Study H-853 March 17, 2005

Second Supplement to Memorandum 2005-10

State Assistance to Common Interest Developments

Additional material commenting on the Commission's proposal to provide state assistance to CIDs is attached in the Exhibit as follows:

HEARING MATERIALS

The material from the CID Bill of Rights Coalition, California Association of Community Managers (CACM), and Nevada Senator Mike Schneider were provided to the Assembly Housing and Community Development Committee in connection with their testimony at the March 9, 2005, informational hearing.

OPPOSITION

Mr. Yaeger writes to express his opposition to the proposed law. He feels that it would require well-run associations to subsidize services to poorly-run associations. He also suggests that a better use for money collected from associations would be the establishment of an insurance pool to subsidize liability and director and officer insurance for associations.

FURTHER SUGGESTIONS

Mr. Klein writes to offer further suggestions for refinement of the proposed law. If the Commission decides to remove the law enforcement function from the proposed law, Mr. Klein suggests that it be replaced with some other enforcement alternative (e.g., enhanced use of small claims court and city attorneys).

He also emphasizes what he sees as the preeminent importance of fair association elections. This reinforces his earlier suggestion that the CID Bureau be authorized to conduct association elections and not just observe them.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Coyote Hill Homeowners Association
230 Bald Eagle Court
Colfax, Ca 95713

March 8, 2005

Chairperson
Assembly Committee on Housing
State Capital
P.O. Box 942849
Sacramento, CA 94349-0000

Subject: Joint Hearing on Forming a State Bureau on Homeowners Associations

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By means of this letter the Coyote Hill Homeowners Association is expressing its objection to the proposal of the California Law Revision Commission to form a State Bureau to regulate Home Owners Associations. This proposal to create an entirely new Bureau with a new budget is contrary to the principle of streamlining government and making it more efficient and will serve no useful purpose. It extracts money from a large number of well operating Home Owners Associations to attempt to solve the problem of a few poorly operated associations. The homeowner disputes being aired in the news are all covered under the Davis Stirling Act and can be handled administratively without the intervention of the State. The proposal would force the many well run associations to pay for the problems of a few that should be solved in the courts.

The proposed assessment of $10 per parcel would increase the operating budget of our association by almost 5 % - which is an unnecessary burden - and would not provide any benefit to the association for the **new tax** being imposed.

We ask that you disallow the proposal of the California Law Commission. If, however, you decide to move forward with this proposal, we ask that you provide some benefit to the associations by forming an insurance pool to lower the cost to the associations for liability insurance and insurance for directors.

Sincerely,

Steve Yaeger, Vice President
Coyote Hill Homeowners Association

cc: California Law Revision Commission

EX 1

CID BILL OF RIGHTS COALITION LETTER TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMMITTEE (MAR. 9, 2005)

March 9, 2005
The Honorable Gene Mullin, Chair
Assembly Housing Committee
The Honorable Gloria Negrete McLeod, Chair
Assembly Business and Professions

RE: State Assistance to Common Interest Developments

Dear Assembly Member Mullin and Assembly Member McLeod:

I am Marjorie Murray, testifying on behalf of the CID Homeowner Bill of Rights Coalition. We have been asked to comment on the CLRC proposal to create a Bureau that provides "state assistance" to common interest developments.

Our Coalition comprises the Congress of California Seniors, Gray Panthers, Older Women's League (OWL), the California Alliance for Retired Americans (CARA), AARP and represents more than four million Californians. With Sentinel Fair Housing and Consumers Union (publisher of ***Consumer Reports***), we endorsed the CID Homeowners Bill of Rights delivered to the CLRC more than three years ago.

Our Coalition has two goals: (1) we initiate and monitor CID legislation in order to expand and protect the rights of CID homeowners (2) we are advocates for homeowners, who routinely ask us for help to resolve disputes over assessments, elections, parking rights, constitutional rights, disability rights, foreclosure problems to name a few issues. We provide homeowners with information and referrals to government, community and legal resources that are already available. We accompany homeowners to administrative hearings, e.g. those held at the Department of Fair Employment and Housing.

Our Coalition has been testifying repeatedly before this Commission on the issue of dispute resolution. You may recall that three years ago, our Coalition recommended to the Commission that a surcharge could be collected from associations through the Secretary of State at the point that the CID renewed its corporate status. Our initial proposal was that the funds would be used to strengthen the state's existing dispute resolution programs in order to provide services to CID homeowners. Dispute resolution programs exist in nearly all of California's 58 counties.

As our recommendation suggests, we have a deep commitment to dispute resolution, but we have an even deeper commitment to dispute prevention through legislative reform.

We have looked closely at the draft proposal; this letter lays out some of our concerns.

- First, the Coalition questions the assumption on which the Bureau proposal is founded, namely, that CIDs are run by naïve volunteer board directors, who make a lot of mistakes. The proposal doesn't acknowledge that thousands – perhaps the majority of CID boards – are in reality being managed by professionals – property managers and law firms in particular

– who not only advise boards, but often function in lieu of them as managing agents. Later this morning you will hear firsthand from the trade groups, whose members advise thousands of California CID boards.

One weakness we see in the current proposal is that managing agents and board directors are required to certify to the bureau only that they have read the association's governing documents. They do not have to certify that they understand the documents let alone that they agree to comply with them.

- Second, the proposal doesn't focus on the prevention of disputes through legislative reform. Current California law consolidates all power -- legislative, judicial, executive – in the board. This structure guarantees that disputes will arise. In fact, this structure promotes disputes, since the homeowner is virtually powerless under it.

- A few of our specific concerns about the proposal are that

  - Homeowners bear the entire cost of the Bureau

  - The Bureau's jurisdiction unclear. Will the Bureau be mediating disputes involving Fair Housing and ADA laws, for example, which are now under the jurisdiction of HUD and DFEH?

  - Mediation is not mandatory [Section 1380.300]. Disputants are not required to participate in first stage of dispute resolution: the Bureau's mediation process.

  - It's not clear if an association – or a managing agent -- can file a complaint against a homeowner.

  - The Bureau will apparently not be "overseeing" the managing agents, who are often the true rule-makers.

  - An association board or director apparently has access to legal counsel in order to challenge the Bureau's citation and/or fine; but the homeowner does not have access to counsel, except at his/her own expense.

  - It's not clear who bears the cost of legal challenges to a Bureau citation: homeowners? Individual directors?

Given this structure, we urge once again that the creation of the Bureau is premature. We urge that:

- the Commission re-visit the "separation of powers" issue raised in several of its background papers. The California state constitution insists on a separation of powers in its own governmental functions; yet the state has created in homeowner associations a government entity in which all powers are fused. The association board makes up the rules, executes them, decides if they've been broken, and punishes the alleged transgressor – sometimes by seizing his property.

- o legislative reform ***precede*** the creation of the Bureau. Surely the Commission doesn't want to see an elaborate state structure set up in order to enforce laws unfriendly to homeowners. The Commission has already recognized this in its background papers, its recommendations, and some of the legislation it has introduced, e.g. last year's AB 512 "Fairness in Association Rulemaking," This new law recognizes that homeowners and boards alike must share power for making up the rules they live by.

- o The Commission examine in particular the issue of constitutional rights of homeowners. Our Coalition has been in the strange position of defending, for example, both the due process and the First Amendment rights of homeowners before legislature's policy committees. We would like to see the Commission re-affirm in a policy paper that the homeowner does not sign away constitutional rights by purchasing a home in a homeowner association. One of the chief architects of the Davis-Stirling Act has stated in a lengthy law journal article that the courts should apply constitutional principles sparingly – if at all – in homeowner association disputes. We would like to see this notion dispelled.

If the creation of a Bureau at this time is premature, what would we put in its place? I will address four areas: dispute resolution, education, enforcement, and financing.

- Dispute Resolution: We recommend again – as we did two years ago -- that boards and managing agents direct homeowners to the dispute resolution programs already in place in California counties. More than 150 such programs are already up and running throughout the state and are staffed by mediation and conciliation experts. Why not use the systems already in place rather than create new ones, which cost homeowners money? Furthermore, disputes are better resolved at the local level within the local context.

1. The Department of Consumer Affairs administers the state's Dispute Resolution Programs Act of 1986 and accompanying regulations, i.e. DCA is the state's enforcement agency for ADR and has a longstanding commitment to ADR administration. It's common sense to use systems already in place and not create new ones, which are more expensive.

2. The infrastructure for financing ADR programs in already in place through existing law. They are financed through court filing fees.

3. The infrastructure for disseminating information to the public about ADR is already in place, not only through Consumer Affairs through its Dispute Resolution Office and through the courts. Information about the state's mediation programs is already on the Consumer Affairs website.

- Education: We recommend that the trade groups, whose members function as managing agents step forward and make several commitments:

- To educate their clients – association boards – in their obligations under California law. We urge them to help boards comply with the law rather than to seek legal opinions to enable boards to circumvent the law.

