Fourth Supplement to Memorandum 2008-12

2008 Legislative Program: Status of Bills (Public Comment)

The staff has been asked to reproduce letters that had been submitted by the Community Associations Institute. Those letters were submitted to Assembly Member Saldaña, in response to her request for a detailed list of CAI's concerns about AB 1921. Many of the concerns raised in the letters are complaints about existing law, rather than complaints about changes that AB 1921 would make to the law. Of the remainder, most have already been addressed and the rest are in the process of being addressed.

In addition, we have received another letter from Donie Vanitzian of Marina del Rey. She opposes AB 1921.

The materials are reproduced in the Exhibit as follows:

Respectfully submitted,

Brian Hebert
Executive Secretary

LAW OFFICES
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
Los Angeles
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Michael W. Rabkin
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File No.
81016-002

March 21, 2008

VIA E-MAIL - caiclac@aol.com
and FIRST CLASS MAIL

Mr. Skip Daum
CAI-CLAC
5355 Parkford Circle
Granite Bay, California 95746

Re: California Law Review Commission ("CLRC") / Proposed Restatement of Davis-Stirling Common Interest Development Act ("Act")

Dear Skip:

As we discussed, I have reviewed the proposed AB 1921 which contains the CLRC's proposed restatement of the Act with respect to terms and phrases which are poorly defined or not defined in the proposed restatement. Here are my main concerns:

Poorly-Defined Terms

"common interest development," "common area" and **"planned development"** - These terms are problematic because when viewed collectively they do not provide sufficient certainty as to whether a project is excluded from the Act. For example if the operating documents for a project provide for common area and lien rights, but, does not technically refer to an association, is such project subject to the Act? There should be an affirmative exclusion of projects that do not strictly comply for relief from liability for failure to comply with the Act if there is a good belief that the project is not subject to the Act.

"governing documents" - This term is defined in Section 4150 as the declaration, the bylaws, the articles, the operating rules and "any other documents that govern the operation of the common interest development or association." First, it is not clear why there is a distinction between a common interest development and an association insofar as all common interest developments are managed by an association. Second, this catchall phrase is rather ambiguous because it could include a resolution or repair manual approved by the board that governs the operation of the association. Perhaps it should be narrowed to "any other documents that

EX 1

govern the operation of the association which are subject to membership approval or revocation."

"unless the governing documents otherwise provide" - Do the governing documents have to state affirmatively otherwise or can the governing documents provide otherwise by being silent on the issue? Also, if the declaration and the bylaws are silent, can the board adopt a rule in order to circumvent the Act. For example, Section 5900 states that "unless the governing documents specify a different percentage" at least 67% of the members must approve granting an owner the exclusive right to use certain common area. If the declaration and the bylaws do not specify a percentage, can the board adopt a rule which says that 1% or 0% of the members approve such transfer?

Undefined Terms

"account" "records of account" and **"financial account"** - These generic terms are used interchangeably throughout the inspection/financial/reserve sections of the Act regardless of the context. In each instance, the term should be clarified to indicate whether it is a bank account or an accounting record such as general ledger, or both.

"current fiscal year" - This term should be defined to state as follows: "Current fiscal year" shall mean the fiscal year in effect when a request for inspection is delivered or a document is prepared.

"development" - This term is used many times but is not defined.

"director" - The term "director" is used sometimes to refer to individual members of the board. A new definition should be added or a sentence should be added to Section 4085 which states: "'Director' shall mean a member of the board of directors."

"owner," "record owner," "owner of record" and **"homeowner"** - The term "member" is defined, but "owner" and the foregoing variations, which are used often are not.

"general assessment" - This term is used in Section 5160(c). It is probably should be regular assessment insofar as the term general assessment is used nowhere else in the Act.

"committee authorized to exercise the powers of the board" - It is not clear what distinction the CLRC is trying by including the language "authorized to exercise the powers of the board." Arguably, any committee can be authorized to exercise the powers of the board, e.g.,

a landscaping committee could be authorized to select the color of the fall foliage planted in the common areas. If a board is obligated by its governing documents to appoint certain committees, e.g., an architectural committee, a nominating committee or a budget committee, are these committees exercising the powers of the board?

"as close to the common interest development as is practicable" - The phrase is used in Sections 4530 and 4575(c) to describe where off-site meetings must be held if the board determines that a larger meeting room is needed than provided for at the site. Because disputes are certain to arise over whether an off-site meeting location is as close as practicable, the phrase should be revised to state: as close to the common interest development as the Board determines is reasonably practicable, taking into consideration, among other things, any applicable rental fee and the amenities of such off-site meeting room."

Multiple Terms

"member" vs. **"owner"** or **"owner of a separate interest"** - Some provisions use the term "member" while some use the term "owner" or "owner of a separate interest," and, sometimes, both terms are used in the same provision (e.g., Section 5080(a) states that "an association or an owner or a member of a common interest development may not file an enforcement action . . ." and Section 5620 states that a member may request a payment plan, but late fees shall not accrue against an owner who is in compliance with the payment plan. Either the same term should be used throughout or, if the terms are to be considered interchangeable, the Act should expressly state so.

