

## Third Supplement to Memorandum 2021-14

**2021 Legislative Program (Material Received after Meeting)**

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The Commission received a letter from Marjorie Murray of the Center for California Homeowner Association Law commenting on Memorandum 2021-14. It is attached as an Exhibit.

In her letter, Ms. Murray criticizes Memorandum 2021-14 as one-sided. She also says the Commission's Executive Director urged the passage of SB 391 in testifying to the Senate Housing Committee and coached the Chair of that committee before the hearing.

With one important exception, the record here speaks for itself. Commissioners and others can readily refer to Memorandum 2021-14 and the Executive Director's testimony before the Senate Housing Committee and draw their own conclusions.

The exception involves the claim that the Executive Director coached the Chair of the Senate Housing Committee. As that claim was discussed at the March meeting, it became clear that it was based on a misunderstanding, which was in turn caused by a typographical error in Memorandum 2021-14. That memorandum erroneously states (with emphasis added):

The opposition is based on four main points. All of those points, and possible responses to them, were discussed with the *Committee's* Chair before the hearing in the Senate Housing Committee on March 18, 2021.

The memorandum should have stated (with emphasis added):

The opposition is based on four main points. All of those points, and possible responses to them, were discussed with the *Commission's* Chair before the hearing in the Senate Housing Committee on March 18, 2021.

When this error was pointed out at the March meeting, the Executive Director apologized for the confusion it had caused. He stated unequivocally that he had not conferred with the Chair or any other member of the Senate Housing Committee regarding AB 391. Nor has any other member of the Commission's staff.

The Commission decided to expressly correct the error in the Minutes for the March meeting. The staff regrets the confusion that it produced.

Respectfully submitted,

Brian Hebert  
Executive Director



March 25, 2021

Crystal Miller-O'Brien, Chair  
California Law Revision Commission  
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**RE: (1) Errors and Omissions in Memorandum 2021-14 2021 Legislative Program 3\_19\_21 submitted to the Commission and (2) Permissible Activities Under the CLRC Mandate**

Dear Chair Miller-O'Brien:

Since 2001, staff from the Center for Homeowner Association Law have been testifying before the CLRC on matters affecting the consumer and civil rights of homeowners living in common interest developments. Our testimony and policy statements are in the Commission's archives.

We feel obliged, therefore, to correct the errors and omissions of the March 19, 2021 memo to the Commission, because **Memorandum 2021-14 2021** too will be archived.

**Background: CCHAL Testimony on "CID Meetings During Emergencies"**

Since August 2020 when the Commission introduced the topic of CID meetings during an emergency, our Center has raised concerns about it. Some of our concerns were resolved, e.g. that a board vote at emergency meetings be by roll call; however, several issues were unresolved by the time the CLRC published its final recommendations on the topic in November 2020 and transferred them to the Legislature.<sup>1</sup>

The concerns were that (1) the **association** (HOA) give individual notice **to** homeowners of the meetings and that the "notice" duty not be shifted to owners (2) in conformance with existing law, a physical location be identified for the tabulation of ballots during an election<sup>2</sup> (3) the meetings be recorded for the benefit of owners and board directors who, for many understandable reasons during an emergency, could not attend the meetings at the day/time set by the board (4) the existing Open Meeting Act enforcement statutes be imported into the new Article on meetings during emergencies.<sup>3</sup>

The Commission discussed all these topics at length before publishing the November 2020 final recommendations. The Commission's discussions of and decisions on these four topics are in Mr. Hebert's previously published **Memoranda**.

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<sup>1</sup> See the November 2020 record posted on the CLRC website <http://clrc.ca.gov/pub/Printed-Reports/Pub242-X100-CID.pdf>

<sup>2</sup> Civil Code section 5120(a)

<sup>3</sup> Civil Code section 4955(a)(b)



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### **Other Stakeholders in SB391/Min**

The Center for HOA Law is not the only stakeholder raising these concerns. The California Alliance for Retired Americans (CARA), the largest grassroots senior advocacy organization in the state, signed on with us in a joint letter raising these issues with the Senate Housing Committee once the recommendations took the form of legislation.<sup>4</sup> CARA has taken positions on countless pieces of legislation impacting association owners, because an estimated 1.5 seniors live in California associations.<sup>5</sup> The joint letter again laid out our unresolved concerns.

Habitat for Humanity, a producer of affordable housing, wrote its own letter of opposition on its own letterhead and sent it to the Senate Housing Committee, again raising concerns. For **Memorandum 2021-14 2021** to suggest that our Center's positions on these issues were unthinkingly "adopted" by CARA and Habitat for Humanity is incorrect as both these advocacy organizations have their own legislative committees comprised of veteran housing experts who analyze legislation and can arrive at their own independent conclusions.

### **Senate Housing Committee Analysis**

However, a more serious matter is the omission in **Memorandum 2021-14 2021** of any mention whatsoever of the analysis done by the Senate Housing Committee consultant of the Commission's recommendations once they were incorporated into draft legislation, i.e. SB391/Min.

