Study H-853 March 2, 2005

Memorandum 2005-10

State Assistance to Common Interest Developments (Staff Draft Recommendation)

At the January meeting, the Commission reviewed public comments on its tentative recommendation on *State Assistance to Common Interest Developments* (September 2004). The Commission decided to continue working on the proposed law and approved a number of minor changes. The Commission's decisions at the January meeting have been implemented in a staff draft recommendation, which is attached. After reviewing the staff draft, the Commission should decide whether to adopt it as a final recommendation, with or without any additional changes.

A copy of the staff draft was provided to the Assembly Housing and Community Development Committee as background for the informational hearing on the proposed law that will be held on March 9, 2005. The staff will report on the results of that hearing at the next meeting, either through a written supplement to this memorandum or orally.

This memorandum is divided into four main sections:

- New information about Florida's program of state assistance to condominiums and housing cooperatives.
- Data on the cost to administer a program of state assistance to CIDs.
- New features of the proposed law.
- Discussion of comment letters, which are attached in the Exhibit as follows:

EXPERIENCE IN FLORIDA

Previous drafts of the proposed law described Florida's requirement that certain types of condominium disputes be submitted to state-sponsored mediation or arbitration before a lawsuit can be filed. In addition, Florida recently created a Condominium Ombudsman program. The Ombudsman is charged with providing education and dispute resolution services to condominium owners. The Ombudsman program is described briefly at page 11 of the attached staff draft.

At the January meeting, the Commission was informed that Florida once had a program for enforcement of condominium law. The program was said to be defunct and it was suggested that the staff investigate what went wrong in Florida so as to avoid similar problems in California.

As it turns out, the Florida law enforcement program is not defunct. Since the late 1970s the Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division") has been charged with enforcing the laws that govern condominiums and housing cooperatives. This means that Florida now offers a full range of state assistance to condominiums: education, informal dispute resolution, and statutory law enforcement.

The Division's law enforcement program is similar in its basic details to the proposed law. Any person can file a complaint alleging a violation of statutory law (the Division has no authority to enforce CC&Rs). The complaint is reviewed to determine whether the alleged violation is within the Division's jurisdiction. If so, it is investigated.

If the Division finds a violation, it will attempt to resolve the problem informally, through education or a negotiated agreement. If negotiation is unsuccessful the Division will issue a corrective order, which can include a

monetary penalty of up to $5,000 per violation. A penalty can be imposed against an association director personally for a knowing and willful violation.

The Division has adopted a detailed regulatory system to govern the correction of violations and the imposition of penalties. The regulations provide a nonexclusive list of nearly 100 possible violations, all based on specific statutory requirements. These are classified into "minor" and "major" violations. For example, "minor" violations include a failure to allow owners to attend a board meeting, or failure to provide for reserve funding in a proposed budget. "Major" violations include failure to hold an annual meeting, failure to adopt an annual budget, and commingling of association and non-association funds. The distinction between minor and major violations determines the type and magnitude of measures used to correct the violation. See generally Fla. Admin. Code Ann. r. 61-B-20.004-006, 61-B-21.001-003, 61-B-77.001-003, 61-B-78.002-004.

A corrective order issued by the Division is subject to administrative appeal and judicial review. See Fla. Stat. Ann. §§ 120.569 (administrative hearing); 120.68 (judicial review).

Rather than providing an example of a CID law enforcement program that failed and was abandoned, Florida provides an example of a carefully articulated enforcement program that has been functioning for over 25 years.

WORKLOAD AND COST DATA

The staff has collected new data that shed additional light on the likely operating cost of the proposed Bureau. We requested data from the Florida and Nevada programs and from California's Department of Consumer Affairs and Department of Fair Employment and Housing. The available data is discussed below.

Florida

Florida provides approximately the same range of services that would be provided by the proposed Bureau: education, informal dispute resolution, and statutory law enforcement. This program is funded primarily through an annual fee of $4 per condominium or cooperative unit. Florida currently has 1,136,871 condominium units and 74,022 housing cooperative units. This results in revenue of around $4.85 million per year. In addition, Florida charges a $50 filing fee for mediation as well as various developer fees (relating to the approval of subdivisions).

In 2004, Florida received and resolved approximately 2,000 complaints of statutory violations. Florida has 1.2 million condominiums and housing cooperative units. That means an annual rate of one formal complaint for every 600 units. If that rate is applied to California's approximately three million CID units, it would yield around 5,000 requests for investigation of statutory violations each year.

Requests for assistance that do not involve an alleged statutory violation would be handled by the Condominium Ombudsman. The Ombudsman program is too new to have meaningful data on its workload. It is possible that additional expenses related to the new Ombudsman function may eventually require an increase in Florida's fee.

The fact that Florida funds its state assistance program with a $4 annual fee suggests that the $5 annual fee provided in the proposed law should be sufficient to finance a similar program in California. Even if Florida's expenses were to increase by 25% due to the new Ombudsman program, it could cover that expense by increasing its fee to $5, the initial amount provided in the proposed law.

Data in this memorandum on Florida's workload and funding is based on information provided in a series of email messages exchanged between the staff and Jon Peet, a senior management analyst in the office of the Director of Florida's Division of Florida Land Sales, Condominiums and Mobile Homes (February 15-17, 2005).

Nevada

Nevada also provides services that are equivalent in scope to those that would be provided by the proposed Bureau: education, informal dispute resolution, and statutory law enforcement. Nevada's program is funded primarily through an annual fee of $3 per unit. In 2004, Nevada collected roughly $877,000 in per unit fees (from around 97% of Nevada's estimated 300,000 common interest community units).

The 2004 operating expenses for the Nevada program were roughly $1.2 million. The difference between revenue and expenses was made up by drawing against a reserve fund that had built up during the program's early years. Once the reserve fund is exhausted, the annual fee will probably be increased to $4 per unit.

The Nevada program receives approximately 150 requests for formal intervention each year. These requests are handled first by the Ombudsman. If they involve an apparent violation of law they are referred for investigation and possible adjudication. If this ratio holds true for California's roughly three million CID units, the proposed Bureau could expect to receive around 1,500 requests for formal assistance each year.

There is no data on the number of informal requests for assistance received by the Ombudsman. Nevada does not count those calls. Prior call estimates proved unreliable due to problems with the counting methodology. Therefore, we are not able to determine the total number of consumer inquiries received by Nevada's Ombudsman.

However, regardless of the actual call volume, we know that Nevada is handling its current workload, including investigation of alleged statute violations, with a budget of around $1.2 million (approximately $4 per unit). This experience suggests that the $5 fee provided in the proposed law should be sufficient to provide a similar range of services in California.

The information on Nevada's workload and funding is based on a telephone interview with Gail J. Anderson, Administrator of the Nevada Real Estate Division (February 24, 2005).

Fair Employment and Housing

The Department of Fair Employment and Housing ("DFEH") processes complaints about illegal discrimination in employment and the provision of housing. DFEH has approximately 200 employees, offices in 11 cities around the state, and an annual budget of approximately $19 million.

In 2002-2003 DFEH resolved 20,500 complaints. It follows a process of mediation, investigation, conciliation, and adjudication. DFEH is therefore similar to the proposed Bureau in its general scope of operation.

Extrapolation of data from Florida and Nevada suggests that the proposed Bureau would receive between 1,500 and 5,000 formal requests for investigation of statutory violations each year. At most, that is a quarter of the DFEH complaint volume. This suggests that the Bureau's law enforcement component could operate on a budget of $5 million or less. An annual per unit fee of $5 would produce approximately $10.5 million dollars per year at current CID registration levels (see discussion of "CID Registration Compliance" below). This would leave at least $5 million for education and informal dispute resolution.

However, the comparison between DFEH and the proposed Bureau is imperfect. The DFEH procedure makes more use of formal adjudication than would the proposed Bureau. The DFEH process requires adjudication to decide a contested case, while the proposed law provides for issuance of a citation without prior adjudication, subject to an optional right of appeal. Also, as a practical matter, housing and employment discrimination cases are probably more difficult to resolve than a typical CID statutory violation, because a discrimination case can include significant monetary claims.

Staffing Comparison

Another way to compare cost data is by comparing staffing levels. Nevada's program serves 300,000 CID households with its 13 full time employees. This suggests that a similar program serving three million CID households in California would require 130 full time employees.

DFEH currently has 200 full time employees and a budget of approximately $20 million. This averages to a cost of $100,000 per employee. If that average is a reliable measure of the cost to operate a consumer service and dispute resolution agency in California, then the proposed Bureau's 130 employees would suggest that the Bureau's annual expenses would be around $13 million. As discussed below, a $5 per unit annual fee would produce between $10.5 million and $15 million annually (depending on the rate of compliance with the registration requirement). Under a staffing comparison model, the predicted expenses would fall squarely within the range of predicted revenue.

CID Registration Compliance

Collection of the CID Bureau fee depends on compliance with the existing requirement that CIDs register with the Secretary of State every two years. As of February 15, 2005, the Secretary of State reported that 21,113 CIDs had registered. The average size of a CID in California is 100 units. Using this average figure, we might assume that 2.1 million of California's 3 million units have registered. A $5 per unit fee would produce between $10.5 and $15 million each year.

It is possible that the number of units registered is larger than the average figure would suggest. Compliance with the registration requirement is probably skewed toward larger associations. A larger association is more likely to have professional management and legal counsel and therefore to know about the requirement and understand the sanction for noncompliance (loss of corporate status).

Deferred Operative Dates

One of the most significant objections raised to the proposed law is that it would not have the resources to handle the volume of calls it would receive and would wind up being perceived by many homeowners as ineffectual.

The available data suggests that the Bureau's resources should be adequate. However, there could well be an initial shortfall. There would be many steps involved in starting Bureau operations: hire and train employees, adopt procedural regulations, obtain office space and equipment, establish an informational website, prepare to answer homeowner questions, establish and operate an informal dispute resolution system, and establish and operate a system to investigate, correct, and adjudicate alleged law violations. All would need to be done in short order.

Revenue, on the other hand, may be slow in accumulating at first. The fee payment obligation would be biennial, and depending on where in the cycle an association falls when the Bureau begins operation, some significant period of time could pass before the association makes its first payment.

One way to soften this transition would be to ease the Bureau into its duties with a set of staggered operative dates. For example, Articles 1 and 2 of the proposed law could take immediate effect. This would establish the Bureau, provide it with authority to start organizing and equipping itself, and would start the fee payment obligation. Articles 3 (Education) and 4 (Informal Dispute Resolution) could be deferred for six months. This would give the Bureau time to accumulate revenue and complete initial research and training before launching its website and call center. Article 5 (Law Enforcement) could be deferred by one year. Again this would allow more time for the accumulation of revenue and the training of personnel. Importantly, it would also give the Bureau six months of experience in handling homeowner complaints before it begins enforcement. This would allow it to better anticipate the number and type of requests for investigation that it could expect to receive.

The staff recommends this approach. It is a practical way to address the initial imbalance between resources and operational demands that is likely to occur.

This section of the memorandum discusses features of the attached staff draft that are new or are otherwise noteworthy.

Funding Issues

Units Counted in Determining Fee

Some homes belong to more than one association. The members of a homeowners association may also be members of a master association, or may be members of a sub-association that provides specialized services to a minority of the homes within the development. If every association is required to pay the CID Bureau fee for each of its separate interest units, some units might wind up paying the fee more than once (once for each association of which it is a member). That would be unfair.

The staff has attempted to draft language that would ensure that a unit is never required to pay the fee more than once, no matter how many associations it is part of. Unfortunately, the relationships between overlapping associations are not easily described. The overlapping associations exist as a result of individual development decisions and are not uniform in their functions, structures, or terminology. This makes it impractical to draft statutory language that encompasses all of the possible relationships and differentiates between them for the purpose of assigning responsibility for payment of fees.

Instead, the proposed law would state the basic policy (a unit should only be counted once in assessing fees) while leaving it up to the overlapping associations to work out amongst themselves who will pay on behalf of their shared units. Proposed Section 1380.130(c) provides as follows:

> 1380.130. …
> (c) If a separate interest is part of two or more associations, only one of the associations is required to pay the fee for that separate interest. An association can avoid paying the fee for a separate interest by certifying, on a form developed by the bureau, that another association has paid the fee for that separate interest.
> …
> **Comment**. … Subdivision (c) provides that a separate interest should only be counted once in determining the fee under this section, regardless of how many associations the separate interest belongs to. This allows overlapping associations to make whatever arrangement for paying fees that suits their circumstances. For example, the separate interests in a 200 unit planned development

> and a 200 unit condominium project are also included in a master association. The master association pays the fee for all 400 units. The planned unit development association and condominium association are then excused from paying the fee for their separate interests, provided that they document payment by the master association.

Duncan MacPherson, an attorney experienced in real estate law, has also raised the following questions relating to the CID Bureau fee:

(1) Should an undeveloped lot be counted in determining the fee to be paid by an association? For example, there are large CIDs in Northern California that have five thousand lots, but only about a quarter of those lots are developed. The rest are held by the developer for eventual sale. If undeveloped lots are counted in determining the fee, the developer in such an association would face an annual fee of $18,750 (3,750 undeveloped lots times $5). Considering that the developer is not going to be receiving the same amount of Bureau services that would be received by 3,750 homes, is it fair to require the developer to bear that fee burden? The staff requests input on this issue.

(2) Should commercial units be counted in determining the fee amount? Exclusively nonresidential developments are exempt from much of the Davis-Stirling Common Interest Development Act and would be exempt from the proposed law. See proposed amendment of Civ. Code § 1373.

However, there are mixed use developments that include both homes and commercial units. Should businesses in these mixed use communities also pay the CID Bureau fee? They probably should. A business in a mixed-use development could have problems with its governing association, or questions about its rights under the law. There is nothing in the proposed law that would prevent a business in a mixed-use development from asking for Bureau assistance with such problems.

If the Commission were to decide that the Bureau should only assist residential owners, then it would be appropriate to exempt nonresidential units from the fee calculation.

Filing Fee

Proposed Section 1380.400 includes language, in brackets, that would impose a $25 fee to be paid when filing a request for investigation of an alleged statutory violation.

If, as estimated above, the Bureau would receive approximately 1,500 to 5,000 requests for investigation each year, this would yield an additional $37,500 to $125,000 in annual revenue.

A modest filing fee would also help to deter frivolous complaints, thereby helping to conserve investigative resources and reduce unwarranted harassment of association officials.

One of the principal concerns that we have heard about the proposed law is that the Bureau would not have sufficient resources to perform its duties, leading to homeowner dissatisfaction. A filing fee comes at that problem from both ends. It would add revenue while reducing demand for services. **The staff recommends that the bracketed language be included.**

Reimbursement of Filing Fee

The proposed law does not expressly provide for reimbursement of the filing fee if a complaint is borne out, but there is nothing that precludes the Bureau from requiring that a person found guilty of a violation reimburse the filing fee, either as part of a negotiated conciliation agreement or as part of a corrective order.

Should the proposed law include express language authorizing reimbursement? For example, Section 1380.400(c) could be revised as follows:

> (c) If the bureau finds that a violation has occurred, it shall contact the person accused and attempt to abate and remedy the violation through conciliation. A conciliation agreement shall be in writing and signed by the person to be bound by the agreement. The agreement may require that the complainant be reimbursed for the cost of the filing fee. The bureau shall provide a copy of the conciliation agreement to the person who filed the request for investigation.

In addition, Section 1380.410(b) would be revised as follows:

> (b) A citation shall identify the statute that has been violated and the facts constituting the violation. The citation shall order abatement of the violation and may order additional equitable relief as appropriate. The citation may require that the complainant be reimbursed for the cost of the filing fee.

Mediation Filing Fee

The proposed law does not include a filing fee for mediation. This is because the proposed law is intentionally nonspecific about the methods the Bureau

would use in providing informal dispute resolution assistance. The Bureau may choose to use very informal means, such as a telephone conference, or may set up a system of formal mediation, using its own staff or contract mediators as the neutral facilitator, or may choose a mixture of many methods. A filing fee might be appropriate for more formal dispute resolution efforts (like traditional mediation), but inappropriate for less formal assistance (like a telephone conference).

One possible approach would be to *authorize* a filing fee, but not require it. The Bureau could then determine which services warrant a filing fee. For example, Section 1380.300 could be revised to include the following subdivision:

> (d) The bureau may, by regulation, establish a filing fee of no more than $25 to be submitted when requesting dispute resolution assistance. The regulation shall designate the type of assistance that requires payment of the fee. A person shall be notified of the filing fee before receiving services that require payment of the fee.

Should a provision of this type be added to the proposed law?

Certification that Documents Have Been Read

Proposed Section 1380.230 requires that directors and "managing agents" certify that they have read the Davis-Stirling Act (or a detailed analysis of the Act prepared by the Bureau), as well as the governing documents of the association that they serve.