"association" v. **"board"** - The association is the legal entity and the board is the decision-maker for such legal entity, however, despite this distinction, the Act often uses these terms interchangeably, which is inappropriate in many contexts. For example, Section 5500(a) states that the board shall maintain separate operating and reserve accounts. Really, the entity, i.e., the association, should be maintaining separate banking accounts. Similarly, several sections refer to the board giving notice, when it is the association's responsibility to do so.

Other Language Problems

"assessment approval" - In Section 4640, the phrase "assessment approval" suggests that all assessments must be approved by the owners via secret ballot, which is not accurate, and, therefore, Section 4640 should be modified to read "approval of assessments legally requiring a vote."

"The loss and restoration of a member's voting privileges" - This phrase is used in Section 4630(c). The word "loss" should be replaced by "suspension" which is the more commonly used term.

"reserve funding study" - This term is used in Article 3 and should be revised to reflect the term used commonly industry-wide, which is "reserve study."

"statement of services rendered" - This phrase is used in Section 4700(a)(6) and should be revised to state "statement of services rendered to the association" because services rendered by the association for an owner are not subject to inspection.

"resident" - This term, as used in Section 4528(b)(1) is incorrect. It should be replaced with "member."

"income" and other accounting terms - According to several commentators the accounting terms used in the Act, namely Chapter 3, Articles 5-7, and Chapter 5, Articles 1-3 are not generally accepted accounting terms e.g., "income" should be "revenue." The CLRC should consult with accounting professionals to review, and if necessary, correct the accounting terminology contained in the Act.

I hope that you find this information useful in seeking revisions to this important piece of proposed legislation.

Very truly yours,

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

MICHAEL W. RABKIN

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CALIFORNIA LEGISLATIVE ACTION COMMITTEE
community ASSOCIATIONS INSTITUTE

Serving 3,000,000 California Households in Condominiums and Homeowner Associations

April 9, 2008

Mr. Brian Hebert, Esq., Executive Secretary
California Law Review Commission
Sacramento, California
(via email)

Re: Response to CLRC's March 24, 2008 Response to CAI-CLAC's Concerns re: AB 1921

Dear Brian,

We appreciate your prompt response to our submission, and the detail put forth in your eighty-one (81) point response. Those that we feel must have some change made are indicated in the response letter to the Assembly Committee on Housing and Community Development, dated April 9, 2008.

The items which you sufficiently explained have helped us understand and have caused us to change our position on them; as such, those items are not listed here, or in some instances, a short comment is made but no change is requested.

1. Items **(3), (4), (6), (7), (8), (9), (11), (12) (13), (14), (15), (17), (18), (19), (20) and (21)** deal with Definition of Terms. Please refer to the attached Addendum regarding Definitions.
2. Not itemized, but **§4090** "Board Meeting" should include in the definition that "only board members vote at board meetings". Straw polls of attending members are informational in nature, and the outcome of the straw poll is not binding on the board.
3. **Item (13) Meeting location**, is also part of Comment **(40), §4575 Meeting location.** See **Item (13**) in the attached Addendum regarding Definitions.
4. **(16) (41) Scope of election procedure with respect to assessment approval. §4640(a)(1)** lists 'assessment approval'. We recommend rewording to: "Approval of assessments legally requiring a vote of the members, as defined in **§5580(b)(1)(2)(3)".** *CLRC previously indicated no objection to adding the limiting language.*
    a. This would limit the vote to "Regular assessments exceeding a 20% increase over the last regular assessment amount", and
    b. Special Assessments exceeding a 5% increase over the previously approved Annual Budget".
5. **§4525.** Suggest "(c) Only board members vote at board meetings".
6. **(18) Reference to "reserve funding study"** §**5555-§5560**. *Please see the comments in attached Addendum Regarding Definitions*. Even though all the terms referenced are used in Article 3, Reserve Funding, pgs. 98-103, the complexity of these two Sections begs for simplification and clarification. The terminology is so secondary to the real problem, which is simplification of these sections, that it really doesn't matter.
    a. What city or town government is required, as in §5555 (c)(8) to confirm Yes or No to "will the current regular assessment, approved increases in the regular assessment, and approved special assessments provide sufficient reserve funds at the end of each year to meet the association's obligation for repair and replacement of major components over the next 30 years?" We all know the answer is "none", and they have staff and attorneys to review these things. An association has volunteer members, who may not be trained in the area of maintenance and repair and finance.

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b. Boards only have the authority to recommend to the members votes on Special Assessments at the time they are in office. How can they project what future boards will recommend, or how the members will vote on proposed Special Assessments? Not having that extrasensory perception, how can they possibly answer that question "Yes"?

