proposal by CLRC. Excessive focus on these at this point runs the risk of losing sight of the forest for the trees. Once the broad policy outlines are established, AHRC proposes that CLRC set up an advisory panel with a majority of homeowner voices to iron out the details before this proposal is finally submitted to the legislature.

A new day beckons for California homeowner associations. AHRC urges everybody to seize the day before it gets lost.

SUPPLEMENTAL COMMENTS BY ARNOLD A. McMAHON

I. THE EXPERIENCE OF MONTGOMERY COUNTY - MARYLAND

1. Montogomery County, Maryland, launched its Commission on Common Ownernship Communities in 1990. It is a comprehensive approach that excludes from its provisions only the following items:

- (a) title to any unit or any common area or element
- (b).the percentage interest or vote allocable to a unit
- (c).the interpretation or enforcement of a warranty
- (d) .the collection of an assessment validly levied against a party
- (e) the judgment or discretion of a governing body in taking or deciding not to take any legally authorized action.

It covers the requirement for any person to take any action, or not to take any action, involving a unit. The Commission routinely handles, for example, disputes regarding architectural matters.

The Commission must consist of 15 voting members, 6 of whom must be homeowners.

2. While it is not easy to assess the success of the Montgomery County proposal, the evidence seems to suggest that it has been successful. The county has 731 common ownership communities, with 107,176 units. It averages about 66 complaints a year. Evan

Johnson of the Montgomery County Consumer Affairs Department states that the vast majority of situations are handled prior to the complaint stage. Very few go to the Hearing Stage – about 8 a year. Since 1998, only 7 of those have been appealed to a court – and none have been overturned.

3. Like California, Maryland has a constitutional provision for a separate judiciary. In Maryland, the actions of the Commission have not been regarded as violating that constitutional provision.

II. McHUGH v. SANTA MONICA RENT CONTROL BOARD

CLRC in its Staff Draft Recommendation of February 15, 2005 declines to include enforcement of governing documents within the scope of enforcement of CIDB. AHRC believes that this recommendation is unwise and is not supported by the California Supreme Court decision of McHugh v Santa Monica Rent Control Board.

1. Unwise: many homeowner associations are roiled with disputes over the governing documents. (Parenthetically, AHRC believes that the CIDB should play an active role in the development of CCRs by developers – to ensure that they are understandable without being a Supreme Court justice, that they make sense, and avoid common pitfalls). The CAI industry lawyers have seized on these situations to generate countless lawsuits, where the legal fees often exceed $100,000, and the only winners are these lawyers. Let us stop this madness, and do the job right.

2. A fair reading of McHugh does not require the exclusion of disputes regarding governing documents. McHugh states:

"An administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief – including certain types of monetary relief – so long as (i) such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the "essential" judicial power (i.e. the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." - Page 372 of the decision.

In fact, McHugh approvingly singles out and quotes a Maryland case on this issue.

As CLRC states that one of the fundamental goals of the CIDB is dispute resolution, McHugh would not only not present an obstacle to attempting to resolve disputes arising out of governing documents, but would seem to support it – if only to prevent the clogging up of the court system.

This is obviously not the place for a detailed discussion of McHugh, but AHRC believes it is critical for the success of homeowner associations that this new bureau handle all disputes except those as enumerated in the Montgomery County statute as listed above.

Hence, AHRC asks that this Committee to make CIDB as inclusive as possible when it comes to disputes. Montogmery County successfully led the way 15 years ago. If we had followed their lead then, many, many homeowners would not have had to suffer the way they have.

AHRC hopes that California will be the first state to lead the way and provide a mechanism to solve so many of the problems that fester in homeowner associations.

MATERIAL PROVIDED BY TOM POOL OF THE DEPARTMENT OF REAL ESTATE TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMMITTEE (MARCH 9, 2005)

Introduction

Good afternoon Mr. Chair and members. I am Tom Pool, the legislative liaison for the Department of Real Estate.

Thank you for the opportunity to address the Committee on the issue of Common Interest Development oversight. I have with me today, Chris Neri, who is an assistant commissioner with the department in charge of the subdivision section. Chris has an extensive subdivision background and would be happy to answer any questions about the Subdivided Lands Law or the public report process.

