Study H-855 February 25, 2011

First Supplement to Memorandum 2011-5

Statutory Clarification and Simplification of CID Law (Public Comment)

At the meeting on February 10, 2011, the Commission received a letter from Marjorie Murray, representing the California Alliance for Retired Americans and the Center for California Homeowner Association Law. Ms. Murray's letter comments on Study H-855 on *Statutory Clarification and Simplification of CID Law*. In the days just prior to and after the February 2011 meeting, the Executive Director received a number of emails expressing views similar to Ms. Murray's. Those materials are attached in the Exhibit as follows:

Respectfully submitted,

Brian Hebert
Executive Director

CENTER FOR CALIFORNIA HOMEOWNER ASSOCIATION LAW

February 10, 2011

Justice John Zebrowski (ret.), Chair
California Law Revision Commission
c/o Brian Hebert, Secretary
c/o U.C. Davis Law School
400 Mrak Hall Drive
Davis, California 95616

RE: Davis-Stirling Project/ Memo 2011-5

Dear Justice Zebrowski:

On behalf of the California Alliance for Retired Americans (CARA) and the Center for California Homeowner Association Law, I have been attending CLRC meetings and testifying before the commission since 2001, when it began its study of CID law.

We have key concerns about the commission's latest project, the Clarification and Simplification of CID Law. This has been a mammoth undertaking, which may or may not be of benefit to the 9 million Californians living in the state's 49,000 associations. Our recommendation is that the commission not adopt staff Memorandum 2011-5 today, but instead direct Commission staff to provide detailed briefings on the additions and changes it is making to Davis-Stirling. These briefings should be interactive ones recorded by the California Channel and posted on the Channel's website.

Yesterday, in fact, Commission Secretary Hebert staff offered to provide a "tour" of Memorandum 2011-5 to me personally. We would welcome such briefings, but it should this offer should be extended to all stakeholders. We recommend that briefings be live events televised by the California Channel and made accessible to all who wish to ask questions about the "Clarification and Simplification" project before the draft legislation begins its journey through any policy committees. This event will allow CLRC staff to brief all stakeholders, including homeowners, and will create an opportunity to get a better understanding of this 271 page document.

Such briefings are essential. All stakeholders – including homeowners – want to grasp the dozens of changes and revisions made to Davis-Stirling that commission staff is recommending. These changes affect their property and their legal rights. Some of those revisions and new sections were documented in the August 10, 2009 staff Memo 2009-33. Whether these changes were incorporated into Memo 2011-5 and whether more changes and additions were made is impossible to tell. Hence the need for detailed briefings.

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Justice John Zebrowski, Chair
California Law Revision Commission
February 10, 2011

We urge the commission to direct staff to prepare briefings on Memo 2011-5 and to use technology to broadcast these briefings. The technology is available here at the Capitol. Why is this important?

1. I have heard commission staff testify repeatedly in policy committees at the Capitol that its process is a public process open to all. The statement is commendable; however, it is only theoretically true. Meetings are routinely held in Sacramento, hundreds of miles away from the stakeholders and the only record of the Commission's proceedings are minutes produced after the fact.

   Not all homeowners are able to travel to Sacramento. Travel is inconvenient, expensive, and for many of our members, a physical challenge. In addition, most homeowners have jobs from which they can't take time off. Greater use of technology could solve this problem.

   The commission's policy, as we understand it, is to solicit public comment on its projects. However, homeowners repeatedly report to us that their letters and emails to the commission staff on the "Clarification" project were either ignored, unanswered or not taken seriously. Homeowners Carole Hochstatter and Norma Walker, Kern County residents, have logged thousands of train miles to attend CLRC meetings on CID issues. Ms. Hochstatter reports that her 2009 letter to the commission volunteering to be part of a working group of 25 homeowners advising the CLRC on this "Clarification" project has gone unanswered to this day. (See attachment.)