7. **(19) "Statement of services rendered" §4700(a) (6)** adding "to the association" we believe defines the term as it was originally intended. *See the attached Addendum Regarding Definitions.*
8. **(20), (21) See (69)** regarding terms and finance terms, a working group needs to be established to study these issues.
9. **(22)** The association is its members and vice versa. The concern expressed is one of concern about the complexity, and therefore expense, of implementing the Clarification and Simplification of DSA. Anything that costs more money comes from the pockets of the members. There is no tax money, deficit spending or any other means of paying for expenses in an association.
10. **(23) Some language is too legalistic and one size fits all.** Look at the background provided by CLRC, and it is clear that over two-thirds of associations self-manage due to their size and budget constraints. The language of AB 1921, as should have been the case with the Davis-Stirling Act, has to be written so these self governing associations can do just that. They do not have legal counsel to interpret for them, simply due to cost. Simplification and Clarification should have taken care of this, but did not. Do laypersons know the meaning of "tolling"?
11. **(25), (27) Expanded scope of record inspection will "swamp" some associations. Chapter 3, Article 5. Section 4700**. When all the documents referred to in the DSA are brought together in one section, it is overwhelming as to the scope of what is allowed. Expanding existing law is what we take issue with; ex., adding the term "ad hoc" reports brings into question Operation and Procedure Manuals of a Managing Agent for an association. Do cities have to open up all of the records indicated in §4700, if a resident of that city makes a request? And can that citizen make unlimited requests, with no definition of how much material is included in a single request? We know the answer is "No", yet higher standards are heaped on CIDs, which are a form of government.
12. **(26) Cap on redaction expense should be increased.** A member can be charged "the direct and actual cost to copy or deliver a record" **§4720(a)**, yet is limited for redaction to "$10 per hour, not to exceed $200 per written request". In a large association with thousands of records, a single request for records could (and this does happen) cost the CID perhaps thousands of dollars, which has to be absorbed by the members who did not make the request. Why is the requesting member not just as liable for redaction cost as they are for copy and delivery cost?
13. **(28) Member Handbook §4810** Other Annual Disclosures are mandated under the Act. Can they, under §4810(a) (10), all be included and delivered on a "request" basis (§4810(c), and therefore not have to make an annual mailing to all members?
    *The statement on pg. 9 of Memorandum 2800-11 regarding §**4819(a)(6)** is acceptable to CAI.*
14. **(31) §4045 (section b)** With so many methods of delivery and public postings an association can utilize, why should a requesting member who does not want to use one of those methods, be allowed to have delivery made at the expense of the association and not the member? The member should be given the choice to accept one of the general delivery methods used by the association for the majority of its members, or pay the expense himself.
15. **(34) § 4185(e) Reference to "declaration" inappropriate for coops.** CLRC agrees, but will make changes at a later date when coops studied comprehensively – but this begs the question – why not make this a two year bill and clean this up?
16. **(36) § 4540(c) member may request hearing in executive session or open meeting.** This is a substantive change to the DSA. If he/she does attend, under §4540(d), does "may attend and speak during consideration of the matter" limit the member from being at the meeting only during discussion of the subject, and be precluded from hearing the board discussion relative to the decision? Discussion of discipline in an open board meeting is a substantive change and one we find controversial.
17. **(38) §4550(a) (not 4540)** Does this mean that if Minutes are made available through TV, on internet, posted on the property, that they have been made "available" to members? Therefore is a request by a member to receive the minutes in written form an item which could be charged for, since the statute is silent on cost, and they have been made "available" in a number of other forms?
18. **(39) §4550 (b)** Important wording that is in existing civil code has been omitted. Add back the words "in the minutes of the immediately following meeting that is open to the members"
19. **(40) §4575 Meeting location.** Article 3, pg. 62 of AB 1921 refers to a MEMBER meeting, not a BOARD meeting. Since the board has the right to determine if there is a meeting location "within the common interest development" of sufficient size, why

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would such a decision, to hold it outside the CID, be cause for litigation? Corp. Code Section 7211 covers Board meetings, and Section 7510 covers Member Meetings. We think **§4575** is more definitive than either one of those sections.

a. Other legal minds thought differently, see **Item (13) on the attached Addendum regarding Definitions**.