We received comments expressing concern about the definition of "managing agent." The proposed law borrows the definition of the term from existing Section 1363.1, which imposes certain disclosure requirements on prospective managing agents. Section 1363.1(b) provides:

> (b) As used in this section, a "managing agent" is a person or entity who, for compensation or in expectation of compensation, exercises control over the assets of a common interest development.
> A "managing agent" does not include either of the following:
> (1) A full-time employee of the association.
> (2) Any regulated financial institution operating within the normal course of its regulated business practice.

Informal comments from representatives of the California Association of Community Managers and the Executive Council of Homeowners suggest that the definition of "managing agent" is too narrow and that we should perhaps

instead incorporate the definition of "common interest development manager" from Business and Professions Code Section 11501:

> 11501. (a) "Common interest development manager" means an individual who for compensation, or in expectation of compensation, provides or contracts to provide management or financial services, or represents himself or herself to act in the capacity of providing management or financial services to a community association. Notwithstanding any other provision of law, an individual may not be required to obtain a real estate or broker's license in order to perform the services of a common interest development manager to a community association.
>
> (b) "Common interest development manager" also means any of the following:
>
> (1) An individual who is a partner in a partnership, a shareholder or officer in a corporation, or who, in any other business entity acts in a capacity to advise, supervise, and direct the activity of a registrant or provisional registrant, or who acts as a principal on behalf of a company that provides the services of a common interest development manager.
>
> (2) An individual operating under a fictitious business name who provides the services of a common interest development manager.
>
> …

One difference between the two definitions is that the Civil Code definition excludes full time employees, while the Business and Professions Code does not. In that regard the Business and Professions Code may be superior. A property manager could be a full-time employee of an association.

However, in other respects the Business and Professions Code definition is too broad. It includes anyone who provides "financial services" or "management services." Those terms are defined as follows:

> (c) "Financial services" means an act performed or offered to be performed, for compensation, for a community association including, but not limited to, the preparation of internal unaudited financial statements, internal accounting and bookkeeping functions, billing of assessments, and related services.
>
> (d) "Management services" means an act performed or offered to be performed in an advisory capacity for a community association including, but not limited to, the following:
>
> (1) Administering or supervising the financial or common area assets of a community association or common interest development, at the direction of the community association's governing body.

> (2) Implementing resolutions and directives of the board of directors of the community association elected to oversee the operation of a common interest development.
>
> (3) Implementing provisions of governing documents, as defined in Section 1351 of the Civil Code, which govern the operation of the community association or common interest development.
>
> (4) Administering a community association's contracts, including insurance contracts, within the scope of the community association's duties or with other common interest development managers, vendors, contractors, and other third-party providers of goods and services to a community association or common interest development.

Bus. & Prof. Code § 11500(c)-(d).

Is a tax preparer a CID manager? What about a parking enforcement officer or a company that does nothing but process dues payments and maintain records of payments? What about a mere shareholder or silent partner in a company that provides financial or management services?

Expansive definitions are not a problem in the context of the Business and Professions Code because there the terms relate to an *optional* certification program. No one is required to become certified.

Under the proposed law a managing agent would be *required* to read the Davis-Stirling Act and the governing documents of an association that he or she serves.

We should be careful how broadly we define the scope of that requirement. An accountant, parking enforcement officer, bookkeeper, or shareholder in a property management company should probably not be required to read the Davis-Stirling Act or the governing documents of all client associations. The requirement is really only crucial for a person who is directly exercising significant delegated authority over the management of an association. For that reason, the staff recommends that we use the narrower definition in Civil Code Section 1363.1.

Also, note that the Civil Code definition relates to an existing mandatory duty. Persons subject to the existing duty presumably know who they are and would understand that the new requirement also applies to them.

The scope of the definition of "managing agent" should perhaps eventually be reviewed in the context of the entire Davis-Stirling Act, but for our present purposes a narrow definition seems the more prudent choice.

Enforcement Against Homeowners

The proposed law permits any interested person to request investigation of an alleged law violation. However, as a practical matter, most complaints will allege a violation by a board (or agent of the board) rather than against a homeowner. This is because statutory law almost exclusively regulates the conduct of the association and its officers and agents, rather than the conduct of individual homeowners.

The staff requested public input on whether there are any statutes that impose duties directly on individual CID homeowners. A few examples have been provided and are discussed below. In considering whether the Bureau should have authority to *enforce* these statutory duties, recall that the Bureau would have unlimited authority to provide informal dispute resolution assistance with any type of CID dispute.

Duty to Pay Assessments

Civil Code Section 1367.1(a) provides that assessments and related collection costs "shall be a debt of the owner of the separate interest at the time the assessment or other sums are levied." That could be construed as imposing a duty that could be enforced by the Bureau under the proposed law. In response to that possibility, the Commission decided to add language expressly providing that the Bureau's enforcement process is not to be used to collect assessments. Proposed Civil Code Section 1380.400(e) provides:

> (e) The procedure provided in this article shall not be used to enforce the obligation of a homeowner to pay an assessment.

Duty to Maintain Property

Under Civil Code Section 1364(a), an association is responsible for maintenance of the common area, except for exclusive use common area. A homeowner is responsible for maintaining his or her separate interest property as well as any exclusive use common area appurtenant to the separate interest. This arrangement can be overridden by the governing documents. Exclusive use common area can include such things as patios, dedicated parking spaces, and the interior of common walls, floors, and ceilings.

Under the proposed law, an association could request that the Bureau investigate and take corrective action against a homeowner who fails to maintain that person's separate interest or exclusive use common area, on the grounds that

the failure is a violation of Section 1364(a). Should the Bureau enforce this obligation?

One of the principal justifications for law enforcement by the Bureau is the need to level the playing field between association boards and their individual members. If the board wants to enforce the law it can use the resources of the association to fund the enforcement action. If a homeowner wishes to enforce the law the homeowner must put his or her own money at risk. This creates an imbalance of power that favors board enforcement actions and disfavors individual enforcement actions. Bureau enforcement of CID law remedies that imbalance by providing an affordable remedy for homeowners.

That policy is not furthered by providing for Bureau enforcement of an individual homeowner's obligation to maintain separate interest or exclusive use common area property. The board already has resources available at its disposal to enforce that obligation. There is no need for state assistance in that situation.

Should the proposed law authorize Bureau enforcement of the obligation to maintain property? If so, we should consider revising proposed Section 1380.410 so that the limitations on personal liability for fines also apply to a homeowner who is the subject of a corrective citation. Section 1380.410(e) could be revised as follows:

> (e) A fine shall not be imposed against a homeowner, director, officer, or managing agent unless the bureau finds, by clear and convincing evidence, that the violation involved malice, oppression, or fraud, as those terms are defined in Section 3294.

Duty to Provide Documents to Prospective Purchaser

Civil Code Section 1368 requires that a homeowner provide certain CID-related documents to a prospective buyer "as soon as possible before transfer of title to the separate interest or execution of a real property sales contract therefor."

Section 1368(d) already provides a remedy for nondisclosure:

> (d) Any person or entity who willfully violates this section is liable to the purchaser of a separate interest that is subject to this section for actual damages occasioned thereby and, in addition, shall pay a civil penalty in an amount not to exceed five hundred dollars ($500). In an action to enforce this liability, the prevailing party shall be awarded reasonable attorneys' fees.

In the context of a failure to provide advance disclosure of CID-related documents, the staff feels that the remedy provided by Section 1368(d) is superior to any remedy that the Bureau could provide. Recall that the proposed law does not authorize the Bureau to award money damages. Section 1368 does. The proposed law provides for civil penalties, but only on a showing of malice, oppression, or fraud. Section 1368 provides for civil penalties for a "willful" violation, a lower standard of culpability.

Nor is it clear that the sorts of equitable relief provided under the proposed law would make up for a failure to provide advance disclosure of CID-related information. The only equitable remedy that seems apt would be recission, but that is a very harsh consequence that seems out of proportion to the nature of the offense.

The staff recommends that Section 1368 also be carved out of the Bureau's enforcement jurisdiction.

Conclusion

If the Commission agrees that all three of the matters discussed above should be exempt from Bureau law enforcement, it might make sense to add blanket language limiting enforcement to alleged violations *by an association or an association officer or agent*. This would exempt the matters discussed above while also avoiding any unanticipated consequences that might result from other miscellaneous homeowner duties that have not yet been identified or that are added in the future.

Should proposed Section 1380.400(a) be revised as follows?

> 1380.400. (a) Any interested person may file a request for investigation of ~~an alleged violation, of~~ whether an association or an association officer or agent, has violated this title or ~~of~~ the Nonprofit Mutual Benefit Corporation Law as it applies to a common interest development. The request shall be submitted in writing, on a form provided by the Bureau [, along with a $25 filing fee].

If that revision is made, subdivision (e) could be deleted as superfluous (perhaps with similar language added to the Comment for clarity). As currently drafted, subdivision (e) provides:

> (e) The procedure provided in this article shall not be used to enforce the obligation of a homeowner to pay an assessment.

Enforcement Process Elaborated

One problem with the prior draft of the proposed law is that it did not distinguish clearly enough between the Bureau's informal dispute resolution and law enforcement functions. That imprecision could make it difficult to tell whether a Bureau action was part of an effort to mediate a dispute or part of an investigation leading up to enforcement action.

This could cause three technical problems: (1) It might be difficult to determine which statements are confidential because they were made during mediation. (2) It might not be clear when a filing fee should be paid for initiation of mediation or an investigation. (3) It might be difficult to know whether the law enforcement process has been exhausted (if exhaustion of that process is required).

The attached draft remedies this by requiring a formalized written complaint for initiating an investigation and by providing a formal conciliation process as part of enforcement. See proposed Section 1380.400(a) & (c). Language has also been added to require a notice of final Bureau action, to aid in documenting that the enforcement process has been exhausted. See proposed Sections 1380.400(b) (decision not to investigate), (c) (resolution through conciliation agreement), (d) (finding that violation did not occur), and 1380.410(a) (decision on whether to issue citation). These notices would also be generally useful as a means of informing a complainant of the result of an investigation.

The conciliation process has been formalized by providing for a written conciliation agreement, to be signed by the person who would be bound. See Section 1380.400(b). A signed conciliation agreement would then be enforceable by the Bureau in the superior court. See Section 1380.430. The Department of Fair Employment and Housing uses a similar approach. See Gov't Code § 12964.

Election Monitoring

The Florida Condominium Ombudsman is authorized to supervise an association election, if requested to do so by the requisite number of homeowners. Monitoring costs are borne by the association. This is potentially a useful service, which could be provided at no additional cost to the Bureau. A provision authorizing election monitoring has been added to the proposed law as Section 1380.310:

§ 1380.310. Election monitoring

1380.310. (a) If the bureau receives a petition requesting monitoring of an association election that is signed by homeowners representing 15 percent of the voting power of an association, or six separate interests, whichever is greater, the bureau shall appoint a person to serve as monitor of the election.

(b) The monitor shall be permitted to observe election procedures and examine election materials, including ballots cast. The monitor shall certify the results of the election to the bureau and shall report any irregularities in election procedures.

(c) The cost of monitoring shall be borne by the association.

Comment. Section 1380.310 is new. See also Sections 1351(a) ("association" defined), 1351(*l*) ("separate interest" defined), 1380.020 ("bureau" defined), 1380.040 ("person" defined).

Should this section be included in the proposed law? If so, is the threshold for a member petition set at an appropriate level (the numbers are drawn from the Florida statute)?

Exhaustion

In January, the Commission instructed the staff to provide two alternative sections relating to exhaustion of the Bureau's law enforcement process: one requiring exhaustion and the other providing that exhaustion is not required. See the alternative versions of Section 1380.440. The Commission should review those sections and consider which is preferable. A brief discussion of the merits of requiring exhaustion can be found at page 8 of the staff draft recommendation.

ADDITIONAL PUBLIC COMMENT

Support

We received several new letters of support for the proposed law. Paul Katosh writes, at Exhibit pp. 13-15:

> I firmly believe that $10 per unit is fully justifiable. Education, regulations, controls, and punishments will cut down on litigation and abuses.

The American Homeowners Resource Center submitted an editorial that supports the proposed law as better than the status quo, at Exhibit p. 22:

> Homeowner associations have come to a fork in the road. They can careen down the same disastrous road that is lined by brigand lawyers seeking to fleece homeowners every inch of the way. This is a grim option. Or they can travel a road where there is at least

> some law enforcement and protection. The California Law Revision Commission proposal offers that hope.
>
> We think the choice is obvious.

Spencer Wood writes, at Exhibit p. 29: "HOA's need a [Bureau] that has the best interest of the homeowners as a high priority."

Michael Doyle writes to provide additional comments on his support for the proposed law. Attachments to his letter (not reproduced in the exhibit) demonstrate the lack of assistance he received from a range of government agencies (see description at Exhibit p. 32).

Karen Linarez writes in support of the proposed law. See Exhibit p. 33. She describes the high cost of existing legal remedies for CID problems and notes that association officers can misappropriate large amounts of association money if there is no meaningful oversight of their actions. She would prefer that the proposed Bureau have no connection to the Community Associations Institute.

Bruce Osterberg writes to the Assembly Housing and Community Development Committee to express support for the proposed law. See Exhibit p. 34. He feels that a lack of accountability is the root cause of problems in CIDs and that the Bureau would help to alleviate that problem.

George K. Staropoli of Citizens for Constitutional Local Government, Inc. has also written the Assembly Housing Committee in support of the proposed law. See Exhibit p. 36. He emphasizes the importance of an affordable enforcement mechanism for existing homeowner rights.

Opposition

We received several letters expressing opposition to the proposed law. Garth Tanner writes, at Exhibit p. 16:

> Please count me as being absolutely opposed to the creation of a Common Interest Development Bureau! We do not need a government agency to deal with issues that can and should be handled between homeowners and their associations or through the courts. If passed by the legislature, I will lobby the governor to veto any bills on this subject.

Kim Moran writes, at Exhibit p. 16.

> I have read the minutes of the previous meeting and the Sacramento Bee's report on the latest hearings. I still stand firmly opposed to the formation of a Bureau. It appears as if a few homeowners who moved into a Common Interest Development

and do not agree with the CC&R's is your justification for creating a Bureau.

The assessment of each homeowner would require that the HOA to raise the yearly assessment. Additionally, in my experience in working with government, there is a great possibility that the ten dollar amount would increase as the Bureau hires experts to interpret the laws that pertain to HOA's. Also, there is concern that the Bureau would then interfere with the CC&R's of the HOA in trying to determine the enforcement.

Kim Carrasco writes, at Exhibit p. 17:

I am strongly against this proposal. One of the speakers at the meeting Friday stated "some people really think we have a choice in whether or not we live in a homeowners association". I beg to differ - when you purchase a house it is real estate law that you be given the CC&R's and sign that you have read & agree to them.

I choose to live in my neighborhood even though our CC&R's are rather restrictive. They even had us tear out concrete work we had done! We pay almost $400 a year to the homeowners association. The dues have steadily increased since day one. I do not want to fund another government department.

James and Karen Smart write, at Exhibit p. 26:

From what we have observed, it is only a very few who move into these communities and choose to ignore the CC&R's.

If a State commission is formed, we are concerned it will only dilute the powers associations have here in California and cause a lot of unnecessary grief and expense.

Arman and Susan Adreasen write, at Exhibit p. 27:

The last thing a bankrupt state needs is another bureau. The ten dollar fee per home would only be a start. Like most bureaus, it would continue to grow, attempt to expand its authority, and would always need more money. We don't need this proposed bureau to look after our affairs; we are capable of doing it ourselves. As previously indicated, the disgruntled people we have been aware of were those who were trying to "beat" the system and thought they were special. People have a choice; they do not have to live in a community governed by an association. We have always managed to get things accomplished through our association's board of directors when it made sense to do so.

As you can judge by the tone of this letter, we are vehemently opposed to the creation of this proposed Bureau.

Lessons from Florida

Beth Grimm expresses concern about the magnitude of the proposed law, especially in light of uncertainty about the potential workload and costs. See

Exhibit p. 18. Ms. Grimm highlights her concern by pointing to criticism of the adequacy of Florida's program of condominium law enforcement (the "Florida Bureau").

Ms. Grimm reports that CID professionals in Florida described the Florida Bureau as generally unable to handle its work volume:

> The persons with whom I spoke had several comments about the previous Florida bureau (which is very similar in intent and scope as that being proposed in California). These are some of the most pertinent (which are consistent with what I suggested could happen in California, if the cart is put before the horse in this endeavor): "It was undermanned - and not in a position to handle the onslaught of telephone calls." "It got to the point where the bureau was unable to find volunteer attorneys to write opinions to assist the bureau." "The staff was not able to handle the calls that came in effectively." "The bureau never really defined what it was trying to accomplish." "It was a nightmare - there was no mechanism to weed out frivolous calls."

See Exhibit p. 18.

This is puzzling. The Florida Bureau has a *written* intake process. A request for enforcement must be submitted on a printed form. See <http://www.myflorida.com/dbpr/lsc/condominiums/index.shtml>. It is not clear what telephone calls are being described. It may be that the comments refer to prior practices.