   Ms. Hochstatter and Ms Walker made this offer at the commission's 2009 Burbank meeting after it was announced that the CLRC was partnering with a working group of 25 attorneys from the Real Estate Section to overhaul Davis-Stirling. There has been a prominent role for association industry attorneys, property managers, CPAs, and other industry professionals. While their input has no doubt been very helpful, it has not been balanced by homeowner input. Ms. Hochstatter reports that she got no response to her offer of help.

   Recommendation: a homeowner working group should be established to partner with the CLRC on this project.

2. Despite the legal impacts of this project on 9 million homeowners, there has been no meaningful role for them in this project. Changes to be made to Davis-Stirling impact the homeowner legal rights and property, but neither their input nor their ideas has been actively sought out. Homeowner Diane Wallace reported to us that she recommended to commission staff that homeowner participation be solicited through the local offices of state lawmakers, or through surveys, but her ideas were apparently dismissed.

   She also suggested that public hearings be convened – as they were when the commission first launched its study of CID law in 2000, but commission staff said such hearings would be too costly. Ms. Wallace is not the only person to make this recommendation to commission staff. Again: televised briefings through the California Channel and using local legislative offices would solve this problem.

   Recommendation: if cost is a barrier to holding public hearings, then televised briefings on Memo 2011-5 through the California Channel to solicit homeowner comment should be held.

3. We also recommend that the commission launch a campaign to get the views of the thousands – millions? – of association owners in California, who do not speak English. We serve these households through the Center for California Homeowner Association Law, and it takes special effort to find translators and lawyers who speak Spanish, Chinese, Vietnamese, and a host of East Indian languages. If English-speaking owners are struggling to understand Davis-Stirling, I can assure you that monolingual households – like East Indian associations in Southern Alameda County -- have no idea what "Davis-Stirling" means and how it impacts their legal rights. One Orange County homeowner reported to us that she approached the Mexican Consulate in Los Angeles to ask one of its lawyers to monitor elections in her association because the English-speaking property manager refused to provide election materials in Spanish to the monolingual Spanish families in the association. The Mexican Consulate agreed to her request. While I admired her inventiveness, I was also shocked that she had to go to the staff of a foreign nation to get the help that she needed.

   Recommendation: a working group – including Legal Services attorneys -- representing monolingual families and Limited English Speakers should also be briefed on this project and engaged in it.

   Recommendation #2: that future commission meetings be held at the Capitol in meeting rooms where the California Channel can televise the proceedings LIVE. The recordings can be preserved for 24/7 access by the public, giving more meaning to the commission's stated purpose of "public participation" in the process.

   The California Channel routinely records policy committee hearings, informational hearings, and other forums where policies are presented and debated. This is, in fact, the mission of the California Channel: ***"to provide Californians direct access to 'gavel-to-gavel' proceedings of the California Legislature, and other forums where public policy is discussed, debated, and decided – all without editing, commentary, or analysis and with a balanced presentation of viewpoints."***

   It's in the live proceedings of the CLRC that the debate and discussion takes place. It's in live proceedings where existing law versus proposed changes are discussed; and it is clear from the Commission meetings that I have attended that there isn't uniform thinking among the Commission members.

   But how are stakeholders – homeowners -- to understand the issues and the debate without listening to the actual discussion? A camera, focused on the proceedings is a valuable record. The California Channel camera does not blink or edit what you see.

   Others before me have written to the commission recommending that the CLRC record its meetings. But staff has objected that posting recordings on the CLRC website would take up too much space on its website. Posting CLRC proceedings on the California Channel solves this problem. It has the additional virtue of giving ALL stakeholders 24/7 access to CLRC meetings, discussion, and debate. This practice promotes the transparency and public participation policies of the commission.

4. Televising and posting the proceedings also provides a record against which the meeting minutes can be measured. Yes, minutes can be an important record, but they are by definition

edited and compressed. They often contain commentary and analysis, whether intentional or not. Minutes are not a substitute for the actual proceedings of the Commission. The mission statement of the California Channel states why unedited "gavel-to-gavel" coverage is crucial: because it gives the public an unedited view of the discussion and the debate over policy issues. Unedited discussion lets voters decide for themselves what positions they will take. Edited minutes of commission meetings are no substitute for listening to discussion and also identifying how individual commissioners think – and vote -- on a given issue.