20. **(41) §4630(f), §4635(b) (c) (3) Add provision authorizing managing agent to assist election inspector.** If the CIDs records are maintained by a managing agent, they are the best source for validating member information and signatures, and should be allowed to assist the inspectors. Otherwise total outsourcing of elections will be required, pushing election cost ever upward. We are pointing out a clarification that is needed.
    a. **§4640(a) (1) Assessment approval.** Memorandum 2008-11, pg. 8 *Secret Election for Assessment increase.* We recommend that the change to (1) have the words <u>of the members.</u> added to the suggested change.
21. **(42) §4655(b)(e) Ballot Retention** In small associations the Inspector is likely to be an owner. In larger associations, an on-site manager or a managing agent with off-site offices would be most qualified to maintain the records. This could be two years or longer, if there were challenges. Per **(41),** they are not allowed to do so.
22. **(43) §4700 (a)(1) Improvement in definition of Governing Documents will address this.** See Item (4) in the attached Addendum regarding Definitions.
23. **(44)(45)(46) Article 5. Inspection of Records. §4700. (a)(2)** Email has become one of the largest sources of fraud, and members deserve to have their identities protected. Members should be required to "opt into" membership lists, and be automatically excluded unless the "opt into" such a list. To require them to "opt out" can be easily overlooked, and result in potential identity theft. **(45)** Was incorrectly identified in our first report.
24. **§4700(a) (6) "statement of services rendered"** should only refer to services "rendered to the CID", not those furnished by the CID. **(See 19).** See Item (19) in the attached Addendum regarding definitions. *See Addendum regarding Definitions.*
25. **§4700(a) (6) Cancelled check.** Since all cancelled checks have the bank account number of the payee on the back side, does this mean that all payments made by check by a member must be redacted? Under **§4735**, is the CID liable for redacting such a record? Or under **§4745** is the CID liable for the "negligent" inclusion of such a record if given to a requesting member? The law as written, appears to put the CID in the middle, with no guideline as to what is "negligent" (language not previously included). *See Addendum regarding Definitions.*
26. **(46) §4700(a) (4) Annual Reports §4800(c)** Does this mean that two copies must be furnished annually, one under §4700 and another under §4800? This has expanded existing law.
27. **(47)(48) §4705** "ad hoc" reports which can include such things as procedural manuals are now part of the association records open for inspection (they did not appear to be under **DSA §1365.2**), and this has substantively changed and expanded the law without legislative or constituent input, and we strongly object. There has to be some reasonableness to the Act, and there seems to be no thought as to the expense and time it will take to satisfy the request from just one agitated owner. If for-profit corporations, governmental bodies and non-profit (non-residential) corporations are not subjected to this degree of internal scrutiny by their stakeholders, why are CIDs?
28. **(47) The concerns listed in our first report, to almost all the Sections of 4700** are based upon the litigious nature of our society, which did not exist to this extent when the DSA was enacted over twenty years ago. Associations are due their rights, as are their members. Fines levied against a CID are paid for by the members of the CID. One member can make life miserable for the staff and members, yet appears to be in the driver's seat of pushing litigation, when requests for information are unlimited and undefined. The law should be adapted to reflect the current situation, not that which was present over twenty years ago. **§4700(a)(11)**
29. **(48)(49)(50) §4705(a) written request to inspect association records** *Memorandum 2008-11, pg. 5-6.* The member's request the Membership List "to determine the number of members and determine the amount of material needed for making a mailing to them" is so generic it cannot be refused. Yet if the list does not contain member names, how it is plausible for the inquiring member to know that person has "opted out" of furnishing their name? We oppose the CARA suggested change. Under **§4715,** we concur with CACM's question regarding "Who will pay?" If it's reasonable to charge the time and copying costs for material and delivery, as in §4700, then why not charge the <u>reasonable time</u> for **§4720(b)** redaction expense? We all know the current law of $10 per hour, capped at $200 is totally unrealistic.

30. **(49) §4705(b)(3)** We concur that the language proposed in *Memorandum 2008-11, pg. 12*, under *Duty to Create Record* is acceptable.

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31. **(51)(52)(54)(56) §4710(a) (b) (c) Redaction,** and the potential liability against, as in **§4745. "Intentional, willful or negligent"** are legalistic terms open to interpretation by a court or a jury or a Small Claims Judge, which are not understood by most associations, or its officer, employee, agent, or volunteer. Several associations currently have members posting information on websites, misrepresenting financial information, etc.. We suggest adding language that does not allow this posting of information on websites.

32. **(53)§4715(a)** Why not have members "**opt-in**" instead of "**opt-out**" of a membership list? They would then be protected, if they forget to "opt-out" of the potential for their information to be used fraudulently. As we know, internet fraud is difficult to find and to prosecute, and finding the culprit who placed the information on the internet is even more difficult to prove.

33. **(55) §4715b Requesting member should bear the cost.** We believe this is a justified expense to the requestor, not the other members.

34. **(57)(58)(59) §4730(b)(2)** It is worded in such a way that IDR must be offered versus providing a general statement reminding them of their right to IDR. (60) §4725 (b) legitimate purpose for requested records §4730(b)(2). These are issues with existing law, which seems to tilt toward the individual requestor, and not what is fair to the other members who must bear the cost generated by the requestor. **§4735** The language distinctly favors the Requestor, not the association. **§4735(d) (2)** "Tolling of any deadline"-what does this mean to the layman board director who is trying to interpret the CID Law?

35. **(61) §4735(d) (3) This is an addition and expansion of existing law and not part of a clarification or simplification of existing law – please remove.**

36. **(63) §4775 (**listed as **§4750** in Response) Recommend reference to §4700 when defining list of records to retain. Please understand we object to the expansion of records in §4700.

37. **(65)§4800(a) suggest** "30 to 90 days before the beginning of the next fiscal year".

38. **(66) (67) 4805 (b) (c)** Agreed – we are trying to give you suggestions for clarification and provide you with current terms used by CPAs to assist in that effort. Specify that accounts refer to general ledger accounts as is inferred**.**

39. **(68) 4805 (c) (3**) This is a needed clarification and not minor. A review is different from an audit and the language is being interchanged. Change the wording to be consistent – if it's a review that is required – then include a statement that says "…the financial statements were not reviewed by an independent auditor.

40. **§4810(a) Member Handbook** has previously been discussed. Shouldn't all Disclosures required on an Annual basis be included in a "member information package", which is available to members, but a mandatory mailing is not required? Who pays for this material if requested by a member via mail? Memorandum 2008-11, pg 8-9, *Member Handbook*, suggested changes are acceptable.