Nor is it clear that the complaints about inadequate resources are borne out by the available data. In 2004, the Florida Bureau of Compliance received 1,945 written complaints of statute violations. The Florida Bureau closed 1,957 complaints that year. The fact that more complaints were closed than received suggests that there is some backlog, but the fact that the number received and closed are very close in size suggests that existing resources are adequate to handle the volume of complaints that are received. See email from Jon Peet, Division of Florida Land Sales, Condominiums and Mobile Homes to Brian Hebert (Feb. 15, 2005) (on file with Commission).

The claim that the Florida Bureau does not have clearly defined objectives also seems inconsistent with the available information. The enforcement function is defined by relatively detailed statutory language which has been implemented with very specific regulations. See "Experience in Florida" above.

It may be that the comments criticizing the Florida Bureau will eventually prove to be apt when applied to the Florida Ombudsman. The Ombudsman does

use a telephone intake process and may well have a hard time handling its call volume and weeding out frivolous calls. However, the Ombudsman has only been operating since January 1. That is not enough time to form a useful impression of the Ombudsman's effectiveness. Experience in Nevada suggests that it is possible to provide assistance by phone in a broad range of CID disputes.

Enforcement and Leniency

Ms. Grimm suggests that, if there is an enforcement program, a board should be given a "pass" for the first violation of law found by the Bureau. This would excuse innocent mistakes based on ignorance or misunderstanding of the law. See Exhibit p. 30. She is also concerned about punishment of board members without first offering significant educational assistance. She feels this might create due process problems, presumably because a board member might be punished for requirements of which the board member is ignorant.

The proposed law already provides the flexibility that Ms. Grimm recommends, though not in the form of a "pass." Before a corrective citation could be issued, the Bureau would be required to attempt to resolve the problem through conciliation. See proposed Section 1380.410. Innocent mistakes could be corrected at that stage through equitable, non-punitive means.

The staff shares Ms. Grimm's view of the importance of educational assistance. However, the fairness of Bureau punishment of individual board members is not dependent on the educational assistance provided to those board members. Under the proposed law, an individual board member could *only* be punished for conduct that involves malice, oppression, or fraud. See proposed Section 1380.410(e)-(f). A director who makes an innocent mistake could not be punished. Punishment for an intentional wrong involving bad faith, after an opportunity for administrative and judicial review, would not violate due process.

Ms. Grimm is not opposed to state assistance with education, informal dispute resolution, election monitoring, and enforcement of records access requirements. See Exhibit p. 20. However, she objects to enforcement of other statutory requirements. She feels that the enforcement component of the proposed law reflects an "anti-board" perspective and "a desire to enforce and impose punishment." *Id*.

The staff disagrees. The proposed enforcement powers have been carefully circumscribed to provide for corrective remedies first and punishment only in cases of serious misconduct. The proposed law is similar in this regard to the Florida Bureau's enforcement approach.

Note that Bruce Osterberg would like to see stronger sanctions. See Exhibit p. 35. He proposes that a knowing violation of election laws be made a misdemeanor. Criminal sanctions are beyond the scope of the proposed law.

Relation to Internal Dispute Resolution Process

Larry Robinson is concerned that statutory ADR provisions may overlap with ADR procedures provided in an association's governing documents. This could prove confusing because the Bureau would have authority to enforce a statutory ADR rule, but could not enforce an ADR provision in an association's governing documents. See Exhibit p. 28.

Mr. Robinson suggests that either (1) the Bureau should have authority to enforce governing documents as well as statutes, or (2) ADR procedures should be made entirely statutory (overriding any procedures in governing documents). Under either approach, the Bureau would have authority to enforce all ADR procedures.

The staff recommends against imposing a single uniform ADR procedure on all associations. As has been noted before, CIDs come in all shapes and sizes and a single uniform procedure could override a procedure that has been carefully designed to address a particular community's needs and is working well. The Commission's recent approach of setting out basic requirements and then allowing an association to adopt procedures that meet those requirements ensures basic fairness without micromanaging details. That is the approach taken last year in AB 1836 (Harman). It should be given a chance to work.

The question of whether the Bureau should have authority to enforce governing documents has a constitutional dimension that is discussed in detail below.

Enforcement of Governing Documents

Patrick McLane strongly urges the Commission to reconsider its decision that the Bureau should only enforce statutory law and should not be given jurisdiction to enforce an association's governing documents. He believes that Bureau enforcement of governing documents would not only be useful, but is "the one function that it **must** have to meet the most critical need of

homeowners…." See Exhibit p. 1 (emphasis in original). See also Exhibit pp. 8-9 (disputing prior staff arguments in favor of limited jurisdiction).

The staff agrees that Bureau enforcement of governing documents would be useful. It would provide an affordable remedy for many problems that can arise in a homeowners association.

The staff disagrees that enforcement of governing documents is an essential function. Even without authority to enforce governing documents, the proposed Bureau would provide valuable services that are unavailable today (education, enforcement of statutory requirements, and data collection on the nature of CID problems in California). Most importantly, the Bureau would have authority to mediate any type of CID dispute, including a dispute involving governing documents.

The fact that the proposed law would not provide all possible services does not diminish the value of the services that it would provide.

Reservation of Judicial Power

The crux of the matter is not whether it would be useful to provide for administrative enforcement of governing documents, but whether it would be lawful to do so. As prior memoranda have discussed, there are constitutional limits on adjudication by an executive agency that is created by statute. The agency may not encroach on powers that the Constitution reserves to the judicial branch. See Cal. Const. art. III, § 3 (separation of powers); Cal. Const. art. VI, § 1 (judicial power vested in courts).

Administrative adjudication by a statutory agency does not encroach on reserved judicial powers so long as (1) the ultimate decisionmaking power remains in the courts (the "principle of check"), (2) the adjudicative activity is authorized by statute, and (3) the adjudicative activity is "reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes." See *McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348, 374, 777 P.2d 91, 261 Cal. Rptr. 318 (1989).

The first two requirements are easily satisfied by the proposed law. The proposed law provides for judicial review of a Bureau decision before it becomes final and enforceable (the principle of check) and includes language expressly authorizing adjudication of statutory violations.

The difficulty is the third requirement, that adjudicative activity must be "reasonably necessary to effectuate the agency's primary, legitimate regulatory

purposes." The Commission concluded that enforcement of governing documents would probably not satisfy that standard and decided not to include such authority in the proposed law. Mr. McLane urges us to reconsider that decision. His arguments are reviewed below, followed by a brief analysis of the constitutional restriction.

As an aside, note that George Staropoli misconstrues the Commission's concern about the constitutionality of administrative adjudication of governing documents. He analyzes the issue as one involving impairment of contracts. He does not discuss the reservation of judicial powers. See Exhibit p. 38-39.

Certainty of Legal Analysis

Mr. McLane notes that our prior analysis of the constitutionality of administrative enforcement of governing documents (including the informal input we received from Professor Michael Asimow on the issue) was phrased in terms of likelihood and opinion rather than certainty. "These characterizations are not the language of solid, well-considered legal opinions, and the opinions themselves appear to be based on unarticulated assumptions that are not sufficiently consistent with the nature of the problem." See Exhibit p. 12.

As is often the case in legal analysis, the governing case law does not directly address the facts at issue in the analysis. The key issue before us is whether it would be constitutional for a state agency to enforce what are essentially private agreements (equitable servitudes and the rules of private organizations). The modern California cases discussing the constitutional limits on administrative adjudication do not address enforcement of private agreements. They all involve the enforcement of ordinances or statutes.

In the absence of a decision that directly addresses the question presented for analysis, the best that can be done is to extrapolate from general principles in order to make an educated prediction. See discussion of "Legitimate Regulatory Purpose" below.

Statutory Declaration of Legitimacy

Mr. McLane writes, at Exhibit p. 12:

> Given that the need and appropriateness of enabling the Bureau to adjudicate issues involving the interpretation, applicability, and application of governing documents are generally recognized and acknowledged, what is needed is the service of one or more experts to draft language that will meet the mandates of the *McHugh* tests and any other requirements that must be met to create a law that

> will pass constitutional muster. If the issue is viewed and approached in such positive manner, it is expected and believed that appropriate language can be readily developed and that the worthy objectives of the proposed Bureau can thereby be fully accomplished.

Implicit in this suggestion is the notion that unconstitutional encroachment into judicial powers can be avoided by sufficiently careful drafting of the authorizing statute.

Certainly statutory drafting can strengthen the case for the legitimacy of regulatory adjudication by providing a clear explanation of the lawful basis for adjudication. However, statutory authorization is not enough. "*McHugh* clearly contemplated that the mere fact of legislative authorization does not shield a challenged power from scrutiny under the reasonable necessity/legitimate regulatory purpose prong of the substantive test." *Walnut Creek Manor v. Fair Employment And Housing Comm'n*, 54 Cal. 3d 245, 257, 814 P.2d 704, 284 Cal. Rptr. 718 (1991). In other words, the substantive question of whether administrative adjudication is reasonably necessary for a legitimate regulatory purpose is independent of whether the Legislature authorizes adjudication.

Legitimate Regulatory Purpose

What is a "legitimate regulatory purpose?" To "regulate" is to control by imposition of rules. Imposition of a cap on allowable rents is regulation. Adjudicative enforcement is incidental to the regulation of rent levels. *McHugh*, 49 Cal. 3d at 374. Adjudication of related common law landlord-tenant claims is *not* necessary to regulate rent levels. Adjudication of such a claim would be "extraneous to the Board's regulatory functions" and would

> (i) not reasonably effectuate the Board's regulatory purposes — ensuring enforcement of rent levels — and (ii) it would shift the Board's primary purpose from one of ensuring the enforcement of rent levels, to adjudicating a broad range of landlord-tenant disputes traditionally resolved in the courts.

Id. at 374-75.

In examining whether administrative adjudication is reasonably necessary to a legitimate regulatory purpose, *McHugh* instructs that a court should

> closely scrutinize the agency's asserted regulatory purposes in order to ascertain whether the challenged remedial power is merely incidental to a proper, primary regulatory purpose, or whether it is in reality an attempt to transfer determination of traditional

> common law claims from the courts to a specialized agency whose primary purpose is the processing of such claims.

McHugh, 49 Cal. 3d at 374-75.

The court's "close scrutiny" of the "asserted" regulatory purpose to determine whether it is "legitimate" suggests judicial wariness that the Legislature might try to cloak nonregulatory activity in regulatory clothing, in order to set up an administrative tribunal to process nonregulatory claims.

For example, in a New Hampshire case cited by *McHugh* as illustrative of the substantive limitation on administrative adjudication (see *McHugh* at 366, 374 n.34) the question was whether an administrative agency set up to adjudicate motor vehicle accident claims would encroach on reserved judicial powers. *In re Opinion of the Justices*, 87 N.H. 492, 179 A. 344 (1935). In holding that program unconstitutional, the court stated:

> As a rule which meets most situations, when an executive board has regulatory functions, it may hear and determine controversies which are incidental thereto, but if the duty is primarily to decide questions of legal right between private parties, the function belongs to the judiciary....
>
> …
>
> However much the vesting of the control of private litigation in an administrative board may be thought to aid in the maintenance of some public policy, it is not permissible.

Id. 179 A. 344, 345-46.

Applying the principles stated above, it would appear that adjudication of claims between private parties involving private property use restrictions and the rules of private associations is a judicial rather than a regulatory function.

For example, suppose that an association's declaration prohibits operation of a home business. A homeowner provides website design services from home. The association learns of the website design business and orders it shut down pursuant to the declaration. The homeowner argues that the use restriction in the declaration does not apply to website design, because no special equipment or inventory is located within the home and no meetings are held within the home.

Regardless of which party is correct, what *regulatory* purpose would be served by administrative resolution of the hypothetical dispute? No state rule is at issue. The public has no declared interest in whether a CID homeowner can operate an Internet consulting business from home. The only public interest

would be in providing an expedient and affordable alternative forum — a useful goal, but not a regulatory one.

> Whatever the borderland of doubt and interchange, argument seems unneeded to demonstrate that the function of trying and deciding litigation is strictly and exclusively for the judiciary when it is between private parties, neither of whom seeks to come under the protection of a public interest and to have it upheld and maintained for his benefit. *The function cannot be executive unless executive activity may embrace litigation in general*. If the proposed jurisdiction might be bestowed, the limits of executive authority would be almost without bounds and indefinite encroachment on judicial power would be possible.

In re Opinion of the Justices at 346-47 (emphasis added).

In other words, if all that is required is that administrative adjudication be expedient or otherwise useful as a matter of policy, then there is no effective limit on the permitted scope of administrative adjudication. *McHugh* provides a discernible limit: administrative adjudication is permitted to the extent that it is necessary for implementation of a regulation.

Administrative enforcement of CID statutes is reasonably necessary to state regulation of CIDs. Bureau enforcement of a private property use restriction or governance rule, however desirable it might be as a matter of policy, is not necessary for the regulation of CIDs. It would merely shift CID disputes from the courts to a specialized and expedient administrative forum. It is therefore very likely that a court would hold such adjudication unconstitutional under the substantive standard declared in *McHugh*.

Complications

The distinction between enforcement of a state enforced rule and enforcement of private rights breaks down slightly in the CID context, in two ways:

(1) When a developer drafts a CID's declaration the developer must satisfy certain Department of Real Estate regulations requiring that fair and reasonable governance procedures be included. Although the exact content of the governing documents is not dictated by the state, and can be changed freely once the period of developer control is at an end, portions of the initial documents are largely shaped by state regulatory controls. This gives some governing document provisions a quasi-public quality.

(2) Some statute provisions establish a default rule, but allow the governing documents to override that rule. For example, Corporations Code Section 7512 provides a default quorum for action at a member meeting, but provides that a bylaw may set a

> different quorum. In a sense, the Legislature is regulating quorum requirements, even when it allows for individual variation. It would seem odd if the proposed Bureau could invalidate an alleged member action for lack of the statutory quorum, but would lack jurisdiction if the quorum violated had been expressed in a bylaw (pursuant to direct statutory authorization).

In these cases, the distinction between private arrangements and state imposed regulations is blurred.

However, the distinction remains clear in other cases. In general, the state does not regulate substantive standards used for architectural review, rules restricting use of separate interests or the common area, or a number of other topics that do not relate to governance of the association.

One possible alternative to the currently proposed restriction on the Bureau's enforcement jurisdiction would be to add authority to enforce a governing document that falls into one of the two cases described above. For example, the Bureau could be given jurisdiction to enforce a governing document provision that is "promulgated pursuant to a specific mandate or grant of authority provided in a statute or regulation."

The staff is concerned that a change along those lines would make it more difficult to determine whether a case falls within the Bureau's enforcement jurisdiction. How direct a connection would there need to be between a governing document provision and a statute or regulation in order for the governing document provision to be enforceable by the Bureau? Would the fact that Corporations Code Section 7150 provides generally that "bylaws may be adopted, amended or repealed by the board" mean that all bylaws that satisfy Section 7150 would be enforceable by the Bureau? Would a provision that was drafted to comply with a Department of Real Estate regulation be enforceable by the Bureau, even if it is significantly amended after the period of developer control?

The staff recommends that the current approach be retained: only statutory requirements would be enforced by the Bureau. The benefit of allowing administrative enforcement of some, but not all, governing document provisions does not seem worth the additional confusion that would result. If practical experience demonstrates that the enforcement jurisdiction should be broadened, the Bureau could make the case for expanded jurisdiction in its annual report to the Legislature.

MISCELLANEOUS ISSUES

Ann Roth of the American Homeowners Resource Center poses a number of questions about the proposed law. See Exhibit p. 22. The staff has provided answers to her questions on the AHRC website (www.ahrc.com), which is where her article originally appeared.

Bruce Osterberg suggests reforms to the law governing association meeting minutes and access to membership lists. See Exhibit p. 35. Those issues are beyond the scope of the current memorandum.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

PATRICK L. McLANE
1642 Fallen Leaf Lane
Lincoln, California 95648-8731

September 23, 2004

Nathaniel Sterling, Executive Secretary
Brian Hebert, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield, Room D-1
Sacramento, California 94353-4739

sterling@clrc.ca.gov
bhebert@clrc.ca.gov

Re: CLRC Memorandum 2004-39 and First and Second Supplements thereto
State Assistance to Common Interest Developments (Staff Draft)

Gentlemen:

This letter is being written to supplement my comments and submission at the Commission's September 17, 2004 hearing in Oakland, to make comments and observations on certain aspects of the above-referenced memoranda, and most especially to explain why the Commission's expressed preference for excluding from the proposed Bureau's functions the adjudication of disputes between homeowners and homeowners' associations over the interpretation, applicability, and application of an association's governing documents will inevitably result in promoting legislation that fails to empower the proposed Bureau to perform the one function that it **must** have to meet the most critical need of homeowners in their dealings and relationship with homeowners' associations and their boards of directors.