5. In addition, key members of the commission itself are often not able to attend CLRC meetings. Lawmakers appointed to the Commission are rarely in attendance, no doubt because of scheduling conflicts. Legislators apparently can't even spare their legislative staff for Commission meetings so that staff can bring first-hand reports back to lawmakers. Televising the proceedings will solve this problem.

   In general, we would like to see the commission move toward greater transparency, which technology now makes possible.

Whether we can support the staff recommendation is not a question we can answer today. I think there are few stakeholders who truly understand what the results of this project are. We recommend, instead, that the commission delay its approval of this project and instead direct staff to prepare – and to televise – briefings that identify all the changes and additions that it is making to a set of laws that affect 9 million California homeowners.

I can always be reached at 510.272.9826 or at mmurray@calhomelaw.org

Sincerely,

Marjorie Murray, President
Center for California Homeowner Association Law
Legislative Committee, California Alliance for Retired Americans (CARA)
mmurray@calhomelaw.org

Attachments:

Letter from Carole Hochstatter and Norma Walker
Letter from Diane Wallace

February 18, 2009

E-MAIL delivery

Brian Hebert
Executive Secretary
California Law Revision Commission
3200 5th Ave
Sacramento, CA 95817

From: Norma J. Walker
Subject: Simplification, and the 25 Attorney Group

Dear Mr. Hebert:

Norma and I have attended CLRC in order to resolve many issues living in a homeowner association in California. We have been welcomed and treated with respect, unlike the treatment in our own Association.

Most recently, we attended the September 2008, meeting in Burbank, California. We spoke in response to Mary Howell of Epstein, Grinnell & Howell, APC, San Diego, Calif. After Ms. Howell's request to extend the deadline period of analysis of the Simplification to the December 2008 meeting, Carole asked whether these 25 attorneys analysis was for "Expertise or Bias. Carole shared that she had researched the 25 attorneys on the internet, and all who had links to a web page were members of firms that took cases from association, but not members. Norma commented that Carole, and I are homeowners/members of The Vineyards Homeowners Association, and we drove to the Burbank meeting from Bakersfield at our own expense. Norma shared that those attorneys who represent themselves as homeowner association attorneys most often represent association boards, not the members. The use of the label

Homeowner Association Attorneys leads to confusion because most members believe these attorneys represent members' interest also, commented Norma During this September 2008 meeting, we commented to the CLRC that after their public comment period for the Simplification issue was over, the 25 lawyer group was able to halt the process.

After the September meeting, and reading the latest memoranda, we find we have these questions:

1. With regard to the current discussion concerning small associations having less access to legal advice, would the Simplification of Davis Stirling be of assistance to ALL associations?

2. Would the CLRC be open to having a discussion with 25 homeowners in association who do not have access to large legal firms that only represent Associations with regard to the Simplification?

3. Does the CLRC understand that legal advice to Associations mean advice to the management and board only?

4. Since small associations are supposed to be having less access to legal advice will this "group of 25" address the problems in the use of Small Claims Court which several individual homeowners have found to be inherently flawed?

5. Why had the "group of 25" waited so long to vent their concerns? Many others have heeded the deadline for public comments.

6. There has been so much conversation, and comments about the election process in Davis-Stirling costing too much. WHAT IS A "SECRET BALLOT" WORTH?

7. Will the "group of 25" analysis benefit only homeowner association vendors, and association boards? Will the "Simplification" speak clearly that legal advice given to Associations represents only the board not homeowners?

8. This proposed "Simplification" is supposed to make governance by volunteer boards simpler; how will this be accomplished by the group of 25?