Overview of DRE

The committee has asked that I respond to 5 specific questions, which I will do. Let me start by providing an overview of the Department and the role it plays in approving the sale of homes in a CID.

With respect to the Department, we have about 300 employees operating in 5 offices located in Sacramento, Oakland, Fresno, Los Angeles and San Diego. Of the 300 employees, 143 work in the Department's subdivision and enforcement programs. The Department is a special fund agency supported mainly by license and subdivision fees with a budget of approximately $33 million. The Department's responsibilities include regulatory oversight of real estate licensees and subdividers pursuant to applicable provisions of the Business & Professions Code, including the Subdivided Lands Law. As an administrative agency, we issue real estate licenses and qualify subdivision offerings for sale to the public. When a violation of the Real Estate Law has occurred the Department can pursue disciplinary action against a license through the administrative hearing process. The ultimate discipline would be the revocation of a license. When a subdivider violates the Subdivided Lands Law, the Department can issue a Desist and Refrain order to stop further sales in subdivision until the violation is remedied. The Department has limited authority to seek fines and no authority to pursue criminal violations. Currently, there are more than 423,000 licensees. With respect to subdivisions, last fiscal year the Department received 4,018 public report applications and issued 3,614 final public reports. Of the 3,614 final public reports issued, 3,317 were in connection with common interest developments. And of the public reports issued in connection with a CID, the department estimates that 514 involved the creation of a new homeowners association. The Department anticipates similar numbers for this fiscal year. Attached, as Exhibit A is a chart with the pertinent statistical data I just described, as well as other departmental information, for the past three fiscal years.

DRE Jurisdiction and Enforcement of the Law

Now, I would like to describe the Department of Real Estate's jurisdictional role with respect to common interest developments.

Subdivision laws enforced by the Department help ensure that subdividers deliver to buyers what was agreed to at the time of sale. These laws cover most standard

subdivisions and various types of common interest developments with 5 or more lots or units. Before real property that has been subdivided can be marketed in California, the subdivider must obtain a public report from the DRE. The public report discloses to prospective buyers pertinent information about a particular subdivision. Prior to the issuance of a public report, the subdivider must file an application along with supporting documents with respect to representations made in the application. With respect to common interest developments, the Department does review the proposed association's governing documents and CCRs for compliance with the law.

After the public report is issued, the Department has jurisdiction over the development until the last unit is sold and control of the association is turned over to the homeowners. Generally, while the developer is in control of the association, the Department can investigate complaints of alleged violations by the developer of the governing documents, and if a violation can be established, as I explained earlier, the Department can issue a Desist & Refrain order stopping sales until the violation is remedied. However, complaints against subdividers are rare. In fiscal year 03/04 the Department received over 10,000 complaints and less than 80 involved subdividers. When the developer sells the last unit in a CID and turns over the association to the homeowners, the Department no longer has jurisdiction.

One question the Committee has asked is whether the Department keeps data on the types or number of telephone calls the Department receives from CID homeowners. The answer is no; however, the Department does track calls in general. As illustrated by Exhibit B, the Department's licensing/exam telephone numbers received over 2.4 million calls in FY 03/04 while DRE district offices answered approximately 113,000 calls and helped more than 14,000 walk-in customers. Anecdotally, by informally polling staff, it is clear the Department regularly receives calls from consumers who are complaining about their HOAs; however, nearly all of these complaints are outside the jurisdiction of the Department as the development is sold-out and the HOA is controlled by the homeowners.