Need for assistance in enforcing governing documents is acknowledged by CLRC

CLRC Memorandum 2004-20 (State Oversight of Common Interest Developments – Discussion of Issues), dated March 30, 2004, states in its opening paragraph that the Commission's decision "to investigate the possibility of establishing a state agency to oversee common interest developments and assist in the resolution of CID disputes . . . was made in response to *continuing concerns the Commission has heard about the practical problems that homeowners face*

when trying to enforce an association's governing documents or CID law. Under existing law, the only effective means of enforcement is litigation, which many homeowners cannot afford." (Emphasis added).

The next paragraph of Memorandum 2004-20 reads as follows:

"A state oversight agency could assist homeowners in resolving disputes. It could provide information and advice and act as an intermediary in an attempt to resolve a dispute informally. *Where a dispute is not amenable to informal resolution, an agency could take steps to adjudicate the dispute and order appropriate relief. This could provide an affordable alternative to litigation.*" (Emphasis added).

This critical need is recognized and emphasized in Section 1380.100 (Legislative findings and declarations) of the CLRC draft of the proposed legislation (CHAPTER 11. COMMON INTEREST DEVELOPMENT BUREAU), which states in pertinent part:

"(b) Common interest development management is complex. Community associations are run by volunteer directors who may have little or no prior experience in managing real property, operating a nonprofit association or corporation, complying with the law governing common interest developments, *and interpreting and enforcing restrictions and rules imposed by a common interest development's governing documents.* . . . Mistakes and misunderstandings are inevitable and may lead to serious, costly, and divisive problems. . . . " (Emphasis added).

The need for the proposed Bureau to have authority to deal conclusively with issues involving the violation of an association's governing documents is stressed and advocated explicitly in the communications from Mel Klein and implicitly in the communications from Bruce Osterberg attached to your First Supplement to Memorandum 2004-39 (dated September 14, 2004). The seriousness and extent of the problems, and the resulting need for a Bureau empowered to deal effectively with such problems, seemed also to be generally recognized and acknowledged by virtually all of the commissioners at the Commission's September 17, 2004 hearing.

Failure of proposed legislation to provide for enforcement of governing documents

However, as noted on page 5 of the said First Supplement to Memorandum, under the heading *Enforcement Jurisdiction, Type of Violation*, you correctly state that:

"The proposed law provides for bureau assistance in *mediating* a dispute involving CID law or a CID's governing documents. As presently drafted, the

enforcement authority of the Bureau would be narrower. It would only apply where there is a violation of 'the law governing common interest developments.' *The bureau would not have authority to issue a citation or impose a penalty for violation of an association's governing documents."* (Emphasis in final sentence added).

Stated reasons for not providing for enforcement of governing documents

In reaching apparent consensus (as expressed at the said hearing of the CLRC) that the proposed draft legislation should be left as is, and should not provide for having the Bureau deal with the actual adjudication of issues relating to violations of an association's governing documents, the commissioners seem to have based their conclusion on two major considerations. The first was the staff's concern (as set forth on page 7 of the said First Supplement to Memorandum) "that administrative enforcement of an association's governing documents, independent of any statutory violation, would cross the line into adjudication of disputes that have traditionally been resolved by the courts." The second consideration was that the extent of the need for services adjudicating issues involving governing documents would create demands on the Bureau that would far exceed its resources, and thus its ability to furnish the services that would be required in this area.

Providing only for mediation will neither meet the need nor solve the problem

The obvious problem with not providing for steps beyond mediation of disputes involving an association's governing documents is that without the threat of adjudication and enforcement in the event of refusal to mediate, or in the event of the failure of mediation to produce a mutually acceptable settlement, associations will have little or no incentive to mediate in the most difficult and contentious cases, and will have little or no incentive to be reasonable in the process of mediation where they do agree (or are compelled) to engage in mediation. Without the necessary incentives to mediate in good faith, the proposed provisions for mediation will do little, if anything, in many if not most cases, to meet the acknowledged need for the fair and expeditious resolution by the Bureau of controversies involving an association's governing documents. **For this reason, rather than abandon and forego any provision for adjudication and enforcement by the Bureau, emphasis needs to be given to finding ways to overcome the considerations that have led the Commission to its conclusion that the proposed legislation should not go further than to have the Bureau provide only mediation services with respect to issues involving an association's governing documents. The challenge for the Commission should be to find a way to overcome the negative considerations and assure that the proposed legislation does not fall short of accomplishing what needs to be recognized as one of its most basic and important objectives.**

Separation of powers issue can be resolved by meeting the tests in the *McHugh* case

The first consideration of the staff and the commissioners, raising the question of whether an administrative adjudicative scheme can survive a constitutional separation of powers challenge, has been rather thoroughly explained and discussed in both (1) Memorandum 2004-20 (at pages 15-18) and (2) First Supplement to Memorandum 2004-39 (at pages 6-8). The final paragraph on this issue in the latter document reads: *"Considering the obvious benefit of bureau assistance in resolving a dispute that involves an association's governing documents, it may make sense to revise the proposed law to allow for agency enforcement of governing documents."* (Emphasis added). It goes on to show the specific changes to proposed Section 1380.310 (Violation of Law) that could be made to accomplish this objective. This line of thinking needs to be adopted and vigorously pursued, and the recommended changes to Section 1380.310 should be adopted to help accomplish one of the primary and most important purposes of the proposed legislation.

Both Memorandum 2004-20 and First Supplement to Memorandum 2004-39 note and discuss *McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348, 261 Cal Rptr. 318, 777 P.2d 91 (1989), the seminal case on the issue relating to the separation of powers doctrine. Memorandum 2004-20 (at page 16) states:

"The court in *McHugh*, departing from earlier precedent, announced that in the future it would apply a two-prong test to determine whether an administrative adjudication scheme can survive a separation of powers challenge. The first prong is a 'substantive' test – is the administrative procedure reasonably necessary to accomplish the agency's regulatory purposes? The second prong is the 'principle of check' – the judicial branch must retain the ultimate power of decision in the case."

It would seem that the substantive test is clearly met by the need for adjudication and enforcement powers to accomplish the proposed Bureau's stated regulatory purposes, as set forth in proposed Section 1380.100 (Legislative findings and declarations). If necessary, the said section can be tweaked and augmented to assure that the substantive test is met. Similarly, the "principle of check" test can be met simply by providing the opportunity for judicial appeal and review. Compliance with this test can be readily assured by appropriate drafting of the legislation, probably by adapting appeal models presently established and tested under existing laws.

Funding requirements can be met by a fee-for-services approach

The second consideration of the staff and the commissioners, namely the lack of funds necessary to meet the need for adjudication and enforcement services in

connection with issues involving an association's governing documents, poses a more difficult challenge, but not one that cannot be met and overcome.

Unfortunately, although recently passed AB 2376 (Architectural Review) contains fine-sounding provisions requiring (1) that the governing documents provide a fair, reasonable, and expeditious procedure for making decisions on a homeowner's request to make a physical change to the homeowner's property, (2) that decisions shall be made in good faith and may not be unreasonable, arbitrary, or capricious, (3) that decisions shall be consistent with any governing provisions of law [*note that there is no stated requirement that decisions also be consistent with all applicable provisions of the governing documents*], and (4) that decisions shall be in writing and, in the case of disapproval, shall include both an explanation of why the proposed change is disapproved and a description of the procedures for reconsideration of the decision by the board of directors, AB 2376's effectiveness is only as good as the honesty, reasonableness, fairness, intelligence, motivation, and private agendas of the individuals having the power and responsibility to carry out its mandates. In situations where some or all of these traits are sorely lacking, the well-intentioned requirements of AB 2376 are rendered hollow and meaningless in the absence of any cost-effective way of enforcing them.

The failure of AB 2376 to provide specifically and meaningfully for the architectural review procedures necessary to assure due process to homeowner applicants, including a legally valid and effective process for the determination of contested legal issues, and for the review of adverse architectural review committee decisions, will inevitably result in far more cases being referred to the Bureau for assistance than would be necessary if AB 2376 had included provisions that were proposed to promote the procedural and substantive validity of architectural review decisions. Also, recognizing that the purposes of the proposed legislation under consideration will not be met unless the presumably substantial backlog of problems involving governing documents can be dealt with (and adjudicated if necessary) by the Bureau, the Bureau's jurisdiction needs to include such backlogged cases, and the demand for adjudication and enforcement services will be swelled by the number of cases arising before the effective date of the proposed legislation.

Because of the huge need and importance of Bureau involvement in providing adjudication and enforcement services with respect to issues involving an association's governing documents, the funding requirements to enable the Bureau to meet the need and provide the required services should be met on some fee-for-services basis. The fees would be based on the extent of the services required, and should perhaps be determined in each case by the amount of time required by Bureau personnel to provide the requested services. The fees could be as high as necessary to effect cost recovery by the Bureau, and would necessarily vary from

case to case, but even the Bureau's highest fees would most likely make a resolution available and possible to abused homeowners at significantly less cost than if they had to pursue their claims in arbitration or litigation independent of the Bureau. Each aggrieved homeowner would be free to decide if he or she wanted to incur the fee obligation as the cost of enlisting the Bureau's services with respect to issues concerning the governing documents. The feasibility and practicality of this suggestion (and variations thereon) need to be examined and analyzed to determine if the proposed approach can provide the funding necessary to enable the Bureau to perform what may be its most critically needed and important functions.

Adjudication and enforcement procedures make mandatory mediation unnecessary

Mediation should be utilized only if all parties voluntarily agree to submit themselves to the process. It is generally acknowledged that mediation does not work unless all parties are motivated to seek a mediated settlement and any imbalance of power is neutralized by a competent mediator or by the more powerful party's good will or concern for possible adverse consequences of not reaching a mediated settlement. In such cases, mediation may reasonably be expected to yield a fair result if the alternative to mediation (or to mediation that fails to produce a settlement) is adjudication that might possibly produce results and consequences less favorable than the results that might be achieved through mediation. Unless all parties subscribe to this thinking, mediation is a waste of time and should not be compelled. An association may be motivated to accept mediation if the alternative is adjudication by the Bureau, but would refuse mediation, or engage in it only to bully a homeowner into an unfair settlement, if the alternative was third-party arbitration or litigation that the homeowner was not likely to be able to afford.

It is also true that some cases, such as typical architectural review cases where the overriding issue is simply whether or not a specific proposed change in the applicant homeowner's property can or must be allowed under the provisions of the governing documents, do not lend themselves to the kind of compromises that might make mediation a reasonably effective way of resolving a dispute. In such cases, unless mediation is honestly and voluntarily subscribed to by both parties, mediation is virtually sure to be a waste of time and resources, and should therefore not be compelled.

Personal responsibility of directors and right to indemnification

The kinds of problems that the proposed legislation is intended to deal with arise largely because of the ignorance, dishonesty, malice, oppression, fraud, bad faith, and/or incompetence of individuals in positions of authority. Unless such individuals are held personally accountable for their illegal, incompetent, and/or

otherwise improper conduct with respect to aggrieved homeowners, and are at risk for the imposition of fines and removal from office, their wrongful behavior will not be deterred. Indemnification should be prohibited in any case in which the Bureau determines that a director's or officer's actions involved malice, oppression, fraud, dishonesty, or bad faith. With the kind of people who create the need for the proposed legislation, motivation is needed to promote righteousness, and the prospects of administrative adjudication and personal liability without indemnification are necessary to encourage their proper and legal behavior.

PATRICK L. McLANE
1642 Fallen Leaf Lane
Lincoln, California 95648-8731

January 25, 2005

Nathaniel Sterling, Executive Secretary
Brian Hebert, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield, Room D-1
Sacramento, California 94353-4739

sterling@clrc.ca.gov
bhebert@clrc.ca.gov

Re: CLRC Memorandum 2005-2 - State Assistance to Common Interest Developments (Comments on Tentative Recommendations set forth in section entitled *Administrative Law Enforcement Authority* [at pages 20-24])

Gentlemen:

This letter is being written to supplement both my earlier letter to the Commission dated September 23, 2004, and my comments at the Commission's January 17, 2005, hearing in Sacramento with respect to the portion of the above-referenced Memorandum entitled *Administrative Law Enforcement Authority* (on pages 20-24). The primary purpose of this letter is to explain why the Commission's expressed preference for excluding from the proposed Bureau's functions the adjudication of disputes between homeowners and homeowners' associations over the interpretation, applicability, and application of an association's governing documents will inevitably result in promoting legislation that fails to empower the proposed Bureau to perform the one function that it **must** have to meet the most critical need of homeowners in their dealings and relationship with homeowners' associations (HOAs) and their boards of directors.

Enforcement of Governing Documents (pages 20-22)

The September 23, 2004, letter contained a section (on pages 1 and 2) which noted and explained that the "need for assistance in enforcing governing documents is acknowledged by (the) CLRC." As basic and critical as this premise is recognized to be, the subsection of the Commission's Memorandum 2005-2 entitled *Enforcement of Governing Documents* contains statements which substantially and inappropriately undermine the premise and purport to be reasons for not empowering the proposed Bureau to adjudicate and enforce matters relating to disagreements between homeowners and HOAs over the interpretation, applicability, and application of governing documents. These statements need to be identified, examined, and challenged, as follows:

1. The introduction preceding the said subsection reads as follows:

"One of the principal powers of the proposed Bureau would be to investigate alleged violations of law and issue corrective citations. This is a necessary backstop to the Bureau's conciliation functions. An agency without enforcement powers would be far less effective in resolving disputes informally."

These statements are all absolutely true. What is missing is recognition that the provisions of governing documents are every bit as much of the "law" applying to the relationship of HOAs to their homeowners as are actual laws pertaining to this relationship. The very nature of HOAs is that they have been mandated and enabled by government-enacted laws and given the right and power to create their own "laws" in the form of "governing documents." The provisions of these documents are only partly mandated by law. Such documents are created and put in place by developers without homeowner participation or approval and imposed on homeowners involuntarily as a condition and requirement of home ownership. They are classic contracts of adhesion which have the authority of law, despite the fact that they have not come into existence through the democratic process of legislation. Furthermore, no provisions of any meaningful consequence have been provided for due process procedures to determine their meaning, applicability, and application, and these functions are left to committees and boards of directors that in many cases are not blessed with the ability, or the inclination, or the integrity to interpret and apply them in a fair, reasonable, and legally correct manner. The problem is compounded by the fact that courts are reluctant to intervene in matters involving the interpretation, applicability, and application of governing documents or in the management and decision-making processes of HOAs, and that this circumstance can be (and often is) interpreted by HOA functionaries in positions of authority to constitute a license to do literally whatever they please under the guise of "enforcing the governing documents." In this area, the potential for hypocrisy, mendacity, and all manner of mischief and abuse knows no bounds. In such unfortunate circumstances, relief will be available under the proposed law only if it is recognized that governing documents are an essential part of the "law"

governing the relationship between HOAs and homeowners, and need and deserve to be given equal status with governmental laws for the exact reasons so appropriately set forth in the above-quoted introduction to this subsection.

2. Although under Civil Code Section 1354(a) "(t)he covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, . . . ," and the tests for determining whether individual restrictive covenants are "unreasonable" as a matter of law, and therefore unenforceable, are set forth in *Nahrstedt v. Lakeside Village Condominium Association, Inc., et al.,* 8 Cal.4th 361, 878 P2nd 1275, 33 Cal.Rptr.2nd 63 (1994), the question of reasonableness (and enforceability on that account) is only one of the possible issues in disputes between homeowners and their HOAs. More often the issue concerns the interpretation, applicability, and application of specific provisions of the CC&Rs in a given situation, without any dispute over whether the provisions are unreasonable as a matter of law. These issues can usually and generally be decided without challenging the presumptive validity of the provisions that are being interpreted and applied, just as issues involving the interpretation and application of governmentally established laws and regulations are decided.

3. The assertions that the "(e)nforcement of governing documents would substitute the Bureau for the association in determining whether and how to enforce rules," and that "(t)his would disrupt self-governance by inserting the state into discretionary and political decision-making" are offered as reasons for not empowering the proposed Bureau to become involved in the resolution of issues concerning the interpretation, applicability, and application of governing documents. This denies and fails to recognize one of the most basic needs for having the Bureau at all. As the situation now stands, HOAs are free to interpret and apply the provisions of their governing documents in whatever manner they may choose, on a case-by-case basis or by general interpretations that may or may not have anything to do with fairness and legal correctness, subject to no requirements for due process, and to no provisions for objective consideration on appeal. To the extent that there may be rules or appeal procedures in place, these can be misapplied or ignored with impunity, as there are now no consequences for errors and abuse short of formal adjudication (whether by arbitration or litigation). Often the abuse of power takes the form of claiming "discretion" (and exercising such "discretion" against the homeowner) in situations where the provisions being interpreted and applied require a given result and do not require or even permit the use of "discretion." Similarly, in cases where there may be justification for considering that discretion can be applied, such discretion can be grossly abused to rationalize a prejudicial determination against the hapless homeowner. The potential for such abuses, and the need to provide the homeowner with relief from such abuses without having to engage in expensive and problematic litigation, should be recognized as primary reasons for creating and tasking the proposed Bureau rather than as reasons for limiting its jurisdiction to preclude consideration

and adjudication of conflicts over the interpretation, applicability, and application of governing documents.