Respectfully submitted,

Carole Hochstatter
Bakersfield, CA (Kern County)

-----Original Message-----
From: Diane Wallace [mailto:dmbarkwall@gmail.com]
Sent: Tuesday, February 08, 2011 12:44 PM
To: Marjorie Murray
Subject: correspondence with Brian Hebert

Hi -

I have corresponded with Brian Hebert regarding the process and the final proposal for the revision of Davis-Sterling. He wanted to know how I learned about the process. I told him that I am on a listserv for Davis-Sterling, which I am.

However, he explained that the changes were only made if they were OK with everyone. My issue with that, which I explained to him, was that the interests of the homeowners should guide decisions that would have an impact on property ownership and property owners. Property managers and associations should only have equal weight on issues related to the common areas.

I questioned the lack of outreach to CID homeowners. He explained that it would be too costly. I responded and suggested that it wouldn't cost anything. Simply requesting that state assemblymembers and senators communicate the opportunity in their email and written correspondence to constituents. And I also explained that it's free to establish a survey online, on websites like Survey Monkey.

Do we need to change this process to protect homeowners? Would this require new legislation?

Diane Wallace

EMAIL FROM ED WEBER
(2/7/11)

Hi Brian!

I am writing to voice my encouragement to you to open up your Davis-Stirling process to include significantly more input from the property owners who are impacted by the law. As you know, the act was created by the legislature to "protect the interests of HOA members"... those property owners whose associations must abide by the law.

Yet, it appears from your process reporting in memos etc that the very attorneys who represent the associations, not the specific rights and interests of individual owners, are dominating the process. Any assumption that these attorneys have the best interests of property owners at heart is, well, naïve at best, and foolhardy at the worst.

In my personal experience, the association attorneys are guilty of ovrtly profiteering, by pitting their well-funded clients (using members funds) against the very owners/members they are hired to protect. Big buck lawyers are breaking property owners' backs using our own money against us. You have given the fox the keys to the henhouse, and the are feeding off of promoted conflict and calling the shots while board members are intimidated and hoodwinked. We chickens remain unrepresented and victimized. Why else would this be one of the most litigious areas of California Law? I can't find an experienced attorney to defend my rights against the association.

We have corresponded for a few years now during this process; you know me to be reasonable and fair-minded. let me ask you... who is your client... the people of California affected by the law, or the cigar-chomping attorneys in the room with you now who are manipulating boards to their profit? I hope your answer is the people, for this is a Republic that is operating like a Balkan state in this area of the law.

Please open the doors and let owners speak to influence D-S changes before your current process is concluded. It is far from ready for prime time, and owners will be forced to organize to lobby our elected officials to oppose its passage for lack of input.

Respectfully,

Mr Ed
Ed Weber

EMAIL FROM DIANE WALLACE
(2/7/11)

Dear Mr. Hebert,

It is my understanding that the Davis-Sterling Law is being revised. As a resident owner in an HOA, I am concerned that the Commission did not reach out to residents and owners for feedback.

I have become aware that the Commission is taking testimony from attorneys that represent management companies and boards - but not owners. Where is the input from the owners and members of the associations?

There are several issues that need to be addressed:

1. Accountability and compliance with the law - How can owners hold Boards accountable for following the law? Boards do not follow the Open Meeting act. Board members expend HOA funds for repairs in the units of the Board members. Boards that totally ignore the posting requirements of the Agendas and Minutes.

2. Board function - There are Boards that do not run the meetings according to the Open Meeting Act. For example, a couple of Board members meet or discuss an issue that is on or not on the agenda. And their decision is simply announced - not allowing for discussion among Board members - nor voting.

3. Lack of responsibility for reserves - There are Boards that spend money from the reserves or do not adequately fund the reserves - so that maintenance projects require special assessments of the owners.

Since 25 % of all residents in CA live in an HOA, would it be possible for your Commission to survey a sample of owners. It is easy and cost-effective to do this online. I teach research methodology at the university level and have had several students conduct their research in this manner.

