

First Supplement to Memorandum 2006-12

CID Ombudsperson Pilot Project (Material Received at Meeting)

The following material was received by the Commission at the meeting on February 23, 2006, in connection with Study H-853 on Common Interest Development Ombudsperson Pilot Project, and is attached as an Exhibit:

Exhibit p.

- 1. Jacki Fox Ruby, California Association for Retired Americans (1/12/06)..... 1
- 2. Marjorie Murray, California Association for Retired Americans (2/23/06)..... 5

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

January 12, 2006

The Honorable Kevin Murray, Chair
Senate Appropriations Committee
ATTN: Nora Lynn, Consultant
Room 4202 State Capitol
Via email and fax

SB 551 – Support if Amended/Fiscal Concerns

Dear Senator Murray:

The California Alliance for Retired Americans (CARA) has taken a “Support if Amended” position on SB 551, legislation which would create an Office of Ombudsman for common interest developments (CIDs).

CARA supports California’s two other state ombudsman programs -- for the mobile home parks and for nursing home patients -- because they offer vital consumer protection to victims of predatory business practices. We look to these existing programs as models for creating the homeowner association ombudsman Office proposed by SB 551.

Our main concern about SB 551 today is the financing of the Office.

Financing:

The financing issue is a difficult one to tackle, because

- It is not at all clear what services will be provided by the Office beyond “education and referral” and whether these two elements were even costed out.
- It is also unclear what level/type of staffing will be required. [The homeowner association industry has asked the Law Revision Commission (CLRC), sponsor of the measure, to staff the Office with association lawyers.]
- So many figures have been projected for the Office. The CLRC has projected in its February 15, 2005 Commission memo (page 9) that “Assuming all associations pay their fees, the fees would produce between \$15-30 million in revenue a year.” However, the background paper on the proposed Office prepared for the Joint Commission on Boards, Bureaus, and Consumer Protection (page 16) projected a budget of “about \$10.5 million” (a year?)
- In addition, an uncertain number of California’s homeowner associations are unincorporated, meaning that they have no reason to renew their corporate status with the Secretary of State and to pay the assessment fee that would be the revenue stream for the Office.

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- The Office proposes duplicating existing state services, e.g. the mediation programs for dispute resolution available at the county level and administered through the Dept. of Consumer Affairs Dispute Resolution Office. [The Dept. administers the state's Dispute Resolution Program Act of 1986 and its accompanying regulations.] These mediation programs are funded with court filing fees and other sources of local revenue.
- the proposed Office treads on the jurisdiction of other state agencies funded through the state's General Fund and federal monies, e.g. the Dept. of Fair Employment and Housing takes Fair Housing complaints (alleging age, race, and other forms of discrimination.) Numerous Fair Housing complaints are filed with DFEH by association homeowners, especially those who are either disabled or seniors (or both.) The Office proposes being the initial gatekeeper for these complaints. In addition, the state Attorney General already has jurisdiction over complaints by homeowners on governance issues, e.g. refusal to open up the HOA's books and records or to hold meetings and fair elections. [See Corporation's Code 8333 ff.]

Neither of California's two existing ombudsman programs – for mobile home parks and for nursing homes -- is financed by the consumers who seek protection from predatory business practices. The mobile home program is financed with state money; the long-term care ombudsman program is financed by a combination of state, federal and local government money plus fines levied against nursing home operators.

As currently conceived, the CID Ombudsman Office is to be financed solely by homeowners, although "any person" – including property managers, law firms, associations themselves, and vendors – can use its services. Homeowners are also expected to pay for any informational materials they purchase, training they seek, and a fee for mediation. A filing fee for registering a complaint has also been proposed. This new tax on homeowners will be a recurring, as opposed to a one-time tax. It will be an additional burden on the many financial obligations that homeowners bear. Homeowners are already paying:

- Regular assessments [which can be increased 20% a year without their consent. This means that assessments double in four years and triple in six.]
- SB 551 states that the ombudsman fee – to be paid by homeowners -- is exempt from the 20% assessment cap set by California statute
- Special assessments
- Transfer taxes [on the purchase of a CID home.]
- Initiation fees to use the amenities
- Special assessments to the community service organization for capital improvements
- Memberships in the three trade organizations¹, which are already providing education and training to association boards.
- Taxes and special assessments to local governments

¹ Community Associations Institute (CAI), Executive Council of Homeowners (ECHO), and California Association of Community Managers (CACM).