41. **(69) §5500-5560.** A meeting will be planned to reach agreement on accounting terminology and CAI members stand ready to participate.

42. **(70)§5575(b) negotiated fees for special services** The language suggested in Memorandum 2008-11, pg. 13 *Fees for "extras"* appears to be acceptable.

43. **(73) §5605(b) (3) late fee amounts need adjusting** Agree this is problem in existing law. $10 late fee is out of step with current Bank NSF charge of $25 or greater. Whatever is changed, it should refer to the CPI as of a specified date as the benchmark.

44. **(77) §5670.** Reference to "handbook" **(§4810**) should be deleted or changed, as term "Handbook" will likely be changed.

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45. **(78) Memorandum 2008-11, pg. 11,** *Typographical Errors* the change to (7) in **§5680(a**) is acceptable. **§5680(a) (2)** is a problem with existing law. Limiting an owner who is a board member to owning two separate interests in a very large association is a limitation on his rights. There should be some scale of ownership based on the number of units to exclude that board member from the protection of the limits of insurance coverage under (a) (7).

46. **(80)§5705(a) Expand ability to relocate members for repair.** This is a request for additional reasons for the temporary, summary removal of any occupant, such as for re-piping. Would like this to be considered in any future rewrite.

47. **(81)§6080 Expand ability to amend condo plan.** This is a major problem, as it requires "all of the following persons: in **§6075**(c)" :

    a. record owner of fee title

    b. By all lessors and lessees of the estate in years.

    This is more punitive than the Super-majority requirement in Elections, which is given relief through the courts in **§4620(d)(3**) which is a fairly common occurrence when CC & Rs are attempted to be modified and older CC & Rs call for a super majority of 75% of the members voting in the affirmative.

48. Has there been consideration of the Sections on ADR and IDR being removed from the Act and being enacted as a separate Section in the Civil Code? They could be referenced in AB 1921, but would reduce the verbage in the Act, and make its provisions available to entities other than CIDs.

49. Has there been consideration of taking Construction Defect, Chapter 9, removing it from the Act and enact it as a separate Section in the Civil Code. It could then be referenced in AB 1921, would reduce the verbage in the Act, and make its provisions available to entities other than CIDs.

50. Why "tombstone" the Davis-Stirling Act? Instead name it what it is… Common Interest Developments Act.

Sincerely,

Dick Pruess

Dick Pruess, Chair
AB 1921 Review Committee of CAI-CLAC

cc: AB 1921 Comm. Mbrs. & CAI-CLAC Exec. Comm. Mbrs.
Lisa Engel, Chief Consultant, Assb. H&CD Comm.
Skip Daum, CAI-CLAC Advocate

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THE TEMPLE OF BLAME
↓
AB1921: ALL SHOCK AND NO AWE

Mr. B. Hebert
California Law Revision Commission
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Re: Response to Memorandum 2008-12
Opposition to Assembly Bill 1921

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Dear Mr. Hebert,

Make no mistake, Assembly Bill 1921 shatters the American dream for millions of residential deed-restricted property owners and many believe that the California Law Revision Commission has exceeded its jurisdiction.

I have received numerous letters and communications from deed-restricted titleholders to my co-authored Los Angeles Times, Real Estate section column titled *Associations* regarding the California Law Revision Commission's wholesale destruction of the Davis-Stirling Act. On March 24, 2008 I authored an Editorial discussing some of the problems associated with Assembly Bill 1921. It was published by the *Central Valley Business Times* and can be viewed at www.centralvalleybusinesstimes.com letters to the Editor.

In MM08-05, the CLRC actually had the gall to state that it "*took over two and half years in developing the recommendation, with every step open to public scrutiny and input.*" Only the CLRC could believe that self-serving statement. Worse, in the First Supplement to Memorandum 2008-12, Legislative Program: AB 1921 (Saldaña); the CLRC chastises the "Attorney Group" in stating:

> *"When AB 1921 was heard by the Assembly Committee on the Judiciary (April 29, 2008), the Committee Chair admonished the CID Attorney Group for raising concerns after the bill had been introduced, rather than during the Commission's deliberative process, and directed the group to submit a specific and detailed list of its concerns to Assembly Member Saldaña by mid-May. The purpose was to reduce the group's concerns to concrete terms so that they could be addressed through discussion and amendment. The list of concerns has not yet been provided."*

Lest the California Law Revision Commission forget, it was the **CLRC** who claimed to be working on this project for two years—**not** the Attorney Group. The CLRC had/has the duty of performing due diligence prior to embarking on such a nonsensical project at taxpayer expense—**not the Attorney Group—not the public**—and certainly NOT the titleholders. The duty is **YOURS, the California Law Revision Commission.**

But this, from Memorandum 2008-12, stating *"Memorandum 2008-11 described the general response that AB 1921 had received from CID interest groups. Many of those groups expressed new concerns about the bill, that had not been raised during the Commission's two and a half year deliberative process"* **takes the cake.** What planet are you on? When you make ridiculous statements like that how can the public believe anything you put forth?