- To join with homeowner advocates in supporting legislation that protects homeowners instead of opposing consumer-friendly legislation at every opportunity. Last year's foreclosure bill,

AB 2598, is a case in point, but I could cite many others which the trade groups opposed, including AB 104 and AB 2598, reaffirming the homeowners right to find out how the board is spending millions in assessments.

- In particular, we urge the trade groups to educate their members about the rights of the disabled who live in associations. Many managing agents are under the impression that the Americans With Disabilities Act and Fair Housing laws to not apply to associations and convey this belief to association boards.

- We also urge the trade groups and managing agents to educate their clients about the Commissions two important pieces of legislation: AB 512 (Fairness in Association Rulemaking) and AB 1836 (Dispute Resolution.) We would like to see them develop model internal dispute resolution procedures, using AB 1836.

- In particular, we urge the trade groups and the managing agents to connect CID boards and property owners to dispute resolution programs throughout the state. The problem is not so much that the programs are not available, but that residents and boards alike do not know that such programs exist – <u>or even that they have a right to alternative dispute resolution under the current Davis-Stirling Act. This information is routinely withheld from both boards and residents alike.</u>

We have already taken the above steps with the constituents that we serve through our Coalition. We invite the trade groups to do the same.

- <u>Enforcement of the law:</u> As we have already said: we cannot support the formation of a Bureau whose purpose is to enforce laws, which are inherently unfair to homeowners.

- <u>Financing:</u> Under the current proposal, homeowners alone are to bear the cost of creating the new Bureau. In addition, homeowners would be required to pay a filing fee every time they wanted to use its services. Why should the costs be borne solely by homeowners? Why aren't the managing agents and other vendors and developers also footing the bill?

In addition, there are hidden costs to homeowners, e.g. if the Bureau cites and fines a board or a director, its decision is not final. The citation can be appealed in the courts. In that case, who is to pay the court costs and the legal fees? The homeowners, through increased insurance premiums or increased assessments.

Respectfully submitted:

Marjorie Murray, Chair
CID Homeowner Bill of Rights Coalition
Legislative Advocate/CID Housing
3758 Grand Avenue, Suite 35
Oakland, California 94610
510.272.9826
cc: Members, Assembly Housing Committee
Members, Assembly Business and Professions Committee

CID HOMEOWNER BILL OF RIGHTS

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

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

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

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

IV Homeowner citizens shall be entitled to speedy access to all association records,

particularly to financial records, contracts, and records of governance at any time without exception.

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

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

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

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

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

X Elections shall be in the hands of the homeowner citizens, not the CID board: ballots shall be secret; no homeowner citizen shall be denied the right to vote for failure to pay any fine or tax, including assessments; directors shall serve no more than two terms and be held accountable for their decisions; the makeup of the board shall reflect the makeup of the association membership.

September 21, 2001/ Congress of California Seniors, Older Women's League, Sentinel Fair Housing, Consumers Union, Gray Panthers, Charles Egan Goff.

CACM LETTER TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMMITTEE (MAR. 9, 2005)

March 9, 2005

To: The Honorable Gene Mullin, Chair
Assembly Housing and Community Development
The Honorable Gloria Negrete McLeod, Chair
Assembly Committee on Business & Professions

From: Karen Conlon, CCAM
President, California Association of Community Managers, Inc.

Subject: Informational Hearing on Establishing A Bureau of Common Interest Developments

The California Association of Community mangers (CACM) would first like to acknowledge and thank the California Law Revision Commission (CLRC), for their enormous amount of work, dedication and service to the issue of proposed state

assistance to common interest developments (CIDs). We also thank you for inviting us to provide you with our insights and observations as we work in day-to-day activities with our esteemed CID clients and Board members.

Our memorandum of December 28, 2004 provided CACM's initial observations and insights to the CLRC regarding the proposal of a Bureau of CIDs. It is our understanding this information has been provided to you. While there are and will continue to be pros and cons to the proposal, we note it is important to assume that this proposal or a similar oversight concept will eventually occur. With this perspective in mind, we strongly encouraged the CLRC to proceed carefully, with much forethought to the concept of a Bureau of CIDs. It is in the state's interest, both economically and in establishing positive and workable public policy, to protect the 9 million consumers who are housed in these communities.

Additionally, we provided to them a compendium of concepts that voiced our concerns. They include:

The initial projections on the quantity of work for the Bureau could potentially initiate a volume of activities that would be overwhelming and costly.

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

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

The bodies of laws that govern CIDs continue to be cumbersome and confusing to volunteer directors and owners. We recommend extensive simplification of the Davis-Stirling Act before the enactment of an oversight agency.

What is the number and types of complaints received by our elected officials regarding CID disputes? In other words, where is the empirical data to document the problems?

Our concerns also included potential loss of real estate values and revenue to realtors if an offending association were listed on a website, negative impact to volunteer association director insurance policies and risk management activities, proposed avenues to resolve disputes is too vague to be effective, and owners typically begrudgingly use the ADR process and would rather file a lawsuit to achieve their end.

Generally, we believe that the proposal of the Bureau is ill-timed. There exist current protections already accorded the rights of owner in CIDs under the Davis Stirling Act, additional laws, and existing related California court decisions. It is unwise and un-necessary for the State to create a new regulatory agency to benefit a minute group of individuals whose disputes represent one percent or less of the total population of 9 million consumers living in CIDs. Again we respectively ask, where is the empirical data to substantiate the need?

The reporting of CID "abuses" do not accurately nor fairly describe both sides of the issue and may consequently exaggerate the circumstances involved. The problems reported are aberrations both statistically and with respect to the manner in which the relevant boards conducted themselves. Our study of the issue included the polling of legislators regarding CID complaints in their district. We continue to proceed with our polling but to date they have not yet been able to provide us with the number or types of CID problems in their districts. Creating a new agency in the manner suggested in an

attempt to prevent these events from occurring again is likely to cause a greater number of negative unintended consequences for consumers (potentially escalation of owner assessments) made necessary to float the costs by the many for the very few.

One of the stated purposes of the proposed Bureau is to respond to and adjudicate disputes of the law and not internal conflicts in the CID. We believe it is too soon to take this step. There is a way to build buffers into the process that will divert or head off these kinds of problems by staging mandatory interventions prior to the necessary exercise of a new regulatory scheme. This is exactly what AB 1836 (effective 2005 and recommended by the CLRC) is intended to do. It will supplement, but not replace, the existing provisions of Civil Code section 1354. Most importantly, the new provisions require the association offer and participate in a "fair, reasonable and expeditious procedure for resolving disputes." This is a significant step. While prior law only required the parties to "endeavor" to submit a matter to ADR prior to filing suit, and contained many "loopholes" to its application, AB 1836 requires an association to offer and then participate in this process for almost all of the common disputes between the association and an owner.

There are of course occasions where the volunteer Board members exercise control in a heavy handed manner, which can create or exacerbate a problem. Dispute resolution of any kind should fairly reflect this shared responsibility for disputes. However, the emphasis on punishment of volunteers by the Bureau seems to be based on the assumption that costly and divisive problems are driven by the persons in control of the associations. Our experience tell us it would seem more accurate to alter this assumption to reflect the fact that it is often the case that the conflicts are driven by disgruntled owners who have difficulty working within the community and availing themselves of their political remedies to affect change.

In the past 25 years, I have participated in thousands of CID meetings and dispute resolutions. I've trained hundreds of boards of directors on their fiduciary duties and responsibilities, and served as an expert witness in numerous CID lawsuits. With others consumers and industry professionals, I have attended meetings of the CLRC, and other CID related activities wherein the "stories" described almost always deal with internal disputes or behavioral issues. From the get-go, the expectation of the consumer will not be met. Believe me when I tell you, many years of amendments to the Davis Stirling Act resulting in legislation imposed on associations continues to raise their assessments. These savvy board members and consumers are watching your activity very closely and asking the question, "what the heck is going on in Sacramento?"

Housing is a crisis in this State. CID's are not like cities and they are not reimbursed for costs from the State. Further, because of the aging of these communities, redevelopment to keep the buildings viable becomes a significant financial challenge. When a new bill is introduced and the term "no fiscal impact" to the State is noted in the bill, it is not understood in Sacramento that any new piece of legislation enacted and imposed on the CID inevitably raises assessments for all homeowners in the community. Typically, it takes legal counsel to provide an interpretation for the Board in order to correctly implement and adhere to the new law.