The Law Revision Commission proposes that, if homeowners were to finance the Office, that the revenue stream would be uncertain in the start-up phase. Therefore the Department of Consumer Affairs would loan money from its other DCA programs to subsidize the Ombudsman operations initially.² The CLRC memo states that the Department does not need express statutory authorization to borrow the money.

Instead of using either homeowner or DCA money, CARA and the senior coalition propose that it be created with alternative sources of financing, which could include:

- Revenues generated by SB 643, legislation requiring associations to register with the California Secretary of State and to pay a special \$30 fee. If an association does not register by January 1, 2006, the legislation requires the Secretary of State to impose a \$60 fine on the association. The Secretary of State has already collected an unknown amount of revenue from registrations required under SB 643.
- Restore the enforcement function of the Office, which was to provide an additional revenue stream for the Office. The Law Revision Commission, sponsor of the legislation, had detailed enforcement procedures in SB 551. The CLRC – and not the author of the measure – stripped the Office of its enforcement powers at the urging of the homeowner association industry, which does not want to be regulated.
- Any private firm, which uses the Office should be taxed for its creation and operations.
- According to the California Research Bureau California developers build another 2500+ CIDs annually. Developers could be taxed a per unit fee for each parcel or unsold unit to which they hold title. We understand that the state of Nevada, which has a similar Ombudsman Office, has exempted developers from this tax. The surcharge on California developers would be a tax only for as long as the developer holds title as opposed to the permanent tax on homeowners.
- Local governments, which approve CID subdivisions and benefit from the expanded tax base they create. Local governments approve CIDs for the same reason they campaign to get prisons built within their jurisdiction: because they expand the population base on which state taxes – motor vehicle taxes, for example -- devolve back to the local jurisdiction.
- The state of Nevada subsidizes the mediation services to the homeowner, a fee which can amount to \$4-500.
- Volunteer labor. The nursing home ombudsman program uses 1100 trained, certified volunteers throughout the state to inspect California's residential care facilities. Their inspection reports are the basis for enforcement actions by the Department of Social Services and the Department of Health. The volunteers are trained and coordinated by the 35 Area Agencies on Aging set up throughout the state. The CID

² See "State Assistance to Common Interest Developments," CLRC staff memo, September 14, 2004

Senator Kevin Murray, Chair
Senate Appropriations Committee/ SB 551
January 12, 2005
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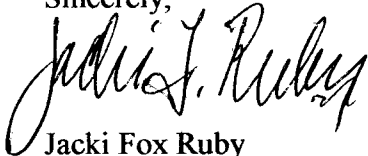
ombudsman program could use this model: using trained and certified homeowners to investigate complaints, to monitor elections, to attend board meetings, for example.

The decentralization of the long-term care Ombudsman raises another issue for the CID Ombudsman Office: it too must be decentralized, given that California has an estimated 41,000 associations with a population of about 8 million people.

We further recommend strongly that, if this proposal is to move forward, the Ombudsman Office be executed first on a small, experimental scale in two or three counties, including one rural county, where services will be more problematic to deliver. A small-scale, experimental project will allow the Office to collect basic data, to experiment with modes of delivering services, and to find out what the true costs of the Office will be.