The CLRC's arrogance in carrying out their pie-in-the-sky posturing by saying ***"the Commission had a clear practice of excluding any substantive change that might be controversial in the legislative process"*** is simply unsurpassed. The implication of that one statement alone invalidates EVERYTHING the CLRC does. Along with countless others, my suggestions were pooh-pooh'd by the CLRC, ignored by Saldana's office, ignored by the Assembly and Senate Committees and not published alongside other opposition papers. This out-of-control freight train spearheaded by the CLRC is not only embarrassing it is costly and unnecessary.

I. REALITY AND FISCAL IMPACT

California is presently cash and income strapped to the tune of over $20 billion

dollars with proposed cuts to be made in every State Department. Keeping that in mind, **nothing** is laudable or applaudable about Assemblyperson Saldana's Assembly Bill 1921, just as nothing is commendable about the countless "paid" hours expended by the California Law Revision Commission in bastardizing the Davis-Stirling Act. Frankly, the Act is bad enough without your help.

Assembly Bill 1921 complicates an already problematic statute. I am on the record demanding a moratorium on any Davis-Stirling Act rewrites until a "credible" study of the problems can be, and has been, accomplished. AB 1921 is the full employment act for special interest parasitic industries and California's legislators. It is shameful that the remaining few protections for the titleholder's vested property interests are dangerously diluted by the cumulative effect of this bad legislation.

Though they may fancy themselves oracles of legislation, California Legislators are instead, masters of self-delusion. While in the Sacramento Holiday Camp, these public sector parasites are rarely held accountable for the disasters they cause. Once their paychecks end, their pensions begin. For the past three decades or so, California statutes have resulted in a battle-scarred minefield memorializing the delusions of self-congratulatory legislators wanting their names in books of California law—at any cost. The bigger the special interest payments—the bigger the name in the books.

If ***ABomination*** **1921** is signed into law, the end game for titleholders is prohibitively expensive litigation.

II. AB 1921 LACKS ADEQUATE CHECKS AND BALANCES

Assembly Bill 1921's caption reads, *"This bill would revise and recast the Davis-Stirling Common Interest Development Act."* In other words it is the "rewrite" of an entire Civil Code Title of law.

Assembly Bill 1921 is voluminous in print and anemic in its practicality. It amounts to a wholesale rewrite of law already in force, interpreted by the courts, and relied upon for well over two decades. Notably, the proposed rewrite is short on substance and lacks justification for shredding laws already in place. AB 1921 purports to sacrifice the Davis Stirling Act by codifying vacuous Legislative oratory. Hiding reality under the guise of "legis-speak" lest their intent be exposed, the cumulative outcome of AB 1921 if passed, amounts to condemning owners to subjugate their rights to the whim of their rulers, be they boards, legislators, vendors, attorneys, judges, arbiters, or the like. It is an "implicit submission" to forces outside the homeowner's control.

A sober look at this preposterous legislation—devoid sufficient public input and competent research—reveals the imposition of unilateral substandard lawmaking. Assembly Bill 1921 consists of bad law: rife with loopholes, titleholder disenfranchisement, and remarkably poor drafting. Without adequate substantiation, one hundred seventeen sections, "Title 6," an entire Chapter consisting of Civil Code sections 1350 through 1378, are hacked out and rewritten in a matter of months by the few, with virtually no meaningful input from the many.

III. AB 1921 MISLEADS THE PUBLIC

Much of the public is unaware that these shenanigans are taking place right under their nose. What homeowner has the resources on such short notice, let alone the time and knowledge to pour over 300 pages of newly conceived laws and then sit down and attempt to craft a letter to their Legislator explaining their views on the matter? I tried to do that and was told the Legislators and the Legislature are only interested in "groups." My letter was not even admitted into the record, so intentionally ignored that the record baldly claimed there was "no opposition."

The level of scrutiny that should have gone into this massive rewrite was, and is, missing. What part of "fiscal impact" does this California Legislature not understand?

Our Legislature has a far higher duty to the public than it is practicing. Without delay, the Legislature should place full-page advertisements in major California newspapers for one year as well as notify every common interest development titleholder that laws profoundly affecting their ownership are in play.

To claim that the Internet provides "notice" is a self-indulgent fantasy. Not every homeowner is computer literate, or has a computer, or has affordable access to the Internet and a printer. And rare indeed is the Internet-enabled titleholder who searches daily to see if the Legislature is tinkering with his property rights. Let alone understanding the bloated Commission's purpose few homeowners have heard of the "California Law Revision Commission." Yet that Commission's dangerously misguided authorship of the proposed Assembly Bill 1921 will effect the lives, property rights, and personal assets of millions of homeowners in this state.

IV. INDIFFERENCE TO STATUTORY INTEGRITY AND CASELAW

Statutory changes tend to be of two types, renumbering-reindexing when societal change renders the current placement inadequate, and substantive changes in the law itself. By doing both simultaneously in Assembly Bill 1921 the Legislature renders impotent the public's ability to understand and comment on it.