Other observations regarding components of the proposal include how the Bureau intends to collect the necessary funds to sustain its' infrastructure. The CLRC suggests that, should the individual CID not pay their fair share, their corporate status with the

Secretary of State would be suspended. Many CIDs bristle at this threat and respond that they (legislators) are already tying the hands of the CID to collect assessments under SB 137 (should it pass the legislature)." Senior communities (i.e. Leisure World Laguna Woods ñ 12,000 seniors), and smaller CID communities have already told CACM they will have a difficult time collecting an extra five ($5.00) dollars in addition to their normal assessment increases from their owners, let alone to solve another community's problems. Their perception is the Bureau will be funded by consumers who will not receive any direct or tangible benefit from the Bureau's services. Their comments have also included the perception of being "double taxed."

We offer the following suggestions to this honorable body and the CLRC:

Simplify the Davis Stirling Act IMMEDIATELY to provide ease of understanding and compliance for owners and board members and define the interrelation between the Act and other laws that govern CIDs.

Create a website for consumers that provides resources, information and standard FAQs (frequently asked questions) about living in a CID.

Establish a method to capture empirical data regarding CIDs, the types of disputes being addressed in their IDR process, and the costs to address these issues.

Owner education is of course important in the overall understanding of living in and governing a CID. Identify resources and/or develop resources for board members, who are held to a higher standard than their owners, and owners who must also be held accountable in learning how to live within the CID.

Re-define the responsibilities of the volunteer board to be one of governance rather than managing the association. Educational tools to promote leadership, effective policy making, delegation of authority, will lead to this end.

Board members are typically not qualified to interpret their governing documents. With over 1200 different regulations, statutes and laws that impact CIDs, it is unreasonable to expect that any lay person, other than a licensed member of the State Bar could accept this responsibility. Governing documents and statutes already require compliance for all members of the association. Do not impose this additional restriction on non-licensed volunteers or professionals not qualified to interpret the law.

The average size of an association is 106 units yet the size and governing documents are ALL unique and different for the 36, 214 CIDs. California is unique in that it recognizes four (4) types of CIDs. With the potential volume of 9 million owners calling an agency to complain, looking for education, guidance and information, it is imperative that any new public policy be suited to the majority of our consumers who live in CIDs.

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CACM is a statewide professional association designed to educate and certify individuals who manage common interest developments. CACM is the first of its kind in the nation and since 1991, has been actively involved in developing state-specific education, a Professional Code of Ethics and Standards of Practice, and a disciplinary process for those manager members who may violate our Codes. Our certification program complies with the requirements of Business & Professions Codes 11500-11506.

We currently have 1,700 manager members of which over 1,000 maintain the Certified Community Association Manager® "CCAM" designation. Out management firm membership represents 65 firms with 11 having achieved the Certified Management

Firm®, "CMF" designation. We additionally have over 500 affiliate firms who provide products and services to the CIDs.

MATERIALS PROVIDED BY NEVADA SENATOR MIKE SCHNEIDER TO ASSEMBLY HOUSING AND COMMUNITY DEVELOPMENT COMMITTEE (MAR. 9, 2005)

NEVADA COMMISSION FOR COMMON-INTEREST COMMUNITIES

Senator Mike Schneider

Presentation before the California Assembly Committee on Housing & Community Development

March 9, 2005

GENERAL BACKGROUND INFORMATION ON NEVADA CIC's

NEVADA HAS 2,073 TOTAL COMMON-INTEREST COMMUNITY ASSOCIATIONS COMPOSED OF:

- 65 MASTER ASSOCIATIONS
- 367 SUB ASSOCIATIONS
- 1,641 REGULAR ASSOCIATIONS

THESE ASSOCIATIONS CONTAIN 310,501 UNITS. AND, WE ARE GROWING RAPIDLY.

IN 1991, NEVADA ADOPTED THE UNIFORM COMMON-INTEREST OWNERSHIP ACT (UCIOA) WHICH HAS BEEN CODIFIED IN CHAPTER 116 OF THE *NEVADA REVISED STATUTES* (NRS). CHAPTER 116 EXTENDS TO MOST CICS CREATED WITHIN THE STATE OF NEVADA.

SINCE THE INCEPTION OF CICS IN NEVADA, THEY HAVE BROUGHT BENEFITS AND PROBLEMS. IN NEARLY EVERY LEGISLATIVE SESSION SINCE 1991, MY COLLEAGUES AND I HAVE TRIED TO REFINE AND IMPROVE CIC LEGISLATION SO OUR CITIZENS CAN CONTINUE TO RECEIVE THE BENEFITS OF ASSOCIATIONS WHILE AVOIDING SOME OF THE UNPLEASANT

SITUATIONS THAT CAN ARISE WITH THEM. LET ME FOCUS ON JUST TWO POLICY APPROACHES WE CRAFTED.

NEVADA OFFICE OF THE OMBUDSMAN FOR OWNERS IN COMMON-INTEREST COMMUNITIES

THE 1997 NEVADA LEGISLATURE CREATED THE OFFICE OF THE OMBUDSMAN FOR OWNERS IN COMMON-INTEREST COMMUNITIES WITHIN THE REAL ESTATE DIVISION. SUCH AN OFFICIAL CAN BE EFFECTIVE THROUGH SUPERIOR KNOWLEDGE OF THE APPLICABLE LAWS, EDUCATION OF BOARD MEMBERS AND HOMEOWNERS, AND FACILITATION OF PRIVATE DISPUTE RESOLUTION.

SPECIFICALLY, THE OMBUDSMAN IS DIRECTED TO:

- ASSIST IN PROCESSING CLAIMS SUBMITTED TO MEDIATION OR ARBITRATION;

- ASSIST OWNERS IN CICS TO UNDERSTAND THEIR RIGHTS AND RESPONSIBILITIES UNDER THE STATUTES AND THE GOVERNING DOCUMENTS OF THEIR ASSOCIATIONS; AND

- ASSIST PERSONS APPOINTED OR ELECTED TO SERVE ON EXECUTIVE BOARDS OF ASSOCIATIONS TO CARRY OUT THEIR DUTIES.

FURTHERMORE, IF THE EXECUTIVE BOARD REFUSES TO ALLOW A MEMBER TO REVIEW THE BOOKS, RECORDS, OR OTHER PAPERS OF THE ASSOCIATION, THE OMBUDSMAN MAY, ON BEHALF OF THE MEMBER AND UPON WRITTEN REQUEST, REVIEW THE RECORDS DURING THE REGULAR WORKING HOURS OF THE ASSOCIATION. IF THE OMBUDSMAN IS DENIED ACCESS, THE OMBUDSMAN MAY REQUEST THE CIC COMMISSION TO ISSUE A SUBPOENA FOR THEIR PRODUCTION.

IN 2003, THE LEGISLATURE INCREASED THE SCOPE OF THE OMBUDSMAN'S DUTIES AND AUTHORIZED THE OMBUDSMAN TO:

- INVESTIGATE DISPUTES INVOLVING THE UCIOA OR GOVERNING DOCUMENTS OF A CIC IN ORDER TO ASSIST IN RESOLVING SUCH DISPUTES;

- COMPILE INFORMATION ON EACH CIC INCLUDING INFORMATION ON THE NUMBER OF FORECLOSURES FOR UNPAID FINES AND ASSESSMENTS AND WHETHER THE RESERVE STUDIES HAVE BEEN CONDUCTED AS REQUIRED BY STATUTE. [**FOR JULY 1, 2004 THROUGH DECEMBER 31, 2004, 95 NOTICES OF FORECLOSURE WERE RECEIVED, 4 UNITS WERE ACTUALLY FORECLOSED ON AND 41 WERE PENDING]**.

A $3 ANNUAL FEE ASSESSED TO EACH UNIT IN AN ASSOCIATION FUNDS THE OMBUDSMAN'S ACTIVITIES.

ASSESSMENT OF OMBUDSMAN PROGRAM

WHILE THE OMBUDSMAN HAS PERFORMED A USEFUL ROLE IN FACILITATING SETTLEMENTS OF DISPUTES, INSTANCES HAVE ARISEN WHERE PARTIES HAVE REFUSED TO COOPERATE BECAUSE THE OMBUDSMAN HAS LITTLE REAL AUTHORITY.

ONE REASON NEVADA SUBSEQUENTLY CREATED A COMMISSION IS THAT SOMEONE HAS TO HAVE THE AUTHORITY TO ENFORCE THE LAWS WHEN ONE OR BOTH PARTIES EITHER REFUSE TO WORK MATTERS OUT THEMSELVES OR CANNOT REACH A RESOLUTION DESPITE EVERYONE'S BEST EFFORTS. IN SUCH A CASE, THE ONLY OTHER OPTION IS TO PROCEED TO COURT. THIS IS AN EXPENSIVE AND TIME CONSUMING PROCESS WHICH FRANKLY MANY HOMEOWNERS CANNOT AFFORD. THEREFORE, MY COLLEAGUES AND I CREATED THE COMMISSION.