Consumer Awareness/Education

I would now like to explain the Department's efforts to inform consumers about living in a CID. In new developments, as I explained earlier, consumers buying an interest in a new common interest development receive a copy of the public report which details material issues of which consumers should be aware, including very specific information about living in a common interest development. Attached as Exhibit C, a single page of general information about common interest developments. This page is inserted in all CID public reports and provides an overview of CIDs, including general information on the governing instruments and assessments homeowners must pay. It also refers to a more extensive informational brochure published by the DRE entitled *Living in a California Common Interest Development*, a copy of which I have brought for each of you. This brochure is available for free and can also be viewed and downloaded from the DRE's Web site. The Department also publishes an *Operating Cost Manual for Homeowner Associations* and *Reserve Study Guidelines for Homeowner Association Budget*s. These booklets help homeowner association boards prepare budgets and ensure the association will have sufficient reserves for long-term maintenance items, such as

roof replacements. These publications can be viewed and downloaded from the Department's Web site for free and hard copies can be obtained for $10.

Summary

Given the small number of complaints received by the Department from homeowners against subdividers when the subdivider is in control of the development and in turn the HOA, it appears the Public Report process and the Department's ability to stop sales is very effective in ensuring the rules and regulations are followed in the initial stages of the CID.

Finally, the Committee has asked for the Department to comment generally on the proposed Bureau and suggest any alternatives to a Bureau. We have reviewed the California Law Revision Commission's proposal and since it does not affect the Department we do not feel it is appropriate to comment.

At this point we would be happy to answer any questions.

DEPARTMENT OF REAL ESTATE

Statistical Information

LICENSEE POPULATION BY FISCAL YEAR

	FY 2001/2002	FY 2002/2003	FY 2003/2004	FY 04/05 as of 2/1
Brokers	108,860	112,942	118,578	123,319
Salespersons	214,998	242,970	275,172	299,996
TOTAL	323,858	355,912	393,750	423,315

STAFFING FOR DRE BY FISCAL YEAR

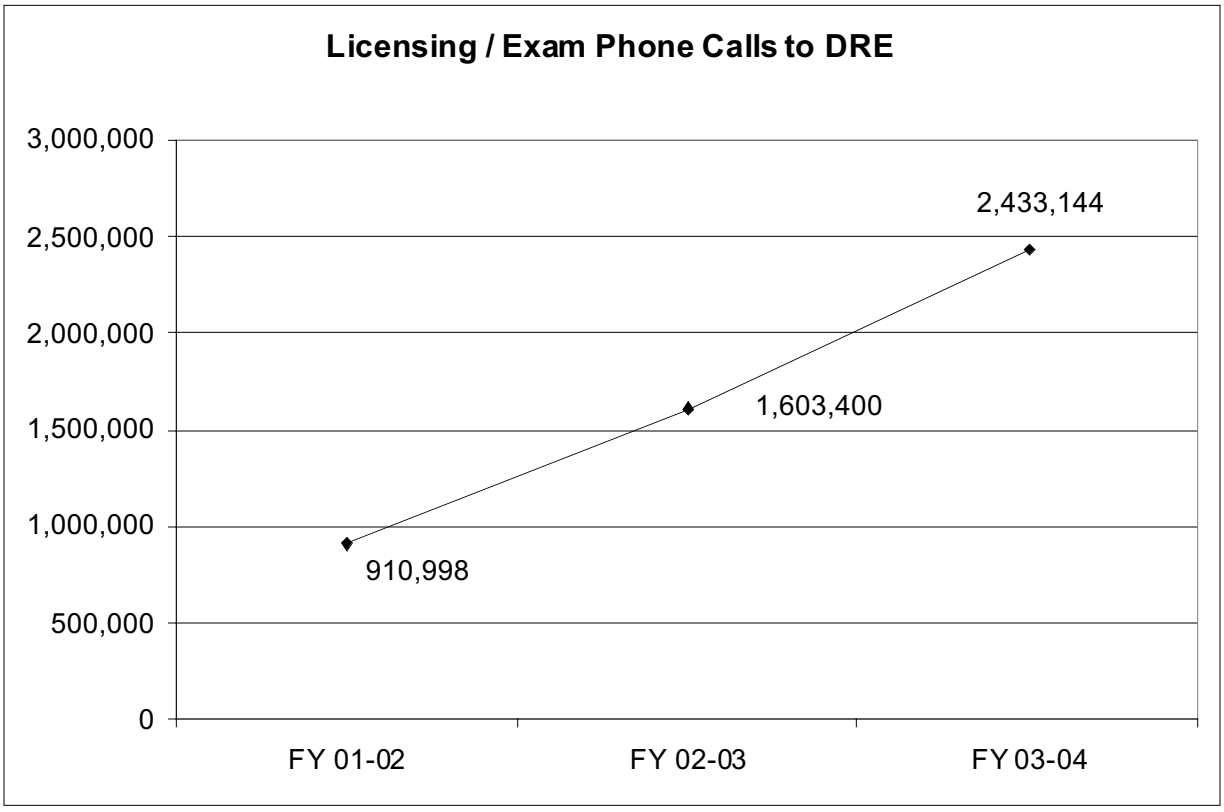
	FY 2001/2002	FY 2002/2003	FY 2003/2004	FY 04/05 as of 2/1
PYs	315	310	292	303