4. The assertions that "(e)nforcement of statutory law provides an inexpensive remedy to *homeowners* if an association violates the law" and that "(e)nforcement of governing documents would provide an additional remedy to *associations* to enforce their rules" to support the conclusion that "(s)uch assistance is not required to level the playing field and would undermine efforts to do so" fails to recognize **(a)** that *associations* will have no need to utilize the services of the Bureau "to enforce their rules" because they have all the unrestrained power that they need to enforce their rules without any help from any Bureau that might be created, but **(b)** that *homeowners* have rights under the governing documents that can be arbitrarily denied or trampled upon by their *associations*, and thus need the services of the Bureau to assist them in situations where their *associations* fail to acknowledge their rights under the governing documents just as much as, and perhaps more so than, in situations where *associations* fail to follow laws created and imposed by government.

Encroachment on Judicial Powers (pages 22-24)

This issue was discussed, and the argument that the separation of powers challenge can be resolved by meeting the tests in the *McHugh* case was presented, in a special section of my September 23, 2004 letter (on pages 3 and 4), which read as follows:

"The first consideration of the staff and the commissioners, raising the question of whether an administrative adjudicative scheme can survive a constitutional separation of powers challenge, has been rather thoroughly explained and discussed in both (1) Memorandum 2004-20 (at pages 15-18) and (2) First Supplement to Memorandum 2004-39 (at pages 6-8). The final paragraph on this issue in the latter document reads: *"Considering the obvious benefit of bureau assistance in resolving a dispute that involves an association's governing documents, it may make sense to revise the proposed law to allow for agency enforcement of governing documents."* (Emphasis added). It goes on to show the specific changes to proposed Section 1380.310 (Violation of Law) that could be made to accomplish this objective. This line of thinking needs to be adopted and vigorously pursued, and the recommended changes to Section 1380.310 should be adopted to help accomplish one of the primary and most important purposes of the proposed legislation.

"Both Memorandum 2004-20 and First Supplement to Memorandum 2004-39 note and discuss *McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348, 261 Cal Rptr. 318, 777 P.2d 91 (1989), the seminal case on the issue relating to the separation of powers doctrine. Memorandum 2004-20 (at page 16) states:

"The court in *McHugh*, departing from earlier precedent, announced that in the future it would apply a two-prong test to determine whether an administrative adjudication scheme can survive a separation of powers challenge. The first prong is a 'substantive' test – is the administrative procedure reasonably necessary to accomplish the agency's regulatory purposes? The second prong is the 'principle of check' – the judicial branch must retain the ultimate power of decision in the case.

"It would seem that the substantive test is clearly met by the need for adjudication and enforcement powers to accomplish the proposed Bureau's stated regulatory purposes, as set forth in proposed Section 1380.100 (Legislative findings and declarations). If necessary, the said section can be tweaked and augmented to assure that the substantive test is met. Similarly, the "principle of check" test can be met simply by providing the opportunity for judicial appeal and review. Compliance with this test can be readily assured by appropriate drafting of the legislation, probably by adapting appeal models presently established and tested under existing laws."

Commenting on statements made in Memorandum 2005-2 on this issue:

1. It should be clear, and can be made clear in the statement of purpose, "that the Bureau's 'primary, legitimate regulatory purpose' would encompass adjudication of disputes arising from an association's governing documents" as well as the "enforcement of regulatory statutes." Appropriate drafting of the statement of purpose should both satisfy the requirements of *McHugh* and enable the Bureau to perform a critically needed function.

2. In order to support the argument that the challenged remedial power is merely incidental to a proper, primary regulatory purpose, and not *in reality an attempt to transfer determination of traditional common law claims from the courts to a specialized agency whose primary purpose is the processing of such claims*, it must be noted that claims involving the interpretation, applicability, and application of governing documents having the effect of law without having been created by a traditional law-making body and without any requirement for due process in determining disputes between the lawmakers (developers) and the associations that they create (and control in the early years) on the one hand, and the persons bound by the private laws contained in governing documents on the other, can certainly not be fairly or accurately characterized as "traditional common law claims." The courts are not accustomed to dealing with such claims, and have demonstrated great reluctance and unwillingness to "interfere" in matters involving governance by HOAs and anything having to do with the enforcement of their governing documents. This circumstance actually creates a need for adjudication in a specialized forum, and the assigning of such power and jurisdiction to the proposed Bureau will help to fill a very significant vacuum

rather than be an usurpation of court jurisdiction over "traditional common law claims."

3. If the power to award compensatory and punitive damages cannot be granted to the Bureau, the Bureau can still be empowered to make decisions about the substantive application of governing documents without the right to award damages. Although this would not provide for total adjudication of all the consequences of disputes involving governing documents, homeowners should not be denied the Bureau's services in determining the interpretation, applicability, and application of governing documents in disputes between homeowners and their HOAs. Although the homeowner can always elect to seek full adjudication, including damages, through arbitration or litigation, the main concern of homeowners in most cases is likely to be the legally and equitably correct resolution of the basic issues of interpretation, applicability, and application of governing documents, and it is expected that in a vast majority of cases homeowners will be quite willing to forego whatever claims they may have for damages in return for the opportunity to have their main concerns dealt with in an affordable manner in the administrative forum provided by the proposed Bureau.

4. The portion of this subsection noting and discussing requests to experts and others "for input on whether Bureau enforcement of governing documents would impermissibly encroach on reserved judicial powers" refers to the opinion of only one expert (Professor Michael Asimow of UCLA Law School), and describes his opinion in only the most general terms and with such inconclusive characterizations as "he has serious doubts," "he questions," and "(h)e believes that the courts are 'really sensitive to laws that would strip them of their traditional business.'" These characterizations are not the language of solid, well considered legal opinions, and the opinions themselves appear to be based on unarticulated assumptions that are not sufficiently consistent with the nature of the problem that needs to be specifically addressed by the Commission in its effort to determine the legally acceptable scope of the proposed Bureau's jurisdiction and functions. In these circumstances, a generally stated question, and a generalized opinion in response to the question, are neither helpful nor conclusive.

5. Given that the need and appropriateness of enabling the Bureau to adjudicate issues involving the interpretation, applicability, and application of governing documents are generally recognized and acknowledged, what is needed is the service of one or more experts to draft language that will meet the mandates of the *McHugh* tests and any other requirements that must be met to create a law that will pass constitutional muster. If the issue is viewed and approached in such positive manner, it is expected and believed that appropriate language can be readily developed and that the worthy objectives of the proposed Bureau can thereby be fully accomplished.

As stated and emphasized in my September 23, 2004 letter, for the reasons and considerations stated therein and herein, **"**rather than abandon and forego any provision for adjudication and enforcement by the Bureau, emphasis needs to be given to finding ways to overcome the considerations that have led the Commission to its conclusion that the proposed legislation should not go further than to have the Bureau provide only mediation services with respect to issues involving an association's governing documents. The challenge for the Commission should be to find a way to overcome the negative considerations and assure that the proposed legislation does not fall short of accomplishing what needs to be recognized as one of its most basic and important objectives."

LETTER FROM PAUL KATOSH (1/21/05)

Date: 21 January 2005
To: California Law Revision Commission
Attn: Mr. Brian Hebert, Assistant Executive Secretary
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Brian:

Thank you for including me in all correspondence concerning Homeowner Associations (HMA's). I moved to Kirkwood in 1975 and joined my association in 1979. The abuses and criminal acts I have witnessed in this period are outrageous. The California Law Revision Commission (CLRC) is performing very important and long overdue work. The locals in Kirkwood support your efforts 100%.

I am not an attorney, but, as a Real Estate Broker in California, I can follow most of the legal arguments being discussed. The anecdotal examples given here are not meant to be personal in nature. All the facts are in writing, either through my association or the Amador County Court System. Commenting on the word "anecdote", Webster's defines it as "short narrative of an interesting, amusing, or biographical incident."

My one suggestion to the CLRC would be that the following examples — and countless others that go unrevealed — be taken very seriously. We need help!

I. Latest Example: As the letter dated November 28, 2003 illustrates, the my association's Board likes to stretch interpretations of the CC&R's. For instance, a vehicle with lettering (VWL) is clearly not a "sign."

The association's CC&R's have no restrictions on VWL's, and there are many such vehicles parked within common areas. However, the only vehicle towed was mine, which cost me nearly $400. The Board's "threat to tow" letter was sent to

only one person with a VWL. The Amador County Sheriff's Department has enacted a policy concerning the towing of vehicles, yet I suspect the association has no knowledge of these rules and procedures.

In essence, this is ***conspiracy to commit grant theft auto!*** Of course, everyone says, "Paul, you are overreacting again!"

II. Prior Example: About seven years ago, the association's Board decided to "get tough" on dues and "enacted" rules and penalties that were truly offensive. In my case, they started foreclosure before the due date for payment, and "discovered" that, in their opinion, I had forgotten to pay dues 10 years ago! The resulting fines and penalties would, therefore, be compounded big time!

Of course, they were unable to produce any evidence, and I won my Small Claims Court decision, thereby receiving fair compensation. Let's remember, however, that I did pay a price when you consider that the association Board spent thousands in insurance money to pursue their case against me.

We all know that taking one's home is serious business and should be done in the rarest of occasions. Lenders and other individuals must follow precise and detailed steps to secure the deed to one's property. The association's Board, however, was engaged in ***a conspiracy to commit grant theft home*** with a one-page document in less than 30 days!

III First Example: About 12 years ago, my association decided to alter the CC&R's in a manner that would allow for driveways and garages. The association's Board and Planning Committee would work out the details. The resulting document was written so as to prohibit the ten or so property owners who owned "flag lots." Since our driveways would be longer than most, some people decided to exclude us.

After a long, bitter, and costly battle in Amador County Superior Court at a cost to me of $12,000, I was able to convince the Court to right this terrible wrong. For instance, how would a disabled person be granted access to my home for rental purposes? Or to purchase it?

This was another attempt by the association's Board to illegally implement a ***conspiracy to block access which violated the ADA (The Americans with Disabilities Act)!***

As I mentioned, these examples can be proven. The documents do exist. These felony-level acts clearly illustrate serious disregard for the law.

Anyone can carp and complain, but I would like to be part of the solution. However, to find good, solid solutions, we must first identify the problems.

A. Most of the people sitting on HMA Boards do not *know* the law. Most would not understand the difference between a "Prescriptive Easement" and a prescription drug! The CLRC is on the right track here. HMA Boards must be regulated, controlled, and, most important, punished if they commit crimes!

A huge white collar crime "hole" now exists in our California society. People are in jail for *attempting* to steal a purse. The association's Board, on the other hand, actually *stole* my vehicle and wrote me a letter suggesting they would continue to do it in a heartbeat! And, of course, it is really sad when someone loses their home and other property to people operating outside any regulations, controls, or punishments.

B. This problem (and "C" below) is more specific to my situation, but it is my hope that the CLRC will address them. When I joined the association in 1979, it was a small, friendly group intent on keeping Kirkwood's HMA simple, productive, and very non-invasive. Unfortunately, more people built homes, became a quorum, and, basically, went crazy. It is one thing to join an association having full knowledge of its vast restrictions in advance. But a full review is required when the place one calls home is overrun by over-zealous, bureaucracy-creating people who operate outside the law!

C. Although it would by my conjecture that most HMA's are of the "one-type" owner, the case in Kirkwood is quite different. Most of the property here is not in the primary residence category, thus putting the few of us who actually live here full time at a huge disadvantage. The numbers are stacked so disproportionately against us, that enjoying some of life's basic pleasures and freedoms is difficult, if not impossible. Of course, the locals can move, but I would rather stay and relish "life, liberty, and the pursuit of happiness" right where I am. Numbers alone should not dictate the lifestyle.

Are there solutions that everyone can live with? Yes! And the Commission has my trust and commitment to work with you in any way possible. I am sure you can sense my passion for the association's Board to become an award-winning group in the future. If these examples can lead to a more cooperative tomorrow, then let me know how to present them in a constructive manner.

In closing, after reading the January 10, 2005, *Staff Memorandum and Comments*, No. 2005-2, it is clear that the CLRC has received varying opinions. With regard to dues, I firmly believe that $10 per unit is fully justifiable. Education, regulations, controls, and punishments will cut down on litigation and abuses. Most HMA's will benefit by keeping insurance premiums lower, so it is money well spent.

Punishment for breaking the law should be swift and stern. Once the word gets out that HMA board members can and will pay for criminal acts, there will be a

significant drop in the number of abuses. The cost of doing nothing is too high! Thank you and everyone involved for tackling a very serious subject.

Best regards,

Paul M. Katosh

EMAIL FROM GARTH TANNER (1/25/05)

Please count me as being absolutely opposed to the creation of a Common Interest Development Bureau! We do not need a government agency to deal with issues that can and should be handled between homeowners and their associations or through the courts. If passed by the legislature, I will lobby the governor to veto any bills on this subject.

Sincerely, Garth Tanner
4373 Newland Heights Drive
Rocklin, CA 95765

A resident of the Whitney Oaks and Springfield Associations in Rocklin CA.

EMAIL FROM KIM MORAN (1/26/05)

Brian Hebert,

I have read the minutes of the previous meeting and the Sacramento Bee's report on the latest hearings. I still stand firmly opposed to the formation of a Bureau. It appears as if a few homeowners who moved into a Common Interest Development and do not agree with the CC&R's is your justification for creating a Bureau.

The assessment of each homeowner would require that the HOA to raise the yearly assessment. Additionally, in my experience in working with government, there is a great possibility that the ten dollar amount would increase as the Bureau hires experts to interpret the laws that pertain to HOA's. Also, there is concern that the Bureau would then interfere with the CC&R's of the HOA in trying to determine the enforcement.

Lastly, at a time when the state is operating under such a deficit, establishing a Common Interest Bureau, even if funded at the expense of homeowners would require state oversight. We do not need government interfering in the business of our Homeowners Associations.

Please add my name, address and email to your list to receive all communications from the Commission.

Sincerely,
Kim Moran
3824 Coldwater Dr.
Rocklin, California 95765

EMAIL FROM KIM CARRASCO (1/27/05)

I read the article in the Sacramento Bee about the Commission's proposal to create a government bureau to oversee homeowner's associations.

I am strongly against this proposal. One of the speakers at the meeting Friday stated "some people really think we have a choice in whether or not we live in a homeowners association". I beg to differ - when you purchase a house it is real estate law that you be given the CC&R's and sign that you have read & agree to them.

I choose to live in my neighborhood even though our CC&R's are rather restrictive. They even had us tear out concrete work we had done! We pay almost $400 a year to the homeowners association. The dues have steadily increased since day one. I do not want to fund another government department.

May I reiterate, I am adamantly opposed to this proposal. And would like this letter to be part of the record.

Kim Carrasco
1005 Glennfinnan Way
Folsom, CA 95630

LETTER FROM BETH A. GRIMM (1/27/05)

BETH A. GRIMM. P.L.C.
3478 Buskirk Ave., Ste. 1000
Pleasant Hill, CA 94523
Ph. 925 746-7177
Fax 925 215-8454
Web: http://www.californiacondoguru.com

Serving HOAs and HOs
throughout the State of California

January 27, 2005

Mr. Brian Hebert
Assistant Executive Secretary
bhebert@clrc.ca.gov
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

VIA FAX: 650-494-1827
E-mail:

Total: 3 pages

Re: Proposed CLRC Bureau - Additional Investigation

Dear Mr. Hebert and the Members of the CLRC:

You may recall that I provided some testimony at the last public hearing on January 19 in Sacramento. My name is Beth A. Grimm. I am an attorney that is very active in the common interest development industry. A good part of my practice involves dispute resolution. I have mediation training and have been involved in many mediations, paid and as a volunteer working with the local Conflicts Resolution Panel and the Courts to facilitate in mediations. I understand the benefit of an ombudsman program because of past experience in serving in that capacity in my County to help resolve disputes that arose because of requests to review public records in local state government.

In giving testimony at that hearing, and again providing further information by this letter, my purpose is simply to assist the committee in realistically evaluating the proposal that is now before it for a common interest development oversight bureau. Under a current proposal, association homeowners will be paying for the oversight bureau, probably at the rate of approximately $5 per unit per year. The proposal I reference calls for a comprehensive bureau that will provide not only education and dispute resolution, but also an enforcement mechanism which involves not only fines, but public posting of associations whose board members are found to have acted with malice. You are considering a very comprehensive bureau, similar in nature to the Fair Housing Agency. I testified as to reservations about taking that large of a leap into the CID oversight "business" because of the lack of adequate and credible empirical data about the type and volume of calls to expect, and the inability to accurately estimate costs. Since I am in the business of dealing with disputes between HOAs and homeowners on a regular basis, I receive calls of that nature almost every day. In addition, I also have been in contact with homeowners, board members, managers and other attorneys in this state as well as other states across the nation who deal with dispute resolution or complaints all the time. I have presented California law on the subject at California and National Seminars. The attendees at these seminars include homeowners, board members, managers and professionals serving the industry. We always have an opportunity to discuss everyday as well as the most complicated problems relating to following the law and resolving disputes. I and other attorneys and managers brainstorm

solutions to the most complicated issues at the seminars for the professionals. I was not speaking from an uninformed position.