NEVADA COMMISSION FOR COMMON-INTEREST COMMUNITIES

THE SECOND POLICY APPROACH I WANT TO ADDRESS IS THIS COMMISSION FOR COMMON-INTEREST COMMUNITIES. IT WAS CREATED BY SENATE BILL 100 WHICH I INTRODUCED IN 2003. THE PURPOSE OF THE

COMMISSION IS TO GIVE HOMEOWNERS AN EXPEDITIOUS AND INEXPENSIVE FORUM FOR RESOLVING DISPUTES WITH CICS.

COMMISSION STRUCTURE

THE COMMISSION FOR COMMON-INTEREST COMMUNITIES IS A FIVE-MEMBER BODY APPOINTED BY THE GOVERNOR TO SUPERVISE THE ADMINISTRATION OF THE UCIOA. COMMISSIONERS MUST MEET CERTAIN QUALIFICATIONS:

- ONE COMMISSIONER MUST BE AN ASSOCIATION MEMBER RESIDING IN NEVADA WHO HAS SERVED ON AN EXECUTIVE BOARD IN THIS STATE;
- ONE COMMISSIONER MUST BE IN THE BUSINESS OF DEVELOPING CICS IN NEVADA;
- ONE COMMISSIONER MUST HOLD A PERMIT OR CERTIFICATE;
- ONE COMMISSIONER MUST BE A CERTIFIED PUBLIC ACCOUNTANT LICENSED IN THIS STATE; AND
- ONE COMMISSIONER MUST BE AN ATTORNEY LICENSED IN THIS STATE;

COMMISSIONERS:

- SERVE 3-YEAR TERMS;
- THREE MUST COME FROM CLARK COUNTY; AND
- MUST ATTEND COURSES OF INSTRUCTION ARRANGED BY THE REAL ESTATE DIVISION CONCERNING RULES OF PROCEDURE AND SUBSTANTIVE LAW APPROPRIATE FOR COMMISSIONERS.

THE COMMISSION:

- MUST MEET AT LEAST ONCE A QUARTER;
- IS EMPOWERED TO ADOPT REGULATIONS TO CARRY OUT THE PURPOSES OF THE COMMON-INTEREST COMMUNITY LAWS; AND

- IS AUTHORIZED TO APPOINT HEARING PANELS COMPOSED OF ONE OR MORE INDEPENDENT HEARING OFFICERS TO CONDUCT HEARINGS AND OTHER PROCEEDINGS, DETERMINE VIOLATIONS, IMPOSE FINES AND PENALTIES, AND TAKE OTHER DISCIPLINARY ACTIONS.

COMMISSION STAFF

IN ADDITION TO THE FIVE COMMISSIONERS, THERE ARE:

- FOUR COMPLIANCE INVESTIGATORS,
- THREE ADMINISTRATIVE AND ACCOUNTING ASSISTANTS, AND
- A DEPUTY ATTORNEY GENERAL.

COMMISSION FUNDING

THE **TOTAL BUDGET FOR THE COMMISSION AND THE OMBUDSMAN'S OFFICE FOR FY 2005-2006 IS $2.8 MILLION**. IT IS FUNDED FROM THE SAME $3 PER DOOR CHARGE THAT FUNDS THE OMBUDSMAN'S OFFICE.

COMMISSION'S POWERS AND PROCEDURES

DATA COLLECTION

The commission is required to:

- Collect and maintain information regarding number and kind of CICs in the state, the effect of Chapter 116 and attendant regulations on the development, operation and management of CICs as well as on the lending market for CICs.

- Collect and maintain information on violations of the chapter, accessibility and use of mediation and arbitration, number of foreclosures within CICs for failure to pay assessments and fines, reserve studies, and any other issues the commission determines are of concern to unit owners.

- Develop and promote educational guidelines for conducting CIC board elections, meetings and for enforcing governing documents through liens, fines, and penalties.

- Recommend and approve education and research programs relating to CICs relating to management, sale and resale of units, alternative dispute resolution procedures, and enforcement of assessments and fines.

COMMISSION REGULATIONS

- Commission authorized to adopt regulations establishing standards for subsidizing mediation and arbitration to ensure such proceedings are expeditious, affordable, and accessible.

- Commission can adopt regulations establishing standards for subsidizing education programs for the benefit of unit owners as well as executive board members and officers of associations.

REGULATION OF COMMUNITY MANAGERS

- Commission must establish standards of practice for community managers.

- Commission or a panel authorized to take appropriate disciplinary action against a community manager who violates any provision of the chapter.

COMMISSION AND OMBUDSMAN AUTHORITY TO INVESTIGATE VIOLATIONS

- Real Estate Division and ombudsman authorized to investigate any person who violates the UCIOA. Commission and hearing panels have jurisdiction to take action against such violators. However, they cannot intervene in internal activities of a CIC except to extent necessary to prevent or remedy a violation.

HOW A COMPLAINT IS FILED WITH COMMISSION

- Person aggrieved by an alleged violation of the UCIOA may file a written affidavit with division not later than one year after person discovers or reasonably should have discovered violation.

- Affidavit must set forth facts constituting violation. However, affidavit may not be filed unless aggrieved person has provided it to respondent with written notice sent by certified mail on at least two occasions mailed at least 15 days apart. Written notice must specify in reasonable detail the alleged violation, any actual damages suffered, and any proposed corrective action.

- **In the first 14 months of operation, the commission received 340 affidavits of which 162 were assigned to field investigators and 178 were returned to the complainant for additional information.**

- Commission or panel may impose a fine of not more than $1,000 if someone knowingly files a false or fraudulent affidavit.

PROCEDURE AFTER COMPLAINT IS FILED

- Real Estate Division refers it to ombudsman who assists parties with resolving the dispute. If parties cannot resolve matter, ombudsman provides division with a report and division conducts investigation to determine whether good cause exists to proceed with a hearing.

- If division determines there is good cause for a hearing, division files a complaint with commission and schedules a hearing.

- Commission or panel must hold a hearing not later than 90 days after complaint is filed by division unless good cause is shown to continue the matter. Division must give respondent at least 30 days notice of hearing and provide copy of the complaint and all relevant information in possession of the division.

- Respondent must file an answer not later than 30 days after division's notice is delivered or mailed and must contain an admission or denial of the allegations in the complaint and any defenses respondent will rely upon. If respondent fails to answer, commission may enter a default decision after giving respondent notice.

- **The commission plans to begin holding its first hearings later this month.**

PARTIES ALLOWED TO HAVE ATTORNEY

- Any party may be represented by an attorney at any hearing on the complaint.

TIMEFRAME TO RULE ON COMPLAINT

- Commission or a panel must render a final decision not later than 20 days after final date of hearing. Written decision must include findings of fact and conclusions of law and all parties must receive notice of the decision by certified mail not later than 60 days after the hearing ends.

COMMISSION SANCTIONS IF VIOLATION HAS OCCURRED

- If commission or panel finds a violation was committed, it may do any or all of the following:

1. Order the respondent to cease and desist;

2. Order the respondent to take affirmative action to correct the violation;

3. Impose an administrative fine of not more than $1,000;

4. Remove an executive board member or officer if they have knowingly and willfully committed a violation and their removal is in the best interests of the CIC;

5. Impose a fine of not more than $1,000 for each violation after notice and hearing if respondent violates an order of the commission or panel;

6. Order respondent to pay costs of the proceedings incurred by division, including investigation costs and reasonable attorney's fees. If respondent is a board member or officer, CIC is responsible for all fines and costs imposed on

respondent and respondent may not be held personally liable, unless respondent knowingly and willfully committed the violation;

7. Order an audit of CIC or require board to hire a community manager or both;

8. Bring an action in district court to enjoin further violations if it has reasonable cause to believe such violations will continue.

QUESTIONS POSED BY CALIFORNIA COMMITTEE ON HOUSING & COMMUNITY DEVELOPMENT

1. WHAT EFFECT HAS THE COMMISSION HAD IN NEVADA? HAS IT IMPROVED MATTERS FOR HOMEOWNERS?

2. WAS IT DIFFICULT POLITICALLY TO CREATE THE COMMISSION?

3. ARE THERE ANY SIGNIFICANT PROBLEMS WITH THE CURRENT CIC LEGISLATIVE SCHEME? IF SO, HOW ARE THEY BEING ADDRESSED?

HISTORY OF COMMON-INTEREST COMMUNITY LEGISLATION IN NEVADA

1991

Nevada Legislature adopted the Uniform Common-Interest Ownership Act (UCIOA) which has been codified in Chapter 116 of the *Nevada Revised Statutes* (NRS). Chapter 116 extends to most CICs created within the State of Nevada.

1995

Legislature was confronted with operational issues regarding the conduct of association business and responded with three bills:

- **A.B. 152**-Legislators were presented with many complaints regarding disputes over the proper interpretation and application of CC&Rs and provisions in association bylaws. In an attempt to provide a simple, inexpensive, and expeditious mechanism for resolving such controversies, A.B. 152 required that any civil action based on a claim relating to the bylaws, rules, or procedures for changing assessments in a CIC must be submitted to mediation or arbitration before the action is filed with a court.