ENFORCEMENT/LEGAL STATISTICS BY FISCAL YEAR

	FY 2001/2002	FY 2002/2003	FY 2003/2004	FY 04/05 as of 2/1
Complaints Received and Screened	8,355	7,828	10,110	4,763
Investigations	5,095	6,987	6,206	3,951
License Suspensions	100	72	120	61
License Denials	376	659	875	322
Revocations	313	251	304	121

SUBDIVISION ACTIVITIES BY FISCAL YEAR

	FY 2001/2002	FY 2002/2003	FY 2003/2004	FY 04/05 (JUL-DEC)
Total Applications Received	2,906	3,478	4,018	2,011
Total Final Public Reports Issued	2,654	3,080	3,614	1,959
Final Public Report Issued to a CID	2,350	2,821	3,317	1,818
Approximate Number of New HOAs	362	416	514	288



IN ADDITION, DRE DISTRICT OFFICES ANSWER APPROXIMATELY 113,363 TELEPHONE CALLS AND HELP 14,000 WALK IN CUSTOMERS ANNUALLY.

Common Interest Development

The project described in the attached Subdivision Public Report is known as a common-interest development. Read the Public Report carefully for more information about the type of development. The development includes common areas and facilities which will be owned and/or operated by an owners' association. Purchase of a lot or unit automatically entitles and obligates you as a member of the association and, in most cases, includes a beneficial interest in the areas and facilities. Since membership in the association is mandatory, you should be aware of the following information before you purchase:

Governing Instruments

Your ownership in this development and your rights and remedies as a member of its association will be controlled by governing instruments which generally include a Declaration of Restrictions (also known as CC&R's), Articles of Incorporation (or association) and bylaws. The provisions of these documents are intended to be, and in most cases are, enforceable in a court of law. Study these documents carefully before entering into a contract to purchase a subdivision interest.

Assessments

In order to provide funds for operation and maintenance of the common facilities, the association will levy assessments against your lot or unit. If you are delinquent in the payment of assessments, the association may enforce payment through court proceedings or your lot or unit may be liened and sold through the exercise of a power of sale. The anticipated income and expenses of the association, including the amount that you may expect to pay through assessments, are outlined in the proposed budget. Ask to see a copy of the budget if the subdivider has not already made it available for your examination.

Common Facilities

A homeowner association provides a vehicle for the ownership and use of recreational and other common facilities which were designed to attract you to buy in this development. The association also provides a means to accomplish architectural control and to provide a base for homeowner interaction on a variety of issues. The purchaser of an interest in a common-interest development should contemplate active participation in the affairs of the association. He or she should be willing to serve on the board of directors or on committees created b In short, "they" in a common interest developme Unless you serve as a member of the governing a committee appointed by the board, your co operation of the common areas and facilities i your vote as a member of the association. There that can be taken by the governing body witho the members of the association which can have a impact upon the quality of life for association me

Subdivider Control

Until there is a sufficient number of purchaser units in a common interest development to elec of the governing body, it is likely that the sub effectively control the affairs of the associ frequently necessary and equitable that the subd during the early stages of development. It important to the owners of individual subdivisi that the transition from subdivider to resident-ov be accomplished in an orderly manner and in cooperation.