As you know, because of information gleaned through your own investigations, there is a new program in Florida using an "ombudsman" program that apparently focuses on education and dispute resolution. However, this was not always the case. Florida once had a full-fledged bureau similar I believe to that proposed for California. I expressed concern about the magnitude of the California bureau that is currently being proposed because of my own, my colleagues, my clients, and other contacts' experiences with complaints in this industry, and because of an awareness that Florida had tried the expansive bureau concept and encountered a number of problems. I mentioned at the hearing some questions about the Florida oversight Bureau that was created many years ago because apparently it failed, and is now supplanted by a fairly new ombudsman program. I suggested further investigation to find out why the bureau that was once active seems to have dissolved.

I have no personal experience with the Florida bureau but have lots of experience with complaints in California, and the benefit of contacts in Florida who do have direct experience with that earlier oversight bureau. I felt it relevant to try and provide more historical information through contacts that you might not be able to easily locate. To get further information, I searched for and talked with persons who are familiar with what happened in Florida with regard to oversight, and the problems that were encountered. The persons with whom I spoke have knowledge and experience in the industry and in working with bureau that was established many years ago in Florida. It is my understanding that the oversight bureau was instituted for the same reasons experienced here - complaints to legislators, horror stories in the news about HOA boards, select groups purporting to represent the interests of owners and seniors, etc.

The persons with whom I spoke had several comments about the previous Florida bureau (which is very similar in intent and scope as that being proposed in California). These are some of the most pertinent (which are consistent with what I suggested could happen in California, if the cart is put before the horse in this endeavor): "It was undermanned - and not in a position to handle the onslaught of telephone calls." "It got to the point where the bureau was unable to find volunteer attorneys to write opinions to assist the bureau." "The staff was not able to handle the calls that came in effectively." "The bureau never really defined what it was trying to accomplish." "It was a nightmare - there was no mechanism to weed out frivolous calls."

I can provide a resource in Florida that can supply firsthand information about the former CID Bureau if you wish. The original Florida Bureau was under the division of Land Sales and Condominiums. The current ombudsman's program, as I understand it, is overseen by a Business and Professions agency. It seems to me

that the committee could benefit from more information about the experience of a state similar in character to California with regard to the high percentage of condominiums and the very complicated nature of the laws.

It is my belief, consistent with my testimony on January 19 and prior communications, that beginning with an ombudsman or oversight program that allowed for a year-long study as a first step, instead of a five or more year commitment, is a better idea. The state could get tied up in a bureaucratic nightmare because of a lack of understanding of what to expect in terms of the many calls that will come in. It is my belief that once there is an agency established in California to take complaint calls, there will be a barrage of calls beyond your wildest imagination, and many of those calls will be complicated and related in scope to much more than the Davis Stirling Act and the Corporations Code laws. I would anticipate strong consumer demands for intervention in cases much like what was requested at the January 19 hearing - assessment disputes, maintenance issues and the like. And as I suggested, the consumers that are paying dearly for a Bureau are going to expect intervention in disputes they have with their associations. It is also my belief that it will not be easy to train and staff a full-fledged agency with people equipped to sort out what calls can be resolved by citing a statute, and what calls are “frivolous” as described to me by Floridians with knowledge of what happened there.

I am not at all opposed to oversight via the provision of more education and dispute resolution. “Violation” letters responding to real/legitimate complaints that recite laws that apply so “uneducated” volunteer board members (meaning those who cannot dedicate 5-10 or more hours a week to learning, understanding, and correctly applying - often under pressure - the very complicated laws in this state) can learn something seems like a very good idea. I am not opposed to officials (ombudsman or other) that have the power to require inspectors at annual elections and oversight with regard to records review processes (to assure reasonable privileges and also to assure that records are not altered or taken by the reviewers). And I believe that dispute resolution in the form of ombudsman facilitators is very beneficial in many cases. However, at the risk of sounding like a broken record, the perception of the committee seems strongly to be “anti-board” with a desire to enforce and impose punishment which stems, I believe, from a lack of understanding about the nature of most complaints and the parties involved.

One last point. The Department of Fair Housing and Employment did not likely form overnight supplying geographically situated offices, full staff, hearing officers and administrative support. A look into how an agency like that gets started, the process and the funding required, is warranted and, I understand, to be investigated.

Please feel free to call me if you have any questions.

Very truly yours,

Beth A. Grimm

BAG/mg

EMAIL FROM AHRC NEWS SERVICES (1/28/05)

Dear California Law Revision Commission - California Law Revision Commission (CLRC):

Please include the following Editorial part of the California Law Revision Commissions records of public input for your proposal for an ombudsman for Common Interest Development homeowners. Thank you.

CAI SEEKS TO GUT CALIFORNIA LAW REVISION COMMISSION PROPOSAL

Because homeowner associations in California are being roiled by problem after problem, the California Law Revision Commission (CLRC) has proposed setting up an agency to handle these problems. This proposal has been met with vociferous opposition from members of CAI (Community Association Institute).

Beth Grimm, a leading CAI lawyer and long time foreclosure lobbyist, wrote a letter of opposition to CLRC on December 28, 2004. She cites two major objections, cost and public disclosure.

CLRC is proposing that the new agency be funded by charging an $5 fee to each home in a homeowner association. This is hardly a budget breaking proposal. It is less than the price of one movie ticket. It is probable the cheapest insurance around. Ms. Grimm charges $200 per hour! It would take a homeowner 40 years of paying the agency fee for just one hour of her time!

Is it any wonder then that Ms. Grimm wants the courts to settle homeowner association issues?

- A homeowner pays $75,000 over a parking issue.
- Another homeowner pays $140,000 over a light on a tennis court.
- Seniors in their 80's and 90's are forced to pay $78 a month for a golf course that they cannot use and several lose their homes to pay the homeowner association CAI lawyers' fees. .

Grimm attempts to justify her position by asserting that California law allows a prevailing party to recover attorney fees. She conveniently fails to point out that a

homeowner going up against a homeowner association is like somebody with a water pistol going up against a B-2 bomber. Homeowner associations are backed by multi-million dollar insurance policies and all of the rich resources of the association. She also conveniently fails to mention that it is the lawyers who are in a win-win situation. They get paid no matter who wins or loses.

Once again, money seems to act as the great fabricator of false ideas.

Ms. Grimm also objects to the new agency posting violations by homeowner associations on its websites. Ms. Grimm describes this as "excessive punishment" and complains that everyone in the Association would "have to pay by suffering the stigma attached to a public proclamation of wrongdoing."

It is hard to see how the individual members would "suffer" because of something that their board did. Furthermore, her surprising proposal to hide wrongdoing goes against our fundamental belief that sunshine is better than darkness, that full disclosure is better than secretively hiding information. Full disclosure would serve as a deterrent to those contemplating some nefarious act, and it might act as a powerful incentive for homeowners to remove the offending board members. In addition, prospective purchasers should know what type of homeowner association they are buying into. Cockroaches like the dark, but cockroaches should hardly be the model for homeowner associations.

Homeowner associations have come to a fork in the road. They can careen down the same disastrous road that is lined by brigand lawyers seeking to fleece homeowners every inch of the way. This is a grim option. Or they can travel a road where there is at least some law enforcement and protection. The California Law Revision Commission proposal offers that hope.

We think the choice is obvious.

EMAIL FROM ANN ROTH, AHRC NEWS SERVICES (1/28/05)

Dear The California Law Revision Commission - Attention Brian Hebert - California Law Revision Commission (CLRC):

The attached article regarding the California Law Revision Commission's proposal for a homeowner association ombudsman addresses many very important issues. The article is by the Ann Roth an author who has written many popular articles about homeowner associations.

Please make this part of the California Law Revision studies about this issue so that the lawmakers, media and the public can consider these issues. Thank you.

CALIFORNIA HOMEOWNER ASSOCIATION OMBUDSMAN - A Bandaid Fix on a Bleeding Carotid?

by Ann Roth

In a recent AHRC editorial it was written that the Community Association Institute desires to Gut the California Law Revision Commission proposal for a homeowner association OMBUDSMAN office.

The OMBUDSMAN proposal includes ENFORCEMENT of violations of homeowner associations (HOA) governing documents against homeowner association board of directors and informal hearings to assist in homeowner disputes. The HOA industry's reaction against this proposal is understandable.

The HOA industry of lawyers, litigators, property managers, realtors, contractors, builders, and other maintenance vendors, stand to lose collectively millions of dollars in revenue for their bottom line anytime a stranglehold is put on their ability to do as they please with regard to homeowner association corporations across the United States.

However, are homeowners and homeowner advocates sitting on the same side of the fence as the HOA industry on this issue? IF SO, IT IS FOR VERY DIFFERENT REASONS.

Homeowners worry that a HOMEOWNER ASSOCIATION OMBUDSMAN OFFICE will not be effective ENOUGH. That the concept of an HOA OMBUDSMAN in any State, may only be a bandaid fix for a bleeding carotid. Ask Nevada.

Perhaps this is a start and that it is better than nothing - we hope.

The OMBUDSMAN idea might take some wind out of the HOA litigation vortex, but homeowners should not get their hopes up. It might only delay the inevitable. While homeowners pour their hearts out to the OMBUDSMAN in an "informal" hearing, will the HOA's lawyers be present? Will they be furiously recording every detail to find ways to use this information against the homeowner? Litigation may still happen and the HOA lawyers will have had time to stack your story against you.

With regards to ENFORCEMENT - THAT is the issue that most likely concerns the HOA industry. And it should. This is where the homeowners MIGHT have a slightly better chance at getting the upper hand on their HOA dispute. HOA disputes often arise over the fact that HOA boards and property managers ignore or violate the laws.

IF the OMBUDSMAN'S office finds a cadre of recalcitrant HOA board member's guilty of violations and there are penalties imposed, it will help to lend

credibility in the homeowner's favor. However, if the HOA is allowed to somehow "appeal" the ruling and take it to the higher courts, which they likely will all the way to the Supreme Court, will the violation ruling of the OMBUDSMAN be allowed to be entered into evidence?

With regard to the OMBUDSMAN's powers - homeowners have plenty of excellent questions and are looking for answers from the California Law Revision Commission:

- Will the OMBUDSMAN's ruling of violation against an HOA board be final?
- Can the OMBUDSMAN's ruling be appealed or end up in litigation anyway?
- Could violation's cause the HOA's liability insurance to increase or cancel? Like auto insurance - one too many violations and you lose your insurance?
- If the HOA board doesn't pay their "ticket" can a bench warrant be issued for their arrest?
- Will the HOA board be required to pay the penalty out of their OWN pockets or will it come out of "Joe Homeowner's" pockets?
- Will homeowners be able to recover damages from violator board members individually?
- Besides the public disclosure list on an OMBUDSMAN website - will the violations be required to be DISCLOSED directly to each prospective homebuyer?
- Where will any hearings be held? States have hundreds of miles between their borders.
- Will the hearing information be kept confidential?
- Who will be handling the hearings? Lawyers? or CAI lawyers?
- Will the parties be represented by lawyers?
- Will the "prevailing party" in a dispute settled by the OMBUDSMAN's office be reimbursed for the costs they incurred?
- Would lawyers fees be included? (This could be dangerous for homeowners)
- If the matter can't be settled by the OMBUDSMAN's office, will the parties get reimbursed for costs they may have incurred?

- How is this different than the mandatory mediation requirements under the current Civil Codes?
- Will the mandatory mediation requirements under the Civil Code be void if you agree to a hearing by the OMBUDSMAN instead?

With regards to the OMBUDSMAN FEE:

- Is the OMBUDSMAN fee mandatory?
- Will failure to pay the fee result in non-judicial foreclosure of one's home?
- Who will ENFORCE collection of the fee?
- Will homeowners who bought their homes prior to enactment of the fee, still be required to pay it?
- Will homeowner's have an opportunity to VOTE on whether they want the HOA to be a "member" of the OMBUDSMAN'S OFFICE or to pay the fee?
- Will the fees be paid through the HOA dues?
- Will the fee be tax-deductible?
- Will each and every homeowner who is required to pay the fee, receive an accounting of how those fees are being spent?
- How will fee increases be handled and homeowners notified?
- Is their a cap on how much the fees can go up?
- Will any of the homeowner fees be used for "education" of OMBUDSMAN personnel and WHO or WHAT agency will provide the "educating"?
- Will education or training of OMBUDSMEN personnel be done by the Community Association Institute or any of its related brethren? Many homeowners view CAI and its affiliates as anti-homeowner.

It goes without saying that when it comes to anything homeowner association related - there are always more questions than answers. With every additional layer of control and bureaucracy imposed upon "Joe Homeowner", comes additional layers of liability. Only time will tell if the idea of a HOMEOWNER ASSOCIATION OMBUDSMAN can be successful.

As usual - the warning sirens should be blaring ANYTIME a prospective homebuyer is considering a purchase into HOA-LADEN housing. DO YOUR HOMEWORK! No pun intended. Until our elected officials have cleaned up this quagmire of housing that they have created - do yourself a FAVOR as well - tell your realtor:

HOA-NO WAY!!

8101 Stagecoach Circle
Roseville CA 95747

January 30, 2005

California Law Revision Commission
3200 Fifth Avenue
Sacramento CA 95817

Gentlemen:

We are against the formation of a State commission to review community associations in California.

We have resided in structured communities in California the past 34 years (Casitas, Alameda, and Sun City, Roseville). From what we have observed, it is only a very few who move into these communities and choose to ignore the CC&R's.

If a State commission is formed, we are concerned it will only dilute the powers associations have here in California and cause a lot of unnecessary grief and expense.

Thank you for your kind attention.

Sincerely,

James Smart

Karen L. Smart

Copy to:
Governor Arnold Schwarzenegger

January 31, 2005

California Law Revision Commission
3200 Fifth Ave.
Sacramento CA 95817

Attention: Mr. Brian Hebert

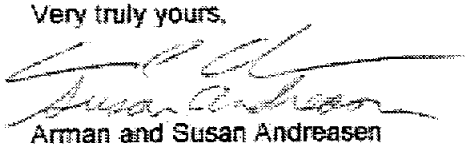
Re: Proposed Bureau to Oversee California Homeowner Associations

For the past 15 1/2 years, we have lived in two different communities controlled by homeowners associations. The first one was in Colorado, and for the past 5 1/2 years in Sun City Roseville, California. We have never had a problem with the CC&R's as we read them before moving into the communities. The few people who seem to have had problems, that we were aware of, were individuals who thought they were "special" in that the rules should be changed to suit their needs.

The last thing a bankrupt state needs is another bureau. The ten dollar fee per home would only be a start. Like most bureaus, it would continue to grow, attempt to expand its authority, and would always need more money. We don't need this proposed bureau to look after our affairs; we are capable of doing it ourselves. As previously indicated, the disgruntled people we have been aware of were those who were trying to "beat" the system and thought they were special. People have a choice; they do not have to live in a community governed by an association. We have always managed to get things accomplished through our association's board of directors when it made sense to do so.

As you can judge by the tone of this letter, we are vehemently opposed to the creation of this proposed bureau.

Very truly yours,



Arman and Susan Andreasen
7056 Mule Team Way
Roseville CA 95747

EMAIL FROM LARRY ROBINSON (2/5/05)

In reading the minutes of the most recent meeting of the CLRC, the commission appears to be heading towards an oversight committee that would be involved only with the Civil Codes. Unfortunately, there is often times overlapping and conflicting provisions between the Governing Documents and the Civil and Corporate Codes regulating HOA's. Below I outline the problem within my HOA:

1. Homeowner gets letter for some violation demanding correction or payment of some sort.

2. Homeowner gets notification of Executive Session of Board and invites Homeowner to attend. (This also probably covers the part of the CC&$'s where if a Homeowner does not agree with an ARC decision they may appeal this decision to the Board.) As of 01/05 a Homeowner may appeal this decision and be heard in a regular BOD meeting. Does the Homeowner still attend the Executive Session and then appeal to the full Board in a regular or special session of the Board? Both regular and special Board meetings are open to the Homeowners.

3. We now have a new level of ADR where we either get a "low cost" mediator or if the Board decides to take the default (most likely) we have the Homeowner and a Board member go at it one on one.

4. The homeowner does not correct the problem and the Board starts the fines and penalties.

5. The homeowner now has the right to appeal the fines and penalties in either a special or regular Board meeting, again open to all Homeowners. The Board still refuses.

6. The homeowner now has the opportunity to ask for ADR as outlined in Civil Codes, this is not as expensive as court but still outside the financial capabilities of most. Normally, the Board will not submit to binding arbitration/mediation.