- **A.B. 510**-Association members are supposed to have direct control over the executive board. Regrettably, legislators learned of numerous instances where members were prevented from effectively participating in the governance process. As a result, A.B. 510 made changes regarding notification of matters relating to homeowners' association meetings and other CIC ownership proceedings. The bill increased the number of association meetings that must be held each year from at least one to a minimum of two. Additionally, A.B. 510 required an association to provide owners with a 21-day written notice of a meeting at which an assessment for a capital improvement is to be considered.

- **S.B. 395**- Finally, the 1995 Legislature passed S. B. 395 which established procedures for constructional defect lawsuits. The Legislature wanted to encourage parties to settle disputes without litigation and enacted procedures requiring parties to specify what defects were at issue and provide opportunities to affect repairs rather than seek damages.

1997

The Legislature continued to monitor developments with CICs. As a result of further input from affected parties, lawmakers recognized the need to modify and expand certain protections they had previously created to ensure members retained ultimate control of their associations.

- **S.B. 314-** authorized a member to attend any meeting of the association or the executive board, except when the executive board meets in executive session. Meetings must be held at least once a year and the executive board must meet at least once every 90 days. Further, the bill prescribed requirements for the content of meeting agendas.

- The bill also established requirements for a reserve account for common area repairs and imposed preconditions before the association can commence certain civil actions.

- In addition, the measure created restrictions on an association's ability to foreclose a lien assessed for a violation of association rules. Further, an association may not apply any assessment, fee, or other charge paid by a member toward a fine imposed against the owner.

- The bill also prohibited an association from exercising the power of eminent domain.

- Additionally, the bill created the Office of the Ombudsman for Owners in Common-Interest Communities and provided a mechanism to fund the ombudsman.

1999

Lawmakers heard testimony that indicated problems still existed with, among other issues, obtaining access to association information and with proper financial management.

- **S.B. 451-** required an association to prepare and distribute operating and reserve budgets, and required the executive board to conduct a study of the reserves at least once every 5 years.

- The measure revised notice requirements for board meetings and provided that the term of office for board members shall not exceed 2 years.

- In addition, S.B. 451 required that the election of board members be conducted by secret written ballot and the votes be counted in public.

- The bill also established additional requirements for proxy voting and prohibited voting by proxy for the election of board members.

- Additionally, S.B**.** 451 granted authority to the Real Estate Commission to subpoena records, books, and other information of an association. The bill also required that a board, upon request by an association member, make available books, records, and other papers of the association.

- Finally, the bill required the commission to establish standards of practice and disciplinary procedures for persons engaged in property management for associations.

2003

Underlying CIC issues remained contentious and lawmakers continued to receive numerous complaints. The 2003 Legislature passed three bills designed to address many of the fundamental problems that arise year after year

- **S.B. 100**- In order to give homeowners an expeditious and inexpensive forum for resolving disputes with CICs, this bill creates a five-member Commission for Common-Interest Communities appointed by the Governor. Commissioners serve three-year terms and must meet certain qualifications. The measure contains provisions relating to a variety of issues such as executive board conflict of interest prohibitions, access to CIC documents, voting procedures, fines, and penalties.

- **S.B. 136**- reinforced the Legislature's concern about due process for association members. The measure requires an owner to adhere to a schedule required by a CIC for the completion of the design, commencement, completion of construction, or issuance of a permit for a unit or an improvement to a unit. The bill also authorizes an association to impose and enforce a construction penalty if an owner fails to adhere to the schedule, as long as the CIC complies with certain notice and hearing requirements.

- **S.B. 359**- protects the ability of association members to display the national flag without unreasonable restrictions.

SENATE BILL 100
(First Reprint)

Topic

Senate Bill 100 makes various changes to provisions governing common-interest communities (CICs).

Summary

Creation of Commission for Common-Interest Communities [Section 13]

Senate Bill 100 defines various terms used in the Act. The bill also creates a five-member Commission for Common-Interest Communities appointed by the Governor. Commissioners must meet certain qualifications, serve three-year terms, and at least three must come from a county with a population of 400,000 or more. While engaged in Commission business, Commissioners receive $80 per day as salary as well as the per diem and travel allowances provided for state employees.

Adoption of Regulations [Section 16 & 18]

The Commission, or the Administrator of the Real Estate Division with the approval of the Commission, may adopt regulations to carry out the Act. The Commission is authorized to employ staff and the Attorney General shall act as counsel for the Commission.

Commission Hearing Panels [Section 19]

Additionally, the bill authorizes the Commission to appoint hearings panels consisting of one or more independent hearing officers. The Commission may by regulation delegate certain of its powers to the hearing panels, including the authority to determine violations, impose fines and take other disciplinary action.

A final order of a hearing panel may be appealed to the Commission and the Commission must review and approve that order not later than 20 days after the Commission provides a written notice of its intention to review the hearing panel order.

Good Faith Immunity of Commission, Division, Employees and Ombudsman [Section 21]

The Commission, its employees and consultants, the Real Estate Division, and the Ombudsman are immune from civil liability for any decision or action taken in good faith without malicious intent.

Commission Data Collection [Section 22]

Furthermore, Senate Bill 100 requires the Commission to collect and maintain certain information regarding the number and kind of CICs in the state, the effect of Nevada Revised Statutes Chapter 116 and attendant regulations on the development, operation and management of CICs as well as on the lending market for CICs. The Commission must also collect and maintain information on violations of the chapter, accessibility and use of mediation and arbitration, number of foreclosures within CICs for failure to pay assessments and fines, reserve studies, and any other issues the Commission determines are of concern to unit owners.

Additionally, the Commission shall develop and promote educational guidelines for conducting CIC elections, meetings and for enforcing governing documents through liens, fines, and penalties. Moreover, the Commission shall recommend and approve education and research programs relating to CICs relating to management, sale and resale of units, alternative dispute resolution procedures, and enforcement of assessments and fines.

Commission Regulations [Section 23 & 24]

The bill also authorizes the Commission to adopt regulations establishing standards for subsidizing mediation and arbitration to ensure such proceedings are expeditious, affordable, and accessible. Additionally, the measure authorizes the Commission to adopt regulations establishing standards for education programs for the benefit of unit owners as well as executive board members and officers of associations.

Furthermore, Senate Bill 100 authorizes the Commission to adopt regulations for issuance of certificates for community managers who do not hold a permit.

Commission and Ombudsman Authority to Investigate Violations [Sections 28 & 29]

Moreover, the measure authorizes the Division and Ombudsman to investigate any person who violates the Act and gives the Commission and hearing panels jurisdiction to take action against such violators. The rights, remedies and penalties provided in the Act are not exclusive and do not abrogate others that might exist at law or in equity. However, the Commission or a hearing panel shall not intervene in internal activities of a CIC except to the extent necessary to prevent or remedy a violation.

Filing Affidavit Regarding Violation With Division [Section 30]

Senate Bill 100 provides that a person aggrieved by an alleged violation of the Act may file a written affidavit with the Division not later than one year after the person discovers or reasonably should have discovered the violation. The affidavit must set forth the facts constituting the violation. However, the affidavit may not be filed unless the aggrieved person has provided the respondent with written notice sent by certified mail on at least two occasions mailed at least 15 days apart.

The written notice must specify in reasonable detail the alleged violation, any actual damages suffered, and any proposed corrective action. The Commission or a hearing panel may impose a fine of not more than $1,000 if someone knowingly files a false or fraudulent affidavit.

Ombudsman and Division Action on Affidavit [Section 31]

Upon receipt of the affidavit, the Division shall refer it to the Ombudsman who shall give such guidance as the Ombudsman deems necessary to assist the parties with resolving the dispute. If the parties cannot resolve the matter, the Ombudsman shall provide the Division with a report and the Division shall conduct an investigation to determine whether good cause exists to proceed with a hearing. If the Division determines there is good cause for a hearing, the Administrator of the Division shall file a complaint with the Commission and schedule a hearing.

Procedure for Commission Hearing on Complaint Filed by Division [Section 32]

The Commission or a panel shall hold a hearing not later than 90 days after the complaint is filed unless good cause is shown to continue the matter. The bill requires the Division to give the respondent at least 30 days notice of the hearing and provide a copy of the complaint and all relevant information in the possession of the Division.

The respondent must file an answer not later than 30 days after the Division's notice is delivered or mailed and must contain an admission or denial of the allegations in the complaint and any defenses the respondent will rely upon. If the respondent fails to answer, the Commission may enter a default decision after giving the respondent notice.