Anyone familiar with the legislative process knows that, once a bill is set for public hearing, the independent analysis published by a committee consultant is **the** prime tool to be studied by lawmakers, who will be called upon to vote on the bill at a committee hearing. The analysis is a particular guide for a committee chair. The committee analysis is not a rubber stamp but a careful thinking through of a bill and its ramifications.

To write the analysis, the consultant considers the proposed legislation and all the comments and concerns made about it by supporters and opponents of the measure. **Under Government Code 8288, the CLRC can be neither an opponent or a supporter of a bill: its role is academic and deliberative.**<sup>6</sup>

The consultant's analysis of SB391/Min states clearly – and in detail -- that all the concerns raised by our Center, by CARA, and by Habitat ought to be considered by the author as proper topics for amendments to the bill. As the analysis shows,<sup>7</sup> the consultant didn't just **mention** the issues in passing but instead devoted a lengthy paragraph to each concern about (1) notice (2) recording the meeting (3) physical location and (4) enforcement. Senator Min did in fact take a detailed amendment on the "notice" issue at Thursday's hearing.<sup>8</sup>

**Memorandum 2021-14 2021** omits all reference to the official analysis of SB391 or to the recommendations of the Senate Housing Committee consultant i.e. that Senator Min consider taking amendments to resolve the concerns of the opposition. Given the vital role of the consultant's analysis – and the consultant's specific recommendations to the author – it is

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<sup>4</sup> SB391/Min. The Senate Rules Committee referred the bill to Senate Housing and Senate Judiciary committees.

<sup>5</sup> The figures come from the American Housing Survey (AHS), i.e. data derived from the federal census. Many of these associations are the size of small cities.

<sup>6</sup> See California Government Code 8288 and Senate Joint Resolution 91 (2018) attached.

<sup>7</sup> The analysis is posted online 202120220SB391\_Senate Housing.pdf

<sup>8</sup> March 18, 2021.



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unclear to us why the staff **Memorandum** omits entirely any mention of the analysis or the consultant's recommendations.

The **Memorandum** also omits the concerns raised by Senators on the Housing Committee at Thursday's hearing, again on issues described in the analysis: (1) recording the meeting (2) deleting the physical location for tabulating ballots and (3) the enforcement issue. These issues were serious enough that at three Senators stayed off the bill, i.e. didn't vote and two Senators plan to re-visit the issues when it is heard again in Senate Judiciary.

### Role of the CLRC

More disturbing than the **Memorandum's** omission of the analysis was the fact that Commission staff appeared as the prime – and first -- witness at Thursday's hearing to urge the passage of SB391. This is not a matter of dispute but of fact since the videotape of the hearing records Committee Chair Senator Scott Wiener introducing Mr. Hebert as a "prime support witness" for SB391.<sup>9</sup> Mr. Hebert did not correct this introduction or state that he was present in any capacity other than a "support witness." Commission staff was aligned with the second support witness – an attorney from the homeowner association industry. The two "support" witnesses urged passage of the measure immediately after Senator Min presented his bill.

The **Memorandum** states further (p 3) that Commission staff conferred with Committee Chair Wiener before the hearing to coach him in rebuttal arguments to the opposition's concerns should they arise during the hearing.

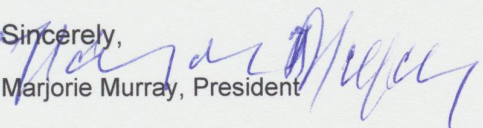
Government Code 5288 permits Commission staff to appear at a public hearing, but their role is specifically limited by the law and by the Legislature's Joint Resolutions. Both make plain that

"the staff of the commission [may be] invited to appear and testify at any committee hearing of a bill to implement a commission recommendation, for the purpose of explaining the recommendation and answering questions posed by committee members, provided that **the staff may not advocate for the passage or defeat of the legislation...**" (emphasis added.)

The Legislature looks to the Commission to be its think tank and to be detached from debates at the Capitol over legislation, that is: to be "above the legislative fray" as it were. However, the testimony of Commission staff as the key witness in support of the bill at Thursday's committee hearing<sup>10</sup> and its coaching of the Committee chair in rebuttal arguments to the opposition's concerns crossed the strict boundaries set out in Government Code 8288. These actions throw the Commission's credibility into question.

We look to your leadership, Commissioner Miller-O'Brien, to ensure that, going forward, the CLRC and its staff resume their invaluable – and unique -- role as the Legislature's subject matter experts, who operate within the boundaries prescribed by law and by resolution.

Sincerely,

  
Marjorie Murray, President

cc: Brian Hebert, CLRC Executive Director bhebert@clrc.ca.gov

<sup>9</sup> A closed-captioned videotape of the hearing is online: <https://www.senate.ca.gov/media-archive>

<sup>10</sup> As well as in conferences with the author's staff.