Cooperative Living

When contemplating the purchase of a dw common interest development, you should cons beyond the attractiveness of the dwelling units Study the governing instruments and give carefu whether you will be able to exist happily in an of cooperative living where the interests of the be taken into account as well as the inter individual. Remember that managing a comm development is very much like governin community … the management can serve you w will have to work for its success. [B & P C 11018.1(c)]

Informational Brochure

The Department of Real Estate publishes th Interest Development Brochure. the informat brochure provides a brief overview of the rights responsibilities of both associations and indivi in common interest developments. To obtain a f this brochure, please send your request to:

Book Orders
Department of Real Estate
P.O. Box 187006
Sacramento, CA 95818-7006

RE 646 (

MATERIAL PROVIDED BY KRISTIN TRIEPKE OF THE DEPARTMENT OF CONSUMER AFFAIRS TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMMITTEE (MARCH 9, 2005)

Introduction

Good afternoon/morning Mr. Chair and members. I am Kristin Triepke, the Legislative Deputy Director for the Department of Consumer Affairs.

Thank you for the opportunity to address the Committee on the issue of Common Interest Development oversight. With me today, is Laura Zuniga, who is the Assistant Legislative Deputy Director.

Overview of DCA

The committee has asked the Department to respond to some specific questions, which I will do. But I thought I would provide you with a brief overview of the Department first.

To promote and protect the interests of consumers, the Department licenses and regulates approximately 2.5 million professionals in more than 230 different professions, such as doctors, dentists, contractors, cosmetologists and auto-repair technicians. The Department's 39 regulatory entities consist of nine bureaus, twenty-four boards, three committees and one commission. The committees, commission and boards are semiautonomous bodies whose members are appointed by the Governor and the Legislature.

Our 39 regulatory entities establish minimum qualifications and levels of competency. They also license, register, or certify practitioners, investigate complaints and discipline violators. Some examples of discipline that can be imposed include a citation and fine, license suspension or even revocation.

With the exception of the Office of Privacy Protection, which is a general fund agency, the Department is a special fund agency whose funding comes from fees paid by the licensees.

DCA's Bureaus

Since the Law Revision Commission's proposal would create a bureau within the Department, you have asked us to provide you with some basic information about our bureaus. The Department's nine bureaus combined have approximately 452,000 licensees, 756 employees and an annual operating budget of close to 149 million (148,696,000). The bureaus annually receive approximately 27,000 complaints.

DCA's CID Role

Two questions you have asked us to respond to are (1) What role does the Department play in relation to CIDs and (2) Does the Department keep any kind of data on the types or number of calls we receive from CID homeowners. Since the Department has no jurisdictional role over CIDs, we do not track the number of calls we receive pertaining to CIDs.

Consumer Awareness/Education/Complaint Mediation

You have also asked us what type of customer component or consumer complaint component does the Department have.

The Consumer Information Center, with a budget of approximately 4.6 million ($4,596,352) and 57.4 employees, is the voice of the Department and serves as the first point of contact for many licensees, registrants and the public. The Center averages up to 90,000 inquiries each month via phone, letter and email. Our toll-free telephone number [(800) 952-5210] is staffed Monday through Friday from 8 a.m. to 5:00 p.m. except holidays. The Center staff can assist in the filing of complaints, mail helpful publications and refer callers to the appropriate government or private agency for more assistance. Through the Center's 24-hour recording, consumers can receive general information such as the Department's web site address, e-mail address, and instructions on filing complaints. Additionally, our Auto Service Fax-Back allows the caller to leave his or her fax number and request for information, such as applications or brochures, and the automated system will fax the information back to the caller within 24 hours. Through our Language Line services, we can answer consumer and licensee questions in 144 different languages. The Center distributes nearly 150,000 publications annually (brochures, applications, etc.).

Through the Communications and Education Division, the Department helps consumers make wise purchasing decisions by informing them through the media about the laws that protect them, explaining what they should know about a business, and letting them know what their responsibilities are to protect themselves. Numerous Department booklets, brochures, fact sheets, and consumer guides are distributed to help inform and educate the public and licensees.