Diane Wallace

EMAIL FROM LINDA BROWN, OAKLAND (2/10/11)

Hello Brian,

First, please add this e-mail address to your data base for notification of all notices, meetings, etc. on Common Interest Development (CID) Law. I do not know why my e-address was dropped as I received notices several years ago.

Second, I will not be able to take time from work today to travel to Sacramento for today's meeting. Due to the short notice of learning about this meeting I have not had time to read and fully digest either the narrative or the nearly 300 pages of the draft recommendations on how to fix the poorly-written Davis Stirling and other laws.

Third, given what I did read, I petition the Commission to not approve this document until:

a) public hearings have been held in the major metropolitan areas with attached CID housing, and

b) these public hearings are widely publicized.

While often called a condo or home to those who live in a CID governed by a homeowners association (HOA), CID/HOA housing is also promoted by government and others as "Smart Growth" or "Transit-oriented Development" or "affordable housing."

This type of housing is also typically funded in part by federal funds (Livable Communities grants) or redevelopment dollars and accounts for more than 60% of new housing starts according to one government report.

While this form of housing is often promoted and valued as a way to help reduce traffic congestion and air pollution and "save" farm and others lands from development, the buyers of CID ownership homes are not warned of the financial and health risks associated with CID homes or that these risks are controllable by the elected officials who write the law or enforce the law.

The Department of Real Estate website buries text that basically states that litigation is the only way to resolve disputes if alternate dispute resolution fails. I am not aware of any government entity that reveals the cost of litigation.

I petition to the CLRC to:

a) notify all known CIDs and the governing Homeowner Association (HOA) boards e.g., those corporations registered with the Secretary of State, of newly-publicized hearings about the CLRC's study and recommendations;

b) require that these CIDs/HOAs give all their "members" a minimum of at least three weeks notice of these hearings plus a two-page summary of the background information plus a listing of all the CLRC background documents to read with a an Internet link to each;

c) notify elected officials approving CIDs of these meetings;

d) notify all nonprofits and other entities that can help spread the word, and

d) encourage the media to fully investigate and report on the problems the CLRC is trying to fix.

I also suggest that public hearings in dense areas with traffic congestion like Los Angeles and the San Francisco Bay Area be held in more than one area. For example, hearings in the San Francisco Bay Area would be needed in Oakland or Walnut Creek (East Bay), San Jose (South Bay), and San Francisco (West Bay).

Ideally the hearings would be in a facility near public transit such as the Bay Area Rapid Transit (BART), be televised, and occur during the business day and early evening so workers can attend.

Comments could also be taken live through the Internet or a call-in phone number.

Fourth, the first few pages that I was able to read did not assure me that the proposed changes are going to resolve the root cause of many of the HOA/CID problems. For example:

1) Will these changes treat problems in older buildings that are converted to a CID equal to those problems in newly-constructed buildings?

2) Are all parties to ADR required to fully disclose all information in a timely (10 days) manner and to negotiate in good faith?

3) Will all HOA board members, the HOA homeowner with a complaint, and any renter, worker, guest, passer-by or other be required to participate?

3) Will truly-good faith Alternate Dispute Resolution (ADR) be a requirement for all participants? If so, how will good-faith be monitored since these proceedings are private?

4) Will construction-defect dispute resolution serve the person with a complaint or those who delay?

Fifth, and most important, if I read the text correctly, I strongly object if "all defect lists and allegations" obtained through ADR be [made] inadmissible if the dispute proceeds to a lawsuit.

ADR can be used as a delay tactic. If parties provide prompt and full disclosure of all facts and then negotiate in good faith, and then take care of their responsibilities, the next step, a lawsuit, would not be needed.

Said another way, HOA homeowners do not need laws to protect those parties who use ADR as a delay tactic for complaint investigations and repairs to known defects such as leaks. Even if a lawsuit has been filed,the law should not protect those who seek to stop investigation (and resolution) of problems that affect the health and safety of occupants

We do not need attorneys and/or insurance company staff and/or paid advisors, including attorneys to advise HOA boards or HOA homeowners or local building officials to:

1) forgo the investigation of reported problems such as a leak, dry rot, and/or mold;

2) forgo reporting of problems such problems; and/or

3) in any way cause repairs to known defects be put on hold or repaired slowly.