Anyone who has ever had to find or follow the law knows the importance of stability of cross-referencing and the agony and cost wholesale renaming and reindexing impose. Moreover this renders much of case law unusable to all but the most sophisticated, well-funded researchers. Nonetheless, under the banner of "simplification" the California Law Revision Commission masks the enormous scope substance of its changes. In its enthusiasm for musical section numbers to cover its tracks and once again the CLRC excises "Title 6" from the Civil Code.

> The initial heading of the former Title 6, "Wills", enacted in 1872 consisting of sections 1270 to 1377 was repealed by Stats.1979, c. 373, sec. 484 to make way for the present version of the Davis-Stirling Act monster. It should be noted that the purpose of moving "Wills" was to place it in Probate Code statutes.
>
> Title 6 "Common Interest Developments" was hatched in 1985. Now its 117 Civil Code sections are littered by the detritus of the

> CLRC's self-aggrandizing musings also known as "Comments" throughout the Code's annotations. Here, "Common Interest Developments" **stays in** the Civil Code statutes but changes it numbering and alters text substance.

In 2007 the California Law Revision Commission reported that it would be **"several years" before this "project"** would be presented to the Legislature. Worth mentioning, is the fact that titleholders did not ask the Law Revision Commission to do this in the first place, but the Law Revision Commission was advised that the owners were against this rewrite of laws in the manner it was occurring. Having slipped this soporific to the public, the CLRC speedily cobbled together AB1921 to be introduced in less than a year.

Moreover, attempting to slip even alert observers another "mickey," it purported to address only "technical and conforming changes," shamelessly mischaracterizing an intentional revision bastardized of form and substance.

V. CLRC HAS A HISTORY OF BASTARDIZING STATUTES

It appears that if a statute section is unclear, there's an excellent chance that the California Law Revision Commission had something to do with it. Responsible for wholesale disruption of entire sections of code, the California Law Revision Commission's pedestrian approach and sloppy analysis, has resulted in serious consequences, if not countless dollars needlessly spent by consumers throughout this state.

Presently, the Law Revision Commission's most recent project includes the bastardization of Civil Code Sections 1350 through 1378 all under the guise of "[t]he Law Revision Commission recommends that the existing Davis-Stirling Common Interest Development Act be repealed and replaced with a new statute that continues the substance of existing law in a more user-friendly form."[1] So too, in justifying the morass it created within the Evidence Code, the Law Revision Commission states it did so "[t]o accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format."[2] Whatever **THAT** means. The Law Revision Commission continues to explain, "[t]he definition focuses on the nature of a proceeding, not its label. A proceeding may be a 'mediation' for purposes of this chapter, even though it is denominated differently .... This definition of mediator encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person's role, not the person's title."[3]

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[1] California Law Revision Commission, Study H-855, Statutory Clarification and Simplification of CID Law (Preliminary Part), MM07-24s2 (2007) (proposed repeal of the Davis–Stirling Act Civil Code Sections 1350 to 1378).

[2] See Evidence Code Section 1115 (Law Revision Commission Comments).

[3] See Evidence Code Section 1115 (Law Revision Commission Comments). See also D. Vanitzian, Expert Series: *Common Interest Developments—Homeowners Guide* 2007-2008 (Thomson-West).

VI. "RECAST" IS JUST A FANCY WORD FOR "REWRITING LAW" WHILE BYPASSING THE DEMOCRATIC PROCESS

The audacity, let alone unmitigated arrogance that somehow the California Law Revision Commission is above the law and can perform such functions that are beyond its mandate, is unnerving. The Commission categorized their so-called "Statutory Clarification and Simplification of CID Law" as the panacea to problems plaguing such developments. What could possibly be "simple" about 300 pages consisting of some 85 cross over laws and no beta test as to its applicability?

Assembly Bill 1921 is not a revision; it is instead a rewrite of the LAW. A legalized pork barrel packed with goodies for the parasitic association industry and its vendors. It is an ill-conceived pork-barrel project that is proceeding without shame and accountability, with no end in sight.

If residential deed-restricted titleholders were ever under the mistaken belief that their Legislator could be an ally—by now they should know better. The public must understand that this cavalier rewrite will detrimentally affect the lives of millions of titleholders and prospective titleholders. Owners, who have dutifully spent decades coming to grips with understanding the Davis-Stirling Act, will be forced to start all over again. Frankly, some may not live long enough to figure it out. Others will likely employ a costlier route, that of hiring lawyers to explain an untested code to them with "on the one hand, on the other hand" and invoicing for it. Others still, may merely rely on the word of third parties whose interpretation of the codes may be slanted or just plain wrong.

VII. THE CALIFORNIA LEGISLATURE MUST ABANDON ASSEMBLY BILL 1921

While the text in Assembly Bill 1921 may look good on paper, it lacks useful application.

This massive, untimely project has far-reaching consequences for millions of titleholders. For all its pages of paper, and all the rhetoric, pomp, and circumstance, save the back-patting, the hundreds of pages of slop miserably fails to protect titleholder assets. It fails to eliminate longstanding problems of imbalance pertaining to mediation, arbitration, and litigation and the attendant costs thereof. And there are numerous problems related to those issues. Instead, it merely provides a laundry list of statutes as its prelude to a newly created mess with utter disregard as to its implementation in terms of "real life."