The Department's Complaint Mediation Program, with a budget of almost 4.8 million ($4,735,491) and 63 employees, mediates approximately 10-15,000 complaints annually for 6 of the Department's 9 bureaus. Mediation staff works with those involved to promote mutually acceptable solutions to problems. More serious complaints and those with potential consumer harm are referred to the Department's enforcement staff for investigation.

The Proposal

Finally, the Committee has asked the Department to comment generally on the proposed bureau and suggest any alternatives to a bureau. While the Department does not take positions on proposals, I do have a few general things to say. While the Governor has expressed his commitment to addressing one of the biggest CID issues, which is the non-judicial foreclosure process for failure to pay delinquent homeowners assessments, the creation of a new bureau does not appear to be consistent with the Governor's interest in reducing and streamlining government. Additionally, in light of the CID bills that have been enacted recently, it is possible that the proposal may no longer be necessary.

At this point we would be happy to answer any questions.

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400 Capitol Mall, Eleventh Floor
Sacramento, CA 95814
916.558.6000 : 916.446.1611 FAX
: www.weintraub.com

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Curtis C. Sproul
916.558.6037 DIRECT
csproul@weintraub.com

March 4, 2005

Assemblyman Gene Mullin
Assembly Committee on Housing
& Community Development
Legislative Office Building
1020 N Street, Suite 167A
Sacramento, CA 95814

Re: Housing and Community Development Hearing on AB 770
(the Common Interest Development Bureau Bill)

Dear Assemblyman Mullin:

Next Wednesday I will be appearing before the Assembly Committee on Housing & Community Development to offer my thoughts on the above-referenced Bill which, if passed into law, will create a new State agency called the Common Interest Development Bureau. This proposal has its origin in a common interest development project of several years of the California Law Revision Commission (the "Commission"). In my opinion this legislative proposal does little more than to add a new and unnecessary State agency that will not measurably improve the quality of life in common interest communities or improve the administration and operation of the owner associations that operate in those communities.

Although I have tremendous respect for Brian Hebert and the other members of the California Law Revision Commission staff, in this instance I believe that the staff has been relying too heavily on the testimony and input of a very small minority of common interest residents who, in some instances, have a personal agenda to advance at the expense of the communities they purport to serve. I have been an attorney for 32 years and for the past 25 years my practice has focused almost exclusively on the representation of common interest communities. I am also the co-author of one of the principal legal reference books in this field of law, namely *Advising California Common Interest Communities* (Continuing Education of the Bar, 1991, updated annually). Over those years of practice I have served as legal counsel to over 200 common interest communities throughout the State and I am also in regular contact with many of the largest common interest property

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Sacramento, CA 95814
916.558.6000 : 916.446.1611 FAX
: www.weintraub.com

management firms in California, including Kocal Management, VierraMoore and Professional Community Management. Finally, I am legal counsel to the California Association of Community Managers (CACM), which is the largest California-based trade association for community association managers.

Prior to preparing this letter I spoke to representatives in these management companies and at CACM to reaffirm my own experience as an attorney, namely that the incidents of significant disputes among common interest property owners or between common interest owners and their development's association are quite few in number. George Moore of VierraMoore observed that "ninety percent of the problems we encounter are caused by less than ten percent of the owners". Those are statistics coming from an experienced property manager who is on the front lines in dealing with homeowners on a day-to-day basis. Although I am removed from the daily give and take among common interest residents and their associations and the number of disputes that make it to my firm's door are probably in the range of one percent of the total population in the developments that I represent. In addition, I can attest to your Committee that this one percent is populated, to a significant extent, by the same individuals, year after year. As I run through the long list of common interest communities I represent there are either no persons or disputes that I can recall with respect to a particular development or there is a named individual or small group of individuals whose names come up time and time again as fomenters of unrest in the developments in which they reside. In the very worst of those cases, these individuals are successful in getting themselves elected to the association board of directors and, when that occurs, the unfortunate community that carelessly allowed them to ascend to positions of managerial power typically find themselves awash in expensive litigation. My point is that while there are infrequent incidents of significant homeowner and association disputes in common interest communities, that fact does not merit a State bureaucratic response.