Such realities thwart the work and recommendations of other state departments like the Department of Health and Human Services and Department of Insurance that state, on their websites, for people--building owners, including the HOA owners of CIDs. to promptly investigate and repair leaks and associated damage.

We do not need laws that shelter those who withhold valuable information from HOA homeowners and some renters (and some HOA boards) who simply want to ensure the safety of their home and the health of the occupants.

HOA homeowners have paid for these repairs through dues and special assessments. Renters have paid through rent.

Due to my experience and understanding that individual homeowners have not been full participants in this review, these proposed changes need more publicity and publicity that targets those who are most adversely affected by current law--HOA homeowners and some renters.

Most of these people are workers with jobs and families. Some are retired workers. To my knowledge there is not a trade association to which these people can pay money to lobby on their behalf. Even if it exists, lobbyists can cost $200,000 or more per year. Businesses, including law firms, can deduct the cost of paying for staff, consultants, and/or lobbyists as a business expense.

HOA homeowners cannot. HOA homeowners--individuals--must pay through loss of time and/or life savings. With current delays, they also pay when they develop stress-related health problems such as anxiety, depression, stroke, and/or heart disease.

In summary, if only lobbyists for business groups have been the ones to primarily shape these recommendations, the results are inherently unfair to workers, retired workers and their families. Full disclosure and a wide discussion is needed to make the needed changes to Davis Stirling and other laws.

Such changes can save the state money and encourage more people to buy and/or live in CID homes.

Thank you for considering these comments. I look forward to learning more about your work.

Linda Brown

To: Brian Hebert, CLRC Feb. 12, 2011

From: Betty Melton, Sun City Roseville

Dear Mr. Hebert

I am a resident in an HOA/CID in Roseville. I have attended CLRC meetings in Burbank and Sacramento. I am particularly interested in the Commission's work on the Davis Sterling Act. I am an avid reader the minutes about each CID meeting. I also realize the magnitude of the work your committee is trying to do to make all of the documents of the Davis Sterling (more) user friendly.

I am impressed with the quality of lawyers and lobbyist that have assembled to give you their input as to how the changes, should be stated. I also recognize that it would be very difficult for you to give equal time to those who do not have all the technical college degrees to give you input. However, I notice that somewhere along the way all of your members have lost sight of the very people who live in these communities.

I believe that there is less attention paid to the rights of the individual residents within a CID community. From time to time the association Board of Directors modifies or makes changes to the governing documents. Often residents never even know that this has happened. While these changes may appear to solve an immediate problem they may eventually lead to an unforeseen problem.

Not being a lawyer, I cannot find any statement in the Davis Sterling act that specifically requires that associations have the responsibility to follow all federal, state and local laws in managing how associations will be run. What happened to the whole idea of the democratic process? It appears to me that, over time, somehow the individuals who pay the bills within the community have been forgotten. Members of the Board may take the position that they are in control and can make decisions and if an individual/s expresses concern then their alternative is to leave.

I believe that the qualifier often at the end of some section or statement of "according to the governing documents" is the reason that there is little attention paid, within CID's, to following all the other societal legal processes in managing an association. It may seem like a lofty goal to put the democratic process first. But, when you consider all the lawyers and lobbyist that make a living off of keeping the process complicated I question whether you need so many of them to give advice.

Go out to the communities and listen to the people. They pay the bill (for association lawyers and memberships in various associations) and deserve some time to be heard. I notice that nearly, all of your, correspondence if from corporations or association committee giving you the benefit of their analysis of some item of interest. It appears to me that the discussion centers basically on the concern of "what's in it for me". Not necessarily on what is in the best interest of the people who live there.

Sincerely,
Betty Melton