If you have any questions, please do call either CARA Vice President William Powers (916.446.4240) or CARA Legislative Advocate Marjorie Murray (510.272.0529)

Sincerely,



Jacki Fox Ruby
Legislative Director

cc: Senator Samuel Aanestad, Committee Vice Chair: ATTN: Joe Shinstock
Members of the Senate Appropriations Committee
Senator Alan Lowenthal



February 23, 2006

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
Middlefield Road
Palo Alto, California

RE: AB 770/SB 551: CID Ombudsman

Dear Mr. Sterling:

I am addressing the Commission on behalf of the legislative committee of the California Alliance for Retired Americans (CARA). At its February 16 meeting, CARA's legislative committee discussed the two issues – financing and dispute resolution – that are the subject of Memorandum 2006-12 (January 31, 2006).

CARA has addressed the financing issue in detailed letters sent to the Assembly and the Senate Appropriations Committees and to the Senate Judiciary Committee. To ensure that CARA's ideas and concerns about financing are correctly represented to the Commission, I am asking today that today's written testimony as well as CARA's letter to Appropriations be entered into CLRC's official record and that all these documents be distributed to each Commission member. I ask that Commission members take a firsthand look at our testimony in order to see for themselves what our concerns are.

Financing

CARA is not the only one with concerns about the financing of the Ombudsman Office.

- Our concerns about financing are very similar to ones expressed by Commission members themselves at their May 12, 2005 meeting. At that meeting, Commissioners asked (1) how the \$10 fee was arrived at and (2) whether modeling the fee on the fees of other states with Ombudsman programs wasn't "questionable," as one Commissioner put it. Another Commissioner asked if staff "came up with a budget and then divided it by the number of California associations" in order to arrive at the fee. Apparently, Commission staff arrived at the fee solely by looking at programs from other states and not by determining first what the program and staffing budgets would be.
- Members of the Appropriations Committees – and the Committee consultants -- are also asking questions about the financing. The Chair of Senate Appropriations told the author of SB 551 at the Appropriations public hearing that the \$10 fee should be reduced, because the enforcement provisions of the bill have been deleted.

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- The CLRC staff memo correctly says: the author of SB 551 declined to reduce the fee. However, the memo omits the further statement of Committee Chair Kevin Murray that, if the enforcement functions weren't restored to the bill but the \$10 fee remained, that he would pull the bill back to his committee, when it returned to the Senate for concurrence after it was heard on the Assembly side. Senator Murray gave the bill a courtesy vote in committee but did not vote for the bill when it came to the Senate floor.
- The 2006-12 memo also omits the fact that restoring the enforcement functions to the Office also restores a revenue stream: fines levied against lawbreaking associations. The nursing home Ombudsman is financed partly through fines levied against nursing home operators, who break the law. Close to \$2 million of its budget comes from such fines.
- The Senate Appropriations consultant also recommended in her analysis that the \$10 fee be slashed. Her reasons were that (1) the Office would be doing education, training and referral only (2) the enforcement functions have been cut from the legislation (3) the Office is going to be reimbursed by homeowners for all the publications that they purchase and the training that they take. In other words, the Ombudsman would collect about \$12 million in fees but then be reimbursed millions for all the money it spent producing education and training materials and courses.
- Likewise, in Assembly Appropriations, Committee member Leland Yee – who is Assembly Speaker Pro Tem – also questioned the fee, stating that the Ombudsman Office was duplicating services that homeowners are already paying for. In particular he questioned the money that homeowners pay in the form of hefty membership fees to the trade groups like CAI and ECHO that are already providing education and training services to associations. Dr. Yee, who sits on the Assembly Business & Professions Committee gave AB 770 a courtesy vote, but said if the duplication of services and the fee weren't dealt with before the Assembly floor vote that he would vote against it – which he did.
- The Assembly floor vote on AB 770 was close: 44 AYES and 36 NOES, indicating that the bill does not have solid support.
- Gloria Negrete McLeod, chair of Assembly Business and Professions, was among those who voted “NO” on AB 770 on the Assembly floor, because of its financing provisions. Her “no” vote does not bode well for SB 551, now on the Assembly side.
- Cal-Tax is also opposed to AB 770/SB551. It might be worthwhile to at least mention that Cal-Tax is a coalition of 60 major California businesses, who object in principle to taxes disguised as fees: fees which are not approved by the people

forced to pay them. It's worth mentioning, I think, that his coalition includes the California Building Industry Association.