The proposed Common Interest Development Bureau also reflects a "one size fits all" mentality that is not well suited to deal with the problems that arise in some common interest communities. In my experience, it is often the smaller common interest developments that experience the greatest number of personal conflicts among residents and their associations because there is no opportunity for significant checks and balances

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among diverse constituencies and there is no objectivity or distance that separates the regulators (i.e., the association board and its professional managers, if any) from the regulated. Larger communities enjoy that diversity and can afford competent and experienced property managers who have the skills, education and experience to effectively address and resolve disputes when they arise[1]. Under this Bill, as currently proposed, the 90+ percent of the owners who are living by the private covenants and restrictions of their development will be compelled to fund the operations of a new State bureaucracy that adds little if any value to their daily lives.

My final point is that this proposed legislation duplicates many dispute resolution alternatives that are already in the Corporations Code and the Davis-Stirling Common Interest Development Act. Since 1980 the Nonprofit Mutual Benefit Corporation Law has required mutual benefit corporations (and practically all common interest associations are mutual benefit corporations) to have and follow fair and reasonable disciplinary procedures when dealing with member discipline (Corporations Code section 7341). Those procedures must be set forth in the organization's governing documents or in a written document distributed annually to the members. The statute further provides that the procedures used by the corporation must provide for at least 15 days prior notice of a hearing at which the target member can make a presentation, and the date of that hearing must be at least five days prior to the scheduled effective date of any proposed discipline.

The Davis-Stirling Act supplements these simple and straightforward Corporations Code statutory rules, by essentially repeating Corporations Code section 7341 in Civil Code 1363(h) and then adding to those internal notice and hearing requirements two layers of alternative dispute resolution (now found in Civil Code sections 1363.810 – 1363.840 and Civil Code sections 1369.510 – 1369.590) before practically every possible common interest owner or community association dispute can ever get to a court house door. The cited Civil Code provisions already require associations to adopt and

[1] When I was a political science major at the University of California, Berkeley, my professors often extolled the virtues of the bottoms-up democracy represented by the New England townships, and yet even at the time of the Federalist Papers those townships had average populations in excess of three thousand citizens.

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follow fair and reasonable dispute resolution procedures and to endeavor to resolve disputes through some form of alternative dispute resolution prior to seeking judicial enforcement. Many of these statutory procedural hurdles along the path to civil litigation have only been in place for a short time and should be given an opportunity to be implemented before an additional and expensive layer of state regulation is added to the process. As the California Law Revision Staff report of February 15, 2005 acknowledges: "Some disputes may involve a mixture of statutory and common law complaints. . . The Bureau would have jurisdiction to decide [statutory law issues involved in the dispute], but could not decide whether the substantive standard contained in the association's declaration had been properly applied." The message in that statement is that, at the end of the day, and after exhausting internal, external, and State Bureau remedies and procedural requirements, the disputing parties may be left with a court action as the only avenue remaining to completely resolve their differences.

Given the protections already accorded to the rights of community association members under the Davis-Stirling Common Interest Development Act, the Nonprofit Mutual Benefit Corporation Law and related California court decisions, it is unnecessary and unwise for the Legislature to create a new agency, funded almost entirely by persons who will not receive any direct or tangible benefit from the agency's services. Rather than contribute positively to the enhancement of the quality of life in common interest communities, it is more likely that the agency will become mired in what Professor Chafee of Harvard characterized as the "dismal swamp" of disputes among persons who are members of private organizations. See Chafee, *The Internal Affairs of Associations Not for Profit*" (1930) 43 Harvard L. Rev. 993, 1023-1026. Persons who serve as directors of common interest associations are bound by fiduciary principles to act in the best interests of their members and their association and to act with due care. If the directors violate

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Sacramento, CA 95814
916.558.6000 : 916.446.1611 FAX
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that position of trust, as few as five percent of the association's members currently have the power to call a special meeting to vote them out of office (Corporations Code section 7510(e)). I am confident that those members are in a better position to hold their association's managers accountable than some remote state agency.

Very truly yours,

Curtis C. Sproul

cc: Yvonne Fong, yvonne.fong@asm.ca.gov