7. Win or lose the Homeowner must capitulate or engage in an expensive legal court battle.

8. The CC&R's state that the Homeowner is responsible for all legal costs incurred by the Association. In other words, it makes no difference if the Arbitration/Mediation is in favor of the Homeowner, the Homeowner is still responsible for all attorney and court costs and a lien may be placed on his property starting the legal costs all over again, or pay.

In my opinion, either the Oversight Department get's involved with the conflicting and confusing CC&R's and the Civil Codes OR laws are passed invalidating the CC&R appeals process and establish one under the Civil Codes.

EMAIL FROM SPENCER WOOD (2/8/05)

Dear Mr Hebert,

I'm a condo homeowner in San Diego. I have recently read Ms Grimm 's comments (12/28/2004) concerning tentative recommendations by CLRC.

I have knowledge of several ugly situations involving HOA's, including my own. At this time, I will refrain from names and organizations. If further details are desired, I'll be glad to provide them.

From my prospective, as a homeowner in an HOA, Ms Grimm states some truths. However, anyone that is or has been involved with the CAI or other such associations and in my opinion, cannot be objective let alone trusted. Ms Grimm indicates she has represented the homeowner. Base on her past involvement in the CAI. a chill goes up my spine when she touts "I am in the minority in representing the homeowner." The minority item is factual. I would want to see the results of any lawsuit and or arbitration issues she was connected with. CAI is represented by hordes of attorneys that prey on homeowners.

HOA's need a "Bureau or ? entity that has the best interest of the homeowners as a high priority. The HOA Board of Directors do not need indemnification if they do not violate the laws. CC&R's are outdated and require major revision. In my case, the current property manager informs us that the cost to revise the CC&R's (one time) equates to $400.00 per unit. We have 208 units and it would cost us $83,200.00. That's unreasonable and a perfect example of the need for a "watchdog" entity and the laws to support that entity and the homeowner. These property managers, trained by CAI, are greedy and unreasonable with legal clout that we cannot compete with. We just cannot fight with empty cannons.

I could go on and on...just want you to view things from a homeowners point.

Appreciate you taking the time to read this.

Sincerely,
Spencer E. Wood
11044 Creekbridge Pl
San Diego, CA 92128-5110
858 679-6550

EMAIL FROM BETH GRIMM (2/12/05)

Dear Committee Members:

I am hoping to attend the next CLRC hearings in March but in case I cannot make it, I have some additional thoughts I would like to pass on to the Committee.

I hope you do not think I am on any kind of campaign to try to abort a good idea. Oversight would be helpful in this state if it proves a viable undertaking and resolves the problem of a the serious lack of education of board members. But I believe education and an attempt at dispute resolution rather than trying enforcement or punishment should get the bulk of the emphasis and funding for starters. And finding a way to funnel board members and even managers to the educational offerings (by sending "reported noncompliance" letters maybe) is a worthy goal because many board members do not even know they are not in compliance. When board members or managers ask where they can go to get information on compliance, there just aren't that many resources that are "one-stop shopping" for information. I have written and update a book every year called "The Davis Stirling Act in Plain English" but its time consuming to update and costly to produce (the statutes are about 30+ pages and the book is about 75 pages now, because it takes as many words to explain the statutes as words are in them. There have to be more than 50,000-100,000 board members in the state. Many attorneys pass out copies of the Davis Stirling Act on disk and paper like they were candy at seminars but the truth is the average person (volunteer board member) could not hope to read the statutes or gain insight as to what they all mean and require for exact compliance and how they integrate with association governing documents.

Many of the laws are not even clear on which controls. Some of the ones that try to be are rife with double negatives - try reading Civil Code Section 1366 a and b and see what you think. If an owner calls and reports that a board raised the assessments 20% and the CC&Rs say the limit is 10%, what would the compliance officer say to that? This is only one example, but a good one because reading the statute and understanding it is very difficult. And this is a question that will come up again and again, I can guarantee it.

When and if there is a bureau, my first suggestion is that when the law is passed, boards should get a "pass" (like the "one-bite" rule for dogs in many states) for the first complaint disclosing a problem, and a reference to the site they can get the necessary information. And hopefully sufficient concentration will be given to developing this educational opportunity before the ax starts to fall. It should be available by the time the first fee is paid. If the State has to wait for the money to trickle in from Associations to develop the educational aspect, it will fall behind the educational component and enforcement of statutes that can't be understood by those who are punished under them (volunteer board members) seems to raise due process concerns.

Respectfully,

Beth A. Grimm
Attorney

EMAIL FROM MICHAEL DOYLE (2/14/05)

Michael Doyle
26061 Buena Vista
Laguna Hills, CA 92653

February 14, 2005

Brian Hebert

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

Re: State Assistance to Common Interest Developments.

To Whom It May Concern,

I wanted to add more comment that strongly supports a need for government representation of the citizens of California in a common interest development.

Indeed we have many questions about what a new "bureau" in our state government will do for its citizens. As of now citizens have a better chance to be heard with a complaint about being ripped off on a car repair scam then they do with a complaint about being ripped off of their home and its equity. The “Common Interest Development Bureau” is a good idea for the times we live in. Continued law revision is eminent for the Davis-Sterling laws. Governor Schwarzenegger has vowed to protect the people. Well gov, here’s 90 million of us that need protection from scams that allow a taking of the very homes we live in. This will be the opportunity for you to give government representation to 90 million plus citizens of California that are living under rule of an association’s ‘volunteer’ board of directors. It still amazes me that we have allowed so many to be controlled by “volunteers” who become filed with their “untouchable” power. It amazes me more to find that these “volunteers” are easily directed by the industry professionals, and attorneys, to spend enormous amounts of money to enforce the ‘taking powers’ an association has.

We now have an opportunity for all 90 million of us California citizens to have a government bureau to turn to when we believe injustice is done to us by our association. I know this important because I am in a lawsuit with my association

and I found no one to that would help me in my government. I have written to Governor Schwarzenegger and his office has forwarded me to the Department of Real Estate. The Department of Real Estate has forwarded me to the Attorney General's office. The Attorney General's office has replied that they are under the executive branch of government and is prevented from intervening in judicial matters. I then wrote to the California Department of Consumer Affairs and they replied that the Department licenses and regulates over two million Californians in more than 200 different professions. They go on to explain that an association is not required to register or have a license with any regulatory body within its Department or any other governmental agency. So then I wrote to Washington DC for the U.S. Department of Housing and Urban Development (HUD) to tell me where my representation is. HUD replied that their Department has no authority over associations and they are governed by the established By-laws that HUD has no authority to change. The reply letters I received were polite and understanding about my situation but all attempts to reach someone in my government reached a dead end.

I have now come to understand that 'we the people' have no government representation once we enter a homeowners association. It is clear that if you have a problem with your association call an attorney and lots of luck. How can 200 professions be regulated with the watchful eye of our state government and the home owners association that represent 90 million citizens every day go over looked? I say it's time for representation.

Sincerely,

Michael Doyle

attch: Reply letters from government agencies.

EMAIL FROM KAREN LINAREZ (2/21/05)

The upcoming hearing(s) to create a CID Bureau for California to help settles HOA disputes should be put into place & the agency should NOT be staffed by CAI lawyers/CAI management. I Live in a Condo assocition & am on my board for the very reason that this is being considered. A simple dispute over a parking issue or placement of a satellite dish, can quickly spiral out of control. What starts out as a 50.00 fine becomes a 3,000.00 fine(lien) once lawyers get involved. The homeowner has little to no recourse, depending on what kind of people sit on the board.

The other issue to consider is the amount of money that can be misallocated by a crooked board/lawyer. Because there is no watchdog for these associations, they can & do get away with stealing funds that belong to the actual association. Our prior board spent $1,000,000.00 (form the reserves) in less then 4 years.

There was so much documentation missing, that only half the money can be accounted for. Honest board members will not be against the CID, if formed; you can bet dishonest board members/lawyers who have tapped into a CASH COW, will be very much against it.

The majority of people who would benefit by the formation of a CID bureua, will not be able to attend the upcoming hearing, as they work so they can pay mortgages, taxes & HOA due's.

Thanks for your time
Karen Linarez
Oakwood HOA

Bruce Osterberg
1809 Wintergreen Glen
Escondido, CA 92026-4938

760.741-1940
mw1809wg@sbcglobal.net
123,τβπ. printed on: 3/1/2005

Lisa Engel – Consultant
CA Asm Comm on H&C Dev
1020 N. Street, #167A
Sacramento, CA 95814

> When neither their property nor their honor is touched, the majority of men live content.
> --Machiavelli

...

Feb 24, 2005

The CLRC Memorandum 05-2 clearly reflects that there are serious problems within current CID governance. It also illuminates special interest groups.

The root cause of problems in CIDs is lack of accountability. Most board members are sincere and effective, however, a few board members and management company representatives clearly have dysfunctional personalities. Even when revealed they are difficult to reason with or remove. In at least one case a special law had to be written.

Homeowners are being abused and they have no viable recourse. Civil action – if they can afford it – raises their assessments and makes enemies of their neighbors.

If any other segment of our society were being abused in this manner there would be loud uproar. But because CIDs are so beneficial to local and state governments, the homeowner abuse is not vigorously opposed.

An Oversight Agency could help alleviate the problem but would it spin out of control and aggravate the problem? In times of a lean budget probably not. But with a lean budget would an Oversight Agency be the solution?

If the Oversight Agency is pursued then I suggest limiting their actions to complaint processing only. Cut out the freebees that the special interests groups are selling or charging for - that might reduce opposition and allow it to be more effective within a limited budget.

But, again, the real problem is the absence of accountability to the homeowners.

First, make it a misdemeanor to engage in or knowingly permit a dishonest HOA election. Without the Press and any other oversight the only deterrent to HOA election fraud is serious penalty.

Then, to encourage reasonable homeowner oversight:

1. Require that HOA board meeting minutes actually reveal what the board is doing. Require financial details, homeowner complaint responses, legal actions, et cetera. Remove the secrecy!
2. Require that HOA board meeting minutes be free to every homeowner and that at least a summary of every meeting is mailed to every homeowner.
3. Require that letters to the Board be included in meeting minutes (or the reason for exclusion noted in the minutes).
4. Require that the homeowner mailing list be made available to each homeowner. After all, it is public knowledge in California!

Compliance (or lack thereof) to these requirements would be easily evidenced, which by itself would promote compliance. Penalties for non compliance would be necessary but infrequently imposed.

This strengthening of the current rules of CID governance would reduce apathy and impose a "cloud" of accountability. A very effective mechanism already in widespread use in our society.

There is no excuse for this abuse to continue.

Bruce Osterberg

cc: Brian Hebert
AHRC News Services

Citizens for Constitutional Local Government, Inc
5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 602-996-3007
info@pvtgov.org http://pvtgov.org

February 28, 2005

California Assembly Committee on Housing
& Community Development
Legislative Office Building
1020 N Street, # 167A
Sacramento, CA 95814

SENT BY EMAIL

RE: CLRC tentative recommendation on State Assistance to Common Interest Properties

Dear Committee Members:

CLRC, in its summary of its *Tentative Recommendation on State Assistance to Common Interest Developments* and proposed legislation, reflects a keen understanding of the conditions, environment and factors, politically and socially, producing the sad state of affairs with respect to CIDs not only in California, but also with planned communities across the country. For your convenience, I've attached a copy to this letter.

To state my concerns concisely: Any statute, law, agency rule or regulation not accompanied by an enforcement process or procedure is not a statute, law rule or regulation. It's an empty statement of policy, relying on the goodwill and citizenship of the people to whom it applies. And when in the course of human events, when a long train of abuses and usurpations, pursuing inevitably the same object, evinces a design to reduce homeowners under an undemocratic, despotic form of corporate government over their homes, their private properties and their lives and the lives of their loved ones, restricting the liberties and freedoms given to and enjoyed by other persons not living in a CID, then it's for the government to provide the necessary oversight and to exercise its rightful and proper police powers to regulate the abusers, and to restore to homeowners in living in CIDs the same rights and privileges enjoyed by all other persons in the state. It is only fitting for the legislature to enact such proposed legislation.

Currently, as an example for the need to regulate CID boards, the statutes apply only to one class of persons in a CID, the homeowners who are not officers or directors of the CID, for it's only the homeowners who are regulated with punishments; such as the right of the CID to take a member's home as a punishment for not paying his maintenance assessments, or for fines and late penalties which further amount to punishments against the homeowner. Where are the punishments for officers and directors who violate the private contract and statutes? Can their homes be sold at a non-judicial foreclosure? Where is the correlation between damages to the CID and the excessive punishment of losing one's home, where many times it's a $200 fine or

assessment in contrast to a $200,000 loss of one's home?[1] The CID did not advance such money, the $200,000, as did a lender or mortgagor, in order for the law to provide a just remedy and permit the CID to deprive the homeowner of his property, his home. It's not entitled to such harsh punitive damages without a compelling, legitimate government interest.

If the above is not a convincing argument for state regulation, let me compare the powers granted to the CID that would not be granted to other nonprofit, charitable organizations with a mission to improve and benefit the community at large, and not just the local CID community. Assume that the United Fund or Red Cross were to seek pledges for the upcoming year and asked for signed pledges with a contractual agreement that if the pledge were not paid, the charitable organization had the right to collect this pledge by means of a non-judicial foreclosure of the deadbeat's home. Would the court enforce it as a bona fide contract? If so, what would be the outcome with respect to the revenues of these charitable organizations? Why then, is this onerous procedure allowed to happen with homeowners living in CIDs? It's allowed to happen because, unlike these charitable organizations, the CID is a mandatory membership association with binding compulsory dues payments, akin to involuntary servitudes or tithes. With these statutes, the state supports the CID covenants and coerces and intimidates the homeowner into making payments. However, there is no need since the CC&Rs already provide for such a remedy.

CIDs are viewed and treated as if they were principalities[2], territories within the state and within the U.S. having their own laws and constitutions, unanswerable for the most part to the government that surrounds them and allows them to exist as such. If the CID were viewed, as it should be, as a legitimate form of government, that is, a group or organization that regulates the people within a territorial boundary[3], others, and I would have no problem. There would then exist equality under the law: either everybody benefits equally or everybody suffers equally.

Don't let the arguments that speak to the enumeration of government functions (the company town doctrine of Marsh v. Alabama[4]) to be the decider of whether a municipal government exists. Look to your own statutes relating to the incorporation of cities as to what the state asks in order to declare a territory, a community, as a legitimate government.[5] And once you realize these contradictory requirements as to what makes a government, then the choice is simple. Either regulate these private CID governments and hold them to the same obligations, duties and responsibilities as you would any other municipal government, or simply declare them to be a government entity, subject to the same laws as any other municipal government[6].

To argue, as have the special interests who have an income stream stake in your decisions, that CIDs are private contracts introduces an additional set of concerns and legal issues relating

---

[1] Cf. *State Farm v. Campbell*, 538 US 408 (2003), where the Court held that excessive punitive damages awarded to persons who were injured were grossly excessive and a violation of the due process clause of the 14th Amendment of the U. S. Constitution.

[2] See George K. Staropoli, "The HOA Principality", February 2005, *The HOA Citizen*, 2 http://pvtgov.org/pvtgov/downloads/newsletter_pubs/hoa_news_2-05w.pdf

[3] *Black' Law Dictionary*, Government, (6th ed. West 1990)

[4] *Marsh v. Alabama*, 326 U.S. 501 (1946) (the functions of a company town where used in comparison with the functions of a municipality).

[5] The California Government Code for the formation of cities, §§ 34450 – 34462, only requires a vote in order to form a government.

[6] *Black's Law Dictionary*, 703, local government, (7th ed. West 1999) "The term includes a school district, fire district, transportation authority, and any other special-purpose district or authority".

to government interference in private contracts; the lack of informed consent, especially with respect to the explicit surrendering of constitutional rights[7]; misrepresentation under contract law; the justification for allowing the common law of servitudes to preempt the California Constitution and statutes; and a legitimate and compelling government interest in supporting CIDs that deprive a class of citizens of the rights and freedoms enjoyed by other citizens in California.[8] Is it permissible for CID CC&Rs to rewrite the US and California Constitutions?[9]

In closing these broad comments, allow me to leave you with this thought relating to any false rationale of a doomsday economic affect if restrictions were to be imposed on CIDs. Before the advent of planned communities people bought homes, builders built homes and real estate agents sold homes. Without planned communities, people will continue to buy homes, builders will continue to build homes, and real estate agents will continue to sell homes. The difference will be the existence of free choice in the type of homes bought and not the purchase of a single product. The only group that will be severely impacted is the Community Associations Institute (only some 16,000 members nationally), a national business trade group that lobbies on behalf of its members. Just about 40% of these members are attorneys and management firms; the remaining members consist of **consumers**, the CIDs and homeowners, in violation, I would argue, of its tax exempt 501(c)6 status.