Apparently the only people throwing their hands up in disgust at the utter waste of "time," "resources," and "excess" in California's Legislature, are deed-restricted titleholders who lack adequate and meaningful representation in Sacramento. The millions of deed-restricted titleholders are left paying the price for bad laws, interference by special interests, and excess spending created by our legislators. It is scandalous the laws that are passed because some special interest entity wants it and can afford a lobbyist, rather than analyzing and researching laws that are necessary, and then proposing their introduction genuinely subject to public comment.

While the many problems with Assembly Bill 1921 are impossible to adequately address, here's a breathtaking example. Consider this newly hatched phrase slated to become law under Assembly Bill 1921: "An affidavit of delivery of a notice, which

is executed by the secretary, assistant secretary, or managing agent of the association, is prima facie evidence of delivery."

***Prima facie* evidence!!!** Might as well say "self-interested and unrebuttable evidence." It matters not what horse the drafter of that provision fell off of, what matters is that with the stroke of a pen something as egregious as what otherwise seem to be an innocuous "phrase" will become law—let alone *prima facie* evidence to be used against the titleholder with no viable avenue for rebuttable evidence.[4]

Imagine a third party vendor who contracts with the association, signing their name to an affidavit stating they did something when in actuality they did not. Imagine the board director secretary trying to cover his or her behind in a breach of fiduciary duty lawsuit for taking a person's home away from them, or instituting litigation against them, or penalizing them—merely by signing an affidavit. How can one disprove dishonesty if it is enshrined in the presumption of truth?

Imagine the same scenario if it were applied to fines, penalties, interest and late charges. The potential for abuse is overwhelming. Phrased alternatively, the venerable certified letter is replaced by the unsubstantiated claim from someone who has nothing to lose and everything to gain.

VIII. FAR-REACHING PROBLEMS WITH ASSEMBLY BILL 1921:

• Assembly Bill 1921 has expunged the word "property" as it relates to the titleholder's vested interest.

• Other than to clarify "escrow" proceedings; define "claimants;" ownership of pets; roof repair or installation; survey questionnaires pertaining to defects; the term "homeowner" is mentioned little, and where it is mentioned it is wholly devoid legal significance rendering the term non-existent as it applies to the titleholder.

• Award of "attorney's fees" are mentioned over twenty-five times and not to the benefit of the titleholder.

• The titleholder is not provided with realistic redress and an avenue for providing penalties against associations, third party providers and advisors, and boards of directors. Assembly Bill 1921 fails to direct the benefits of any such penalties directly to the affected titleholder(s).

• Assembly Bill 1921 fails to provide a "Victims Fund" for any titleholder who is a victim to the bad laws and who suffers at the hands of the association, its third party vendors, providers and advisors, and boards of directors who break the laws.

• There should be no creation of an ombudsman department or agency because of the drastic fiscal impact it will have on the entire state and the owners. No such agency should be funded by residential deed-restricted taxation alone.

• Assembly Bill 1921 fails to provide *per se* penalties against third-party management companies and their employees and it fails to provide per se penalties against recalcitrant boards. Moreover, it fails to per se assist titleholders in protecting their assets, fails to provide a viable avenue of redress, other than prohibitively expensive litigation, for the mounting problems associated with common interest developments, and homeowner associations. Every avenue the

[4] e.g., D. Vanitzian, *Homeowner Associations: Dynasties of Dysfunction* (2004).

titleholder attempts to pursue for "fairness" is a costly dead-end—thanks to California's obtuse Legislature.

• Assembly Bill 1921 fails to address a huge problem that is created by the lump sum rewrite that did not exist before. That is, the culmination of intersecting procedural demands such as Request for Resolution, mediation and/or arbitration causing a cumulative effect that often costs more and lasts longer than litigation itself. Needless to say, there are no guarantees that once initiated, any of those alternatives, ie, request for resolution, mediation, arbitration, will result in a viable resolution. **Assembly Bill 1921 serves only to exacerbate these inherent statutory problems.**

IX. LAW REVISION INTERFERENCE WITH LEGISLATION

The Commission's time has come and gone. It is no secret that on more than one occasion I have written the Governor imploring him to pull the Law Revision Commission's funding and/or altogether disband it.

Though paid handsomely while the rest of the State suffers great economic loss, cutbacks, and unemployment, the California Law Revision Commission no doubt believes they are only doing their job. That, however, should be a topic for debate. Often patronizing and condescending toward those in disagreement with its agenda, the Legislature not unlike the Commission, appear to side with, if not coddle the special interest industries. The standard response to the non-special-interest public is, "the staff recommends against that change."

Presently, the graveyards of repealed code sections caused by the Law Revision Commission's chainsaw approach in attempting to substantiate its grant money should be investigated. The Commission and the Legislature have created mass confusion for California consumers where none need exist. A first step to clarity and filling the over $20 billion deficit would be to zero out the CLRC budget and to thoroughly investigate the laws proposed by the State Legislature prior to passage.

For these reasons and much, much more, I oppose Assembly Bill 1921 *in toto*.

Respectfully,

/s/ DV

D. Vanitzian