Now let me summarize CARA's concerns in our January 12 letter to Senate Appropriations.

1. Neither of California's other two Ombudsman offices are financed by the consumers they are designed to protect. This fact is omitted from the 2006-12 memo. The nursing home ombudsman program, for example, is financed with a combination of state, federal, and local money. About \$3 million of the Ombudsman's \$11 million budget comes from local government, that is, the budget is about the same size as the proposed CID Ombudsman budget. The nursing home program processed 45,900 complaints in 2004.
2. The 2006-12 memo states that asking local governments to help finance the program is a political impossibility. However, the League of California Cities is now regularly testifying at committee public hearings in support of the Ombudsman legislation, so asking their help must be more of a political possibility than the memo states.

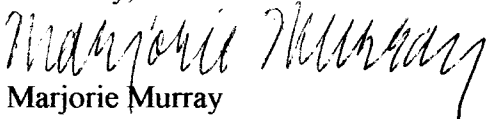
Furthermore, local governments approve an estimated 1500-2000 homeowner associations each year in California. Each association expands the population of the local jurisdiction. Expanded population, in turn, increases the amount of certain taxes – motor vehicle taxes, for example – that the state distributes to local governments based on their population. Given that the League of Cities now wholeheartedly supports the Ombudsman Office, why can't the League be approached to support the measure? Cities could contribute a percentage of those taxes returned to local governments as a result of the increased CID populations in their jurisdictions.

3. The state of Nevada has exempted developers from paying the per parcel tax that homeowners pay to finance Nevada's Ombudsman office. While it's true that the current language of the bill "includes" developers, the legislation should be amended to specifically include developers, who could easily be exempted by regulation from paying the per parcel fee. Whether developers should have to pay was discussed specifically by the CLRC, you may recall, and the decision made to omit "developers" from the legislation.
4. CARA also questions the duplicate costs of dispute resolution.
 - a. The CLRC's own legislation, AB 1836/Harman, requires each association to have internal dispute resolution procedures in place. Homeowners are presumably already paying regular assessments to create these mechanisms. Mr. Harman voted against AB 770 on the Assembly floor.

- b. Local, community-based dispute resolution programs, financed with court filing fees and local government resources, are already in place throughout the state. These programs are either free or low-cost. However, both bills were recently amended to require the homeowner to pay \$50 for mediation services. Again: why should the homeowner pay yet a third time for dispute resolution services? Let me point out that making maximum use of these existing services is one way that local governments can contribute to the financing of the Ombudsman Office.
 - c. As the Commission knows, the dispute resolution sector is divided into for-profit and non-profit organizations. The for-profit sector is lobbying intensely for the legislation through its trade group, the California Dispute Resolution Council, because it sees huge business opportunities in AB 770 and SB 551. The community-based programs, however, are largely on the sidelines. In the Commission's view, what is to be the role of these community-based programs in the Ombudsman Office? And how could costs be reduced by making maximum use of these programs, instead of relying on the for-profit mediation businesses?
5. Finally, CARA once again urge that the Commission make the Ombudsman project a pilot project in reality and not in name only. Again, CARA urges that the Office be executed first on a small, experimental scale in two or three counties, including one rural county, in order to find out what the true costs of the Office are. Making wild guesses about the financing of the Ombudsman Office has already cost the bills votes in committee and on the floor.

If you wish to discuss these issues, please do call either CARA Vice President William Powers (916.446.4240) or CARA Legislative Director Jacki Fox Ruby (510.549.3908.)

Sincerely,



Marjorie Murray
California Alliance for Retired Americans