Attorney Representation and Commission Decisions [Sections 33 &34]

Any party may be represented by an attorney at any hearing on the complaint. The Commission or a panel must render a final written decision not later than 20 days after the final date of the hearing. The decision must include findings of fact and conclusions of law and all parties must receive notice of the decision by certified mail not later than 60 days after the hearing ends.

Commission Authority to Remedy Violations After Hearing [Sections 35- 37]

If the Commission or a panel finds a violation was committed, it may order the respondent to cease and desist, order the respondent to take affirmative action to correct the violation, or impose an administrative fine of not more than $1,000. The Commission or panel may also remove an executive board member or officer if they have knowingly and willfully committed a violation and their removal is in the best interests of the CIC. If a respondent violates an order of the Commission or panel, it may impose a fine of not more than $1,000 for each violation after notice and hearing.

The bill also authorizes the Commission or panel to order a respondent to pay the costs of the proceedings, including investigation costs and reasonable attorneys' fees. If the respondent is a board member or officer, the CIC is responsible for all fines and costs imposed on the respondent and the respondent may not be held personally liable.

Additionally, if the Commission or panel finds the board of a CIC or someone acting on behalf of a board has committed a violation, it may order an audit of the CIC or require the board to hire a community manager or both. The Commission or Division may also bring an action in district court to enjoin further violations if it has reasonable cause to believe such violations will continue. If the Commission or Division has reasonable cause to believe a person will commit, or continue to commit, a violation, either may seek an injunction in court.

Displaying the Flag [Section 38]

Senate Bill 100 authorizes a unit's owner to display the flag of the United States in a manner consistent with the Federal Flag Code and permits a CIC to impose certain reasonable restrictions on displaying the flag.

Executive Board to Place Complaints on Agenda [Section 39]

Additionally, the bill requires an executive board to place a subject on the agenda of the next regularly scheduled meeting if the board receives a written complaint from a unit's owner alleging the board has violated any provision of the chapter or the governing documents and action is required by the board.

Conflicts of Interest for Board Members [Sections 40, 42 & 62(5)]

Furthermore, the bill prohibits a member of the board, an officer or a community manager from soliciting or accepting any compensation or gratuity that would improperly influence or appear to a reasonable person to improperly influence them or result in a conflict of interest. Senate Bill 100 also prohibits an executive board member or officer from entering into certain contracts for goods or services with the CIC. Each person on the ballot as a candidate for executive board member must make a good faith effort to disclose any business or personal interests that would result in or appear to a reasonable person to result in a potential conflict of interest if elected. The disclosure must be made in writing to each member of the CIC in a manner established in the bylaws.

Prohibition on Retaliatory Action by Board [Section 41]

Moreover, the measure prohibits a board, member of the board, officer, employee, or agent from taking any retaliatory action against a unit's owner because the owner complained in good faith about an alleged violation or requested to review the CIC's books and records.

Payment of Costs and Reserve Contributions by Declarants [Section 43]

The measure also requires declarants and successor declarants to pay certain costs for additional elements when the CIC is developed in phases and further requires them to deliver their share of the reserves specified in the required reserve study.

Transient Commercial Use [Section 44]

Additionally, the bill allows transient commercial use of units under certain conditions in counties with a population of 400,000 or more.

Reallocation of Costs in Master Associations [Section 45]

Furthermore, an executive board of a master association created before January 1, 1975, located in a county with a population of 400,000 or more may reallocate the costs of administering the common elements among the units of the CIC uniformly and based upon actual costs associated with each unit.

Delegate Voting [Section 46]

Moreover, the bill authorizes CICs with at least 1,000 units, or CICs created prior to October 1, 1999, to exercise voting rights by delegates or representatives if the declaration so provides.

Construction Penalties [Section 47]

Senate Bill 100 authorizes a CIC to impose a construction penalty against an owner who fails to adhere to a construction schedule if the penalty and schedule are set forth in the declaration, another document recorded before the owner acquired title to the unit or in a contract between the owner and the CIC. The owner must receive notice of the violation and be informed of the right to a hearing. A construction penalty is not a fine for purposes of Chapter 116.

Commission Subpoena Power [Section 51]

The measure also authorizes the Commission, a member of the Commission or a panel to issue subpoenas that are enforceable by petition to a district court.

Ombudsman's Authority to Investigate and Compile Data [Section 52]

Additionally, the bill authorizes the Ombudsman to investigate disputes involving Chapter 116 of Nevada Revised Statutes (NRS) or governing documents of a CIC in order to assist in resolving such disputes. The Ombudsman is also required to compile information on each CIC including information on the number of foreclosures for unpaid fines and assessments and whether the reserve studies have been conducted as required by the statutes.

Exemption of Predominantly Non-residential Associations [Section 54]

Furthermore, the bill exempts CICs created before January 1, 1992, if they are located in a county whose population is less than 50,000 and less than 50 percent

of the units are put to residential use unless a majority of the owners elect otherwise in writing.

Prohibition Against Unreasonable Restrictions on Use or Improvement of Units [Section 58]

Moreover, the measure prohibits a CIC from unreasonably restricting or impeding the lawful rights of an owner to have reasonable access to the owner's unit. A CIC is also prohibited from unreasonably restricting or withholding approval for improvements such as ramps, railings or elevators necessary to improve access for owners with disabilities, additional locks to improve security, or shutters to improve security or reduce energy costs. Such improvements that are visible from any other portion of the CIC must be installed in accordance with procedures in the governing documents and must be designed to the maximum extent practicable to be compatible with the style of the CIC.

Limitations on Fines [Section 61]

Senate Bill 100 imposes certain limits on the amount of interest charged on past due fines and the costs of collecting such fines.

Staggered Terms and Prohibition Against Serving on Board if Related to Community Manager [Section 62]

The bill also provides that terms for board members shall be staggered, with certain exceptions, and that there is no limit on the number of terms a member may serve unless the governing documents provide otherwise. Additionally, the measure prohibits a person from serving as a board member or officer of a CIC if the person is related to someone who serves as a community manager for that CIC, unless the person is appointed by the declarant.

Secret Ballots and Other Procedures for Elections [Sections 62 & 63]

Furthermore, Senate Bill 100 makes certain provisions for secret ballot elections for the selection or removal of executive board members, unless the CIC declaration provides for voting by delegates or representatives. If an election is conducted by secret ballot, the ballots must be opened and counted at a meeting of the CIC. Incumbents and candidates are prohibited from participating in the opening or counting of ballots or from possessing or having access to the ballots. Each member of the board must certify in writing to the CIC within 90 days after being elected or appointed to the board that the member has read and understands the governing documents and Chapter 116.

Association and Board Meeting Minutes [Sections 65 & 66]

The bill requires the secretary of the CIC or other designated officer to take minutes at each meeting of unit owners and at each board meeting. The minutes must contain certain specified items. Minutes must be retained until the CIC terminates and owners may record meetings if they provide notice prior to the start

of the meeting that they intend to record the proceedings, except when the board meets in executive session.

Actions During Executive Board Sessions [Section 67]

The bill prohibits a board from meeting in executive session to take action on contracts, including contracts with the attorney for the CIC. Copies of contracts a board takes action on must be made reasonably available to owners for review. A board may meet in executive session to discuss the character, alleged misconduct, professional competence, or physical or mental health of a community manager or employee of the CIC. The board may also meet in executive session to discuss the failure of an owner to adhere to a construction schedule.

Quorum Requirements and Use of Proxies [Sections 68 & 69]

Senate Bill 100 provides that if the governing documents require a quorum for an association meeting greater than 20 percent of the eligible votes that may be cast for election of the board, and there are insufficient people present to constitute a quorum, the persons in attendance may adjourn the meeting to a time not less than 48 hours nor more than 30 days later. At the subsequent meeting, a quorum shall be deemed to be present if persons eligible to cast 20 percent of the vote at an election of the board are present. However, only matters that were on the agenda of the original meeting may be acted on. Further, the actual number of votes that are required pursuant to the governing documents for taking a particular action is not changed. The bill also provides that before a vote may be cast pursuant to a proxy, certain conditions must be met.

Commission Regulation of Community Managers [Sections 70 & 71]

Additionally, the measure provides that the Commission shall establish standards of practice for community managers who hold permits or certificates. Moreover, the Commission or a panel is authorized to take appropriate disciplinary action against a community manager who violates any provision of the chapter. Furthermore, the bill makes changes regarding exceptions to the requirements for holding a permit or certificate as a community manager.

Tax Credits for Park Facilities [Section 73]

The bill also authorizes a CIC to use credits against the statutory residential construction tax for park facilities and related improvements under certain conditions.

Penalty for Failure to Pay Fees to Administrator [Section 74]

Additionally, Senate Bill 100 authorizes the Administrator to impose a penalty against a CIC that fails to pay the fees owed by the CIC to the Administrator. The penalty for each violation may not exceed 10 percent of the amount of the fees owed or $500, whichever is less.