I do not intend to go into the details of the tentative recommendation at this time, and will leave my concerns as stated above, except for the note to § 1380.310, Violation of Law, in the proposed legislation. In this note, CLRC raises a question of the constitutionality of a duly enabled state agency to regulate and adjudicate the provisions of private contracts, namely, the governing documents of the CIDs. Obviously, while Art. I, Sec. 10 of the U. S. Constitution prohibits the interference with the obligation of contracts, it's done every day under the state's police powers to regulate the conduct of persons for health, safety and general welfare objectives. In fact, the Davis-Stirling Act regularly does so today as shown by civ:1352.5 that states, in part,

> 1352.5. (a) No declaration or other governing document shall include a restrictive covenant in violation of Section 12955 of the Government Code.
>
> (b) Notwithstanding any other provision of law or provision of the governing documents, the board of directors of an association, without approval of the owners, shall amend any declaration or other governing document that includes a restrictive covenant prohibited by this section to delete the restrictive covenant, and shall restate the declaration or other governing document without the restrictive covenant but with no other change to the declaration or governing document.

---

[7] See Pet.'s Br., "Argument", I.B., p.24, *Comm. For a Better Twin Rivers v. Twin Rivers Homeowners' Association*, C-121-2000 (NJ. Super. Ch. Div. 2004) http://www.aclu-nj.org/legal/legaldocket/freespeech/committeeforabettertwinriv.htm (It should be noted that the attorney for the Petitioner is Frank Askin, Chief Counsel for ACLU and Professor of Law at the Rutgers Constitutional Litigation Clinic).

[8] "A law that violates this concept [of classification] also denies the individuals classified due process of law because the means employed by the government do not relate to a compelling [ ] legitimate end of government." John E. Novak & Ronald D. Rotunda, *Constitutional Law* § 14.1 634 (6th ed. West 2000)

[9] CIDs are not true democracies. While members can vote in a CID, there is the absence of the American principles of government and structure in terms of checks and balances and a separation of powers. People can vote in China and Cuba, but no one refers to these countries as democracies. Furthermore, allowing a CID to use an attorney paid for through member dues and to deny the member the right to consult with that attorney, requiring the member to pay for his own attorney, makes a mockery of justice. This restriction sets an insurmountable bar for members to attain justice, much like the effect that the poll tax had on black voter registration.

Furthermore, the legislature has already commanded an alternate dispute resolution procedure under civ:1363.310, which states in part,

> 1363.830. A fair, reasonable, and expeditious dispute resolution procedure shall at a minimum satisfy all of the following requirements:
>
> . . .
>
> e) A resolution of a dispute pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the association and is judicially enforceable. An agreement reached pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the parties and is judicially enforceable.

All that is required is for the legislature to delegate authority to the Bureau to require the application of the existing California Administrative Procedures Act.[10] Furthermore, this Act is clear in just the opposite direction; that judicial review is only permissible under certain circumstances so long as the Bureau has been delegated the authority to hear complaints concerning violations of covenants.[11]

The state has always had the right to require conformity to approved contractual provisions and contractual obligations, and the legislature can so grant these powers under this act and then there would be no question of the right to adjudicate such provisions[12]. This restriction on contractual provisions occurs throughout the industries -- truth in lending, truth in advertising, etc -- and creates no earth shattering new legal doctrine. And, in keeping with the intents and purposes propounded in the summary to the CLRC tentative recommendation, granting such authority is warranted.[13]

This request for comments appears to create doubt and fears as to the legitimacy of government regulation when it applies to restricting CID management's actions, while ignoring the existing restrictions on the liberties of homeowners as reflected in the right to foreclose provisions of the Davis-Stirling Act.

Respectfully,

---

[10] See California Government Code, §§ 11000 – 11019.9 in which the delegation of authority must be granted. At the federal level, this doctrine is well demonstrated by the U. S. Supreme Court's holding, concluding paragraph, in *FDA v. Brown & Williamson Tobacco Corp*., 98-1152, (2000), "[A]n administrative agency's powers to regulate in the public interest must always be grounded in a valid grant of authority from Congress."

[11] See California Government Code §§ 11350, 11350.3 that restrict the scope of judicial review.

[12] See generally 16A Am. Jur. 2d, Constitutional Law, §§ 327, 379

[13] George K. Staropoli,, *eEditorials*, Click Here: August 2004, "A proposal for the "Muni-zation" of HOAs: Stop developers from granting private government charters", http://pvtgov.blogspot.com/

George K. Staropoli
President

Cc: California Law Review Commission
Attach.

SUMMARY OF TENTATIVE RECOMMENDATION

Community associations are run by volunteer directors who may have little or no prior experience in managing real property, operating a nonprofit corporation, complying with the law governing common interest developments, and interpreting and enforcing restrictions and rules imposed by a common interest development's governing documents. Mistakes and misunderstandings are inevitable and may lead to serious, costly, and divisive problems. The principal remedy for a violation of common interest development law is private litigation. Litigation is not an ideal remedy where the disputants are neighbors who must maintain ongoing relationships. The adversarial nature of litigation can disrupt these relationships, creating animosity that degrades the quality of life within the community and makes future disputes more likely to arise. Litigation imposes costs on a common interest development community as a whole — costs that must be paid by all members through increased assessments. Many homeowners cannot afford to bring a lawsuit and are effectively denied the benefit of laws designed for their protection.

The proposed law would create the Common Interest Development Bureau within the Department of Consumer Affairs. The bureau would educate common interest development homeowners and board members as to their rights and obligations under the law, provide informal assistance in resolving disputes, and as a last resort, enforce the law governing common interest developments.

The bureau would be funded through a fee charged to community associations when they register with the Secretary of State every two years.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Citizens for Constitutional Local Government, Inc
5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 602-996-3007
info@pvtgov.org http://pvtgov.org

Citizens for is a nonprofit organization formed to provide full and material disclosure of **all** the factors that can have profound effects on your decision to buy into an HOA controlled property. We believe that the regulation of planned communities must be under local government statutes to provide for the constitutional protection of homeowner rights.

Our Mission:

1. To inform the public (a) of the private government nature of HOAs and their governing bodies, the homeowners association; (b) of the restrictions on homeowners' civil liberties and; (c) of the lack of effective enforcement of state laws and the governing documents under the "private contract" interpretation of HOAs;

2. To change existing state and federal statutes to (a) restore democratic principles of government to existing homeowners associations and (b) replace the "private contract" interpretation of CC&Rs with a declaration that HOAs are civil governments subject to the laws of the land;

3. To seek the declaration and revision of the legal status of planned communities to that of a local governmental entity, after the developer is required to turn over control of the HOA to its members; and

4. To foster and promote grassroots lobbying efforts consistent with achieving the goals stated in (1) – (3) above .

For more information, see

PVTGOV: http://pvtgov.org/
Eeditorials: http://pvtgov.blogspot.com/
The HOA Citizen: http://pvtgov.org/pvtgov/downloads/newsletter_pubs/hoa_citizen.asp

STATE ASSISTANCE TO COMMON INTEREST DEVELOPMENTS

A common interest development ("CID") is a housing development characterized by (1) separate ownership of dwelling space (or a right of exclusive occupancy) coupled with an undivided interest in common property, (2) covenants, conditions, and restrictions that limit use of both the common area and separate ownership interests, and (3) management of common property and enforcement of restrictions by a community association. CIDs include condominiums, community apartment projects, housing cooperatives, and planned unit developments.[1]

There are over 36,000 CIDs in California, ranging in size from three to 27,000 units each.[2] These developments comprise over three million total housing units — approximately one quarter of the state's housing stock.[3] CIDs accounted for 60% of all residential construction starts during the 1990s. The planned unit development alone represented more than 40% of single family home sales during that period.[4]

CIDs are governed by volunteer directors, elected from among the unit owners. Faced with the complexity of CID law, many of these volunteers make mistakes and violate procedures for conducting hearings, adopting budgets, establishing reserves, enforcing rules and restrictions, and collecting assessments. Many CID homeowners do not understand their rights under CID law and under their association's governing documents. These sorts of mistakes and misunderstandings inevitably lead to conflicts within the development, either between the association and an individual homeowner, or between homeowners.

Empirical information is not available concerning the incidence of such disputes in California. However, some data is available from other jurisdictions in which there is government supervision of CID operations. For example, in Nevada the Ombudsman for Owners in Common Interest Communities receives approximately one complaint for every 100 common interest dwelling units per year. In California, with its approximately three million CID dwelling units, that would yield about 30,000 complaints each year.[5]

A homeowner who believes that a community association is violating the law or has otherwise breached its duties has no effective remedy other than civil

---

1. See Civ. Code § 1351.

2. Gordon, *Planned Developments in California: Private Communities and Public Life* 21-22 (Cal. Pub. Policy Inst., 2004).

3. *Id*. at 20-21.

4. *Id*. at 3.

5. For another effort to estimate the frequency of CID disputes, see Johnston & Johnston-Dodds, *Common Interest Developments: Housing at Risk?* 35 (Cal. Res. Bur., Aug. 2002).

litigation.[6] Litigation is not an ideal remedy for many common interest development disputes. Homeowners who sue their associations are suing their neighbors and themselves. The adversarial nature of litigation creates animosity that can degrade the quality of life within the community and make future disputes more likely to arise. Litigation imposes costs on the community as a whole — costs that must be paid by all members through increased assessments.

Many homeowners cannot afford to bring a lawsuit, especially in cases where money damages are not at issue.[7] A person who cannot afford to sue is effectively denied the benefit of laws designed for that person's protection. The absence of an affordable remedy limits accountability for wrong-doing, creating an atmosphere in which some may choose to cut corners or abuse their power.

PROPOSED LAW

State Assistance to Common Interest Developments

A program of state assistance to common interest developments would be helpful in addressing the problems described above. The state could provide training for those charged with difficult responsibilities, provide information and advice to those who do not understand their legal rights and responsibilities, assist in informally resolving disputes, and as a last resort, could take enforcement action against a person who violates common interest development law. This would help to avoid many problems and would provide an affordable administrative remedy for problems that cannot be resolved through education and conciliation.

Similar assistance programs exist in other states. Florida and Nevada have comprehensive programs that include a range of education, mediation, and law enforcement functions.[8]

The proposed law would create the Common Interest Development Bureau within the Department of Consumer Affairs ("Bureau"). The Bureau would be funded entirely from fees charged to CID homeowners.[9] No general revenue funds would be used. The Bureau would have the following general responsibilities, which are discussed more fully below: (1) education, (2) dispute resolution, (3) law enforcement, and (4) data collection.

---

6. The Attorney General has authority to intervene in cases involving the alleged violation of certain corporate governance statutes. See Corp. Code § 8216. However, the Attorney General's involvement is limited to sending a "notice of complaint" letter. If that does not resolve the problem, the complainant is advised to obtain private counsel. See <www.caag.state.ca.us/consumers/complaints/npmb.htm>.

7. Many CID disputes involve laws regulating community association governance (e.g., procedures for elections, meetings, or access to records). In such a case, the relief sought will typically be an injunction or declaratory relief.

8. See "Experience in Other Jurisdictions" *infra*.

9. See "Funding Issues" *infra*.

Education

The Bureau would maintain an informational website. The website could be used to provide direct access to governing law, distribute plain language explanations of difficult concepts, and answer frequently asked questions. The website would also provide an annual summary of changes in CID law, to inform association directors and homeowners of new legal requirements or changes to existing requirements.

In addition, the Bureau would maintain a toll-free telephone number that could be used to request information or advice.

An authoritative, neutral, and readily available source of information, advice, and training can help association directors and homeowners to understand their legal rights and responsibilities. It would also help to defuse disputes that are based on misunderstanding or mistrust.

Dispute Resolution

On request, the Bureau would assist in trying to resolve a dispute informally. The proposed law does not define what methods would be used. It is expected that the Bureau would adopt procedures based on other successful dispute resolution programs within the Department of Consumer Affairs.

Statements made during the Bureau's informal dispute resolution process would be confidential and could not be used in any subsequent administrative adjudication or litigation.[10] Confidentiality fosters frankness, which is important to the successful settlement of disputes.[11]

In addition to mediating disputes, the Bureau would be authorized to monitor association elections (if a sufficient minority of members request the assistance). Fair elections are essential to successful self-governance and provide a path to dispute resolution that is based in the community rather than in the legal system.

Law Enforcement

Any interested person could request that the Bureau investigate an alleged violation of CID statutory law.[12]

If the Bureau determines that a violation of law has occurred it would attempt to correct the violation by informal agreement.[13] If the violation cannot be resolved through a voluntary agreement, the Bureau could issue a citation ordering correction of the violation and imposing a range of equitable and punitive remedies.[14]

---

10. See proposed Civ. Code § 1380.300(b)-(c) *infra*.
11. See, generally, *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996).
12. See proposed Civ. Code § 1380.400 *infra*.
13. See proposed Civ. Code § 1380.400(c) *infra*.
14. See proposed Civ. Code § 1380.410 *infra*.

A person named in a citation could appeal the citation administratively.[15] The Bureau's decision on appeal would be subject to judicial review, by writ of administrative mandate.[16]

If a person does not comply with a Bureau citation or a negotiated conciliation agreement, the Bureau could bring an action in superior court to compel compliance.[17]

Specific issues relating to enforcement are discussed more fully below.

Empirical Data

An important incidental benefit of the proposed law would be the ability of the Bureau to collect empirical data on the nature and frequency of CID disputes in California. The Bureau would report its findings to the Legislature each year.[18] This would provide an objective basis for evaluating any future reform of CID law.

ENFORCEMENT ISSUES

Subject Matter Jurisdiction

The Bureau would have authority to investigate and correct a violation of statutory law. For example, a homeowner could request investigation of an association's failure to do any of the following:

- Hold an open meeting and provide a copy of meeting minutes.[19]
- Provide access to accounting books and records.[20]
- Follow procedures for member meetings and voting.[21]
- Provide required financial statements.[22]
- Follow proper rulemaking procedure.[23]
- Follow proper disciplinary procedure.[24]

Many CID disputes involve these sorts of routine governance problems.

Under the proposed law, the Bureau would not have authority to enforce an association's governing documents. For example, the Bureau would not enforce a restriction on pet ownership or parking rules that is set out in the association's

15. See proposed Civ. Code § 1380.420 *infra*.
16. *Id.*
17. See proposed Civ. Code § 1380.430 *infra*.
18. See proposed Civ. Code § 1380.120 *infra*.
19. See Civ. Code § 1363.05.
20. See Civ. Code §§ 1363(f), 1365.2.
21. Corp. Code §§ 7510-7527.
22. Civ. Code § 1365.
23. Civ. Code §§ 1357.100-1357.150.
24. See Civ. Code § 1363(g)-(h).

declaration of covenants, conditions, and restrictions. This limitation is intended to avoid executive encroachment into powers that are reserved to the courts by the California Constitution.[25]

In a seminal case on the proper scope of administrative adjudication, *McHugh v. Santa Monica Rent Control Board*, the court held that administrative adjudication does not encroach on reserved judicial powers so long as the ultimate decisionmaking power remains in the courts (the "principle of check") and the adjudicative activity is both authorized by statute and "reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes."[26]

Under the proposed law, a corrective citation would not be enforceable until after judicial review opportunities have been exhausted. This would satisfy the principle of check.

However, it is not clear that enforcement of an association's governing documents would fall within the Bureau's "primary, legitimate regulatory purpose." The California Supreme Court has distinguished between administrative enforcement of statutory law and administrative adjudication of common law claims. In *McHugh*, the court upheld administrative adjudication of a rent regulation ordinance, but indicated in dicta that adjudication of common law counterclaims would involve the exercise of judicial powers reserved to the courts. In such a case, the administrative agency would be "adjudicating a broad range of landlord-tenant disputes traditionally resolved in the courts."[27] In determining whether administrative adjudication unconstitutionally encroaches on reserved judicial power, a court would "closely scrutinize the agency's asserted regulatory purposes in order to ascertain whether the challenged remedial power is merely incidental to a proper, primary regulatory purpose, or whether it is in reality an attempt to transfer determination of traditional common law claims from the courts to a specialized agency whose primary purpose is the processing of such claims."[28]

The Commission believes that enforcement of statutory requirements would fall squarely within the executive branch's legitimate regulatory powers. However, administrative enforcement of governing documents, which would involve common law principles relating to equitable servitudes and contracts, would probably encroach on matters that have traditionally been adjudicated by the courts. In order to avoid a constitutional challenge to the Bureau's authority, the proposed law limits the Bureau's enforcement jurisdiction to matters of statutory law. For similar reasons, the Bureau would not be authorized to award damages.[29]

---

25. See Cal. Const. art. III, § 3 (separation of powers); Cal. Const. art. VI, § 1 (judicial power vested in courts).

26. 49 Cal. 3d 348, 374, 777 P.2d 91, 261 Cal. Rptr. 318 (1989).

27. *Id*. at 374-75.

28. *Id.*

29. See *Walnut Creek Manor v. Fair Employment & Housing Comm'n*