Liens [Sections 76-78]

Furthermore, the bill makes certain changes to the provisions regarding liens, including granting a CIC a lien against a unit for any construction penalty imposed under the Act.

Access to Association Records [Section 79]

Senate Bill 100 requires a CIC to make certain records available to members upon written request, including without limitation, all records filed with a court relating to a civil or criminal action to which the association is a party. The executive board must also maintain a general record concerning each violation of the governing documents for which a fine, construction penalty or other sanction has been imposed, other than a failure to pay an assessment. The record must contain a general description of the nature of the violation and the type of sanction imposed, including the amount of any fine levied. The record must not contain the name or address of the person who was the subject of the sanction or fine or any other information that could be used to identify them. The record must be organized in such a manner that it is convenient for members to access. All of the records of a CIC must be maintained for at least 10 years.

Providing Reserve Study to Potential Purchaser [Section 83]

Finally, Senate Bill 100 also requires a unit's owner to furnish a purchaser with a summary of the financial components of the CIC reserve study before an offer to purchase becomes binding. Upon request of a unit's owner or a purchaser, the CIC must provide reasonable access to the entire reserve study for inspection, copying and audit.

Effective Date

Portions of the Act become effective on July 1, 2003. Some sections become effective on October 1, 2003. Other sections become effective on January 1, 2004.

CIC GENERAL INFORMATION

What are the limitations on association powers?

In addition to limitations contained in the governing documents, CICs are prohibited from taking certain actions. For example, a CIC may not unreasonably restrict or impede the lawful rights of an owner to have reasonable access to the owner's unit. A CIC is also prohibited from unreasonably restricting or withholding approval for improvements such as ramps, railings or elevators necessary to improve access for owners with disabilities, additional locks to improve security, or shutters to improve security or reduce energy costs. Such improvements that are visible from any other portion of the CIC must be installed in accordance with procedures in the governing documents and must be designed to the maximum extent practicable to be compatible with the style of the CIC.

Similarly, any covenant, restriction or condition in a deed, contract or other legal instrument which affects the transfer, sale or any other interest in real property that prohibits or unreasonably restricts the owner from using a solar energy system is void and unenforceable.

What are the powers and responsibilities of the executive board?

General Powers

Each member of the executive board must, within 90 days after taking office, certify in writing that they have read and understand the association's governing documents and the provisions of Chapter 116 of NRS.

Unless otherwise provided by the declaration, the bylaws, or the NRS, the executive board may act in all instances on behalf of the association. The executive board cannot amend the declaration, terminate the CIC, elect members of the executive board, or determine their qualifications, powers, duties, or terms of office. The executive board may fill vacancies for the unexpired portion of any term. Additionally, the board elects the association officers.

Standards of Conduct for Board Members

Members of the board must exercise the same ordinary and reasonable care as directors of a corporation. Executive board members are subject to the business-judgment rule. Essentially, this standard requires that, in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest.

Avoiding Conflicts of Interest

Each candidate for election to the board must make a good faith effort to disclose any financial, business, professional or personal relationship or interest that would result in or appear to a reasonable person to result in a potential conflict of interest.

The disclosure must be made in writing to each member of the CIC in the manner established in the bylaws.

Additionally, a member of the board, an officer, or a community manager is prohibited from soliciting or accepting any compensation or gratuity that would improperly influence or appear to a reasonable person to improperly influence them or result in a conflict of interest. An executive board member or officer is also prohibited from entering into certain contracts for goods or services with the CIC.

Prohibition on Retaliatory Action

A board, member of the board, officer, employee, or agent is prohibited from taking any retaliatory action against a unit's owner because the owner complained in good faith about an alleged violation or requested to review the CIC's books and records.

Employment of a Community Manager

A homeowners' association may employ a community manager to handle matters for the community. With certain exceptions, the community manager must have a permit or a certificate to act as a community manager and be certified by the Real Estate Division. Community managers are required to have successfully completed required instruction in property management of CICs. Additionally, community managers are required to take an examination before being certified and then are required to renew their certification periodically. Similar rules apply to property managers who hold permits.

Imposition of Fines and Penalties

In 2003, the Legislature created a distinction between a fine and a construction penalty. The executive board has authority to impose fines and other sanctions for violations of the governing documents, including, but not limited to:

- Prohibiting an association member from voting on matters related to the CIC for a reasonable time; and
- Prohibiting an association member, guest, or tenant from using the common elements for a reasonable time, except for streets, sidewalks, and parking areas.

A fine may be imposed for each violation. The fine must be commensurate with the severity of the violation but must not exceed $100 for each violation, or a total amount of $500, whichever is less. Further, if a violation is not cured within 14 days or any longer period set by the board, the violation is deemed to be a continuing violation and additional fines may be imposed for each seven-day period that the violation is not cured.

Fines bear interest at the rate set by the CIC but not to exceed the legal rate per annum. Costs of collecting an unpaid fine may also be collected according to a

schedule established by the CIC, with certain limitations established by statute for violations that do not threaten the health, safety or welfare of other residents.

A board may not impose a fine unless:

- Not less than 30 days before the violation, the person to be fined has been provided with written notice of the applicable provisions of the governing documents;

- Within a reasonable time after the violation, the person to be fined has been given a written notice specifying the details of the violation, the amount of the fine, and the date, time and location for a hearing; and

- The person to be fined has been given a reasonable opportunity to contest the violation at the hearing.

A board must hold a hearing before it can impose a fine unless the person to be fined pays the fine, waives the right to a hearing in writing, or fails to appear after proper notice of the hearing. Additionally, a board may appoint a committee of not less than three members to conduct hearings on violations if the governing documents so provide. These provisions only establish minimum procedural requirements for imposing fines and do not preempt provisions of the governing documents that provide greater procedural protections.

A board is also authorized to impose a construction penalty against an owner who fails to adhere to a construction schedule if the penalty and schedule are set forth in the declaration, another document recorded before the owner acquired title to the unit, or in a contract between the owner and the CIC. The owner must receive notice of the violation and be informed of the right to a hearing. A construction penalty is not a fine for purposes of Chapter 116.

Reserves Studies

Each CIC is required to conduct a study of the reserves required to repair, replace, and restore the major components of the common elements at least every five years. Further, the results of the study must be reviewed at least annually to determine if the reserves are sufficient and whether necessary adjustments to maintain the required reserves must be made. The results of the study must be submitted to the Commission for Common-Interest Communities within 45 days after it is adopted by the executive board.

A person qualified by training and experience must conduct the reserve study required. The reserve study must include:

- A summary of an inspection of the major components of the common elements the association is obligated to repair, replace, or restore;
- An identification of the major components of the common elements that the association is obligated to repair, replace, or restore which have a remaining useful life of less than 30 years;

- An estimate of the remaining useful life of each major component identified above;
- An estimate of the cost of repair, replacement, or restoration of each major component identified above, during and at the end of its useful life; and
- An estimate of the total annual assessment that may be required to cover the cost of repair, replacement, or restoration of the major components identified above, after subtracting the reserves of the association as of the date of the study.

Further, this statute requires the commission to adopt regulations establishing the qualifications required for conducting the reserve study. Those qualifications are found in the *Nevada Administrative Code*.

Financial Oversight

Additionally, an executive board is required to hold a meeting at least once every 90 days to review:

- A current reconciliation of the operating and reserve accounts of the association;
- The actual revenues and expenses for the reserve account compared to the budget for that account for the current year;
- The latest account statements prepared by the financial institutions in which the accounts of the association are maintained;
- An income and expense statement for the operating and reserve accounts, prepared on at least a quarterly basis; and
- The status of any civil action or claim submitted to arbitration or mediation in which the association is a party.

What charges may be included in annual assessments?

Until the association makes an assessment for common expenses, the declarant shall pay all common expenses. After the association has made the initial assessment, they must be made at least annually, based on a budget adopted at least annually by the association. All common expenses, including a reserve, must be assessed against all the units (except certain vacant lots) in accordance with the allocations set forth in the declaration. The association shall establish an adequate reserve, funded on a reasonable basis, for the repair, replacement, and restoration of the major components of the common elements. The reserve may be used only for those purposes, including, without limitation, repairing, replacing, and restoring roofs, roads and sidewalks, and must not be used for daily maintenance.

Further, to the extent required by the declaration, any common expense associated with the maintenance, repair, restoration, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides. The association must provide written notice to each unit owner at least 21 calendar days before a meeting where an assessment for a capital improvement is to be considered or where action may be taken.

Unless the declaration otherwise provides, penalties, fees, charges, late charges, fines, and interest charges are enforceable as assessments. If a homeowner makes a written request for a statement showing the amount of unpaid assessments due on the owner's unit, the association must provide it within 10 business days. Additionally, the NRS prohibits the application of an assessment, fee, or other charge paid by a member toward a fine imposed by the association against the unit's owner.

What happens if a fine, penalty, or an assessment is not paid?

An association has a lien against any unit for any penalty, assessment, or fine imposed against the owner. Unless the declaration provides otherwise, penalties, fees, charges, late charges, fines, and interest charged for items such as the use, rental, or operation of common elements are also enforceable by liens.

The lien may then be recorded and foreclosed by sale after certain notices required by law are given to the owner. However, an association may not foreclose a lien that results from a fine for a violation of the governing documents unless the violation is one that threatens the health, safety, or welfare of the residents of the association or, the lien is for a construction penalty. Proceedings to foreclose a lien for unpaid assessments must be instituted within three years or the lien is extinguished. An association may bring an action in court to recover the assessment or fine instead of filing and foreclosing a lien. In either case, the prevailing party must be awarded costs and reasonable attorney's fees.

What are the penalties if someone violates an association's governing documents or the statutes respecting homeowners' associations?

If any person subject to Chapter 116 of NRS fails to comply with any of its provisions or any provision of the declaration or bylaws, then any person or class of persons suffering actual damages from the failure to comply has a claim for appropriate relief. A person may bring a civil action for damages. Punitive damages may also be available if the failure to comply is found to be willful and material and if the failure is established by clear and convincing evidence. The prevailing party may be awarded reasonable attorney's fees.

Additionally, a person who is aggrieved by an alleged violation of CIC laws may file a complaint with the Commission for Common-Interest Communities.

How must executive board meetings be conducted?

Time for and Notice of Meetings

An executive board meeting must be held at least once every 90 days. Except in an emergency or if the bylaws require a longer period, notice of each meeting must be given not less than 10 days before the meeting by notice sent to the mailing address of each unit or any other address or electronic mailing address designated in writing by the unit's owner. Alternatively, notice may be published in a

newsletter that is circulated to each association member. The notice must state the time and place of the meeting and include a copy of the agenda or the date and locations where copies of the agenda may be conveniently obtained. The notice must also include notification of a member's right to have a copy of the minutes or a summary of the minutes of the meeting upon payment of the cost of providing the copy and to speak to the association or executive board, unless the executive board is meeting in executive session. The agenda must identify items that the executive board may take action on at the meeting.

Contents of Agendas

An executive board must place a subject on the agenda of the next regularly scheduled meeting if the board receives a written complaint from a unit's owner alleging the board has violated any provision of the chapter or the governing documents and action is required by the board.

An Owner's Right to Address Board

A member may attend any meeting of the association members or of the executive board and speak at the meeting, except executive sessions. However, the executive board may establish reasonable limitations on the time a member may speak at such a meeting.

Association and Board Minutes

The secretary of the CIC or other designated officer must take minutes at each association meeting of unit owners and at each executive board meeting. The minutes must contain certain specified items. Minutes must be retained until the CIC terminates and owners may record meetings if they provide notice prior to the start of the meeting that they intend to record the proceedings, except when the board meets in executive session. Minutes or a summary must be prepared within 30 days after the meeting and a copy must be given to any member who requests one, although the board may charge for the cost of providing the copy.

Executive Board Sessions

Executive sessions are closed meetings of the board. Association members are not allowed to attend executive sessions unless they are the subject of a hearing on an alleged violation of the governing documents. They may however be excluded during deliberations.

A board may meet in executive session to discuss the character, alleged misconduct, professional competence, or physical or mental health of a community manager or employee of the CIC. The board may also meet in executive session to discuss the failure of an owner to adhere to a construction schedule or a violation of the governing documents. Additionally, a board may meet to discuss litigation. A board may not meet in executive session to take action on contracts, unless the contract is between the CIC and an attorney.

Are association members permitted to review association books and records?

The executive board must make available the books, records, and other papers of the association for review during the regular working hours of the CIC, upon written request. This includes, without limitation, contracts to which the CIC is a party and all records filed with a court relating to a civil or criminal action to which the association is a party. However, certain records are not open to inspection. These include contracts between the CIC and an attorney and personnel records of CIC employees, except for records relating to hours worked and salaries and benefits. Records relating to another CIC member are not open to inspection.

The executive board must also maintain a general record concerning each violation of the governing documents for which a fine, construction penalty or other sanction has been imposed, other than a failure to pay an assessment. The record must contain a general description of the nature of the violation and the type of sanction imposed, including the amount of any fine or construction penalty levied. The record must not contain the name or address of the person who was the subject of the sanction or fine or any other information that could be used to identify them. The record must be organized in such a manner that it is convenient for members to access.

The board must maintain and make available for review at the business office of the association or other suitable location within the county where the CIC is located, the financial statement of the association, budgets of the association, and the reserve study.

All of the records of a CIC must be maintained for at least 10 years (except minutes, which must be kept as long as the CIC exists). An executive board is prohibited from requiring payment of more than $10 per hour to review books, records, contracts, or other papers. A fee may be charged to cover the actual costs of preparing a copy, but not to exceed 25 cents per page. Further, if the board refuses to allow an association member to review these documents, the ombudsman may request to review the records during the regular working hours of the association. If access is denied, the ombudsman may request the commission to issue a subpoena for their production.

Can an association commence a civil action?

The executive board may commence a civil action if a vote is taken at a meeting where notice is given at least 21 calendar days in advance and at least a majority of all unit owners approve. This rule does not apply to actions to enforce payment for an assessment or to enforce the governing documents. Additionally, if there is need to commence such an action to protect the health, safety, and welfare of the residents, a board may commence a civil suit without the required vote. However, the board must then conduct a vote or obtain written agreement of at least a majority of the members to ratify the suit within 90 days after commencement of the action, and if it is not ratified, to dismiss it.

Additionally, if an association commences or seeks to ratify the commencement of a civil action, the association must provide a written statement to all members at least 10 days in advance that includes:

- A reasonable estimate of the costs of the civil action, including reasonable attorney's fees;
- An explanation of the potential benefits of the civil action and the potential adverse consequences if the association does not commence the action or if the outcome of the action is not favorable to the association; and
- All disclosures required to be made upon the sale of the property.

LETTER FROM MEL KLEIN (MAR. 12, 2005)

RE STAFF DRAFT REPORT MM05-10S1

SATURDAY, MARCH 12, 2005

Based on your final recommendation, it looks like the hopes we had for a CID bureau might be going nowhere. A three to five year pilot project involving only an ombudsman is "forever" for many elderly, who won't be around long enough to benefit, and it is far, far, too long to wait for even those of us who will still be around. Moreover, why bother at all with a new bureaucracy that has no enforcement powers, one that could not deal with the really serious problems?

If the proposal set out by the staff isn't acceptable as it stands, rather than water it down to uselessness, let's go back and look for alternatives. I believe other very viable possibilities exist, and can be implemented with little more than a stoke of a pen:

1. Small Claims Court: One possibility is that of authorizing Small Claims Courts to enforce conformity with existing CID law, and perhaps even to rule in cases involving the governing documents when clear evidence of abuse of authority or discretion can be found.

2. City Attorneys: An alternative suggested by the remarks of the Assistant Attorney General, Herschel Elkins, quoted in your report, could be very interesting. What Mr Elkins wrote is:

"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."

Consider legislation explicitly instructing city attorneys to enforce conformity with the dictates of Davis Stirling. The legislation might authorize communities to enact a small tax on CID units, collectable with property taxes, should the new service strain their resources. Let the law enforcement personnel we already have enforce these laws!

Fair Elections: Nothing… nothing… is more essential than legislation assuring absolutely simon-pure elections, regardless of the fate of the CID agency proposal. At the

foundation of any democratic system are procedures that enable members to deal with problems on their own… with their vote. If members of a CID find the Board acting in disregard of their interests, the fundamental recourse is to elect a new Board.

But for that to be practical and effective, you need to be absolutely, positively, sure that the elections are taint-free.

This does not do away with the need for a mechanism to deal with code violations, such as either of the two measures proposed above, but what you really need in the end is some reliable means of changing the Board, and that comes down to having completely and unquestionably secure and credible election processes; no compromises here.

These two areas: enforcement using existing state systems, and measures to ensure fair elections, seem to me clearly where the effort should be made. It is hard to imagine successful arguments against having a city attorney act against violations of the law, or against procedures that assure shareholders of fair elections. (How are elections handled in public companies?)

Efforts to create a new agency to deal with CIDs, as desirable as that might be, now appear to be the equivalent of swimming upstream against a strong current. There are too many objections to reason against, and too many interests to conciliate. It would be quixotic to pursue that idea. We need a remedy.

Though it would certainly be a shame that the exhaustive effort to establish a CID agency should come to naught, then again, perhaps it isn't coming to naught, even if it doesn't come out as intended. The discussions in the staff reports have been enormously stimulating and illuminating, and have surely put us in a better position to find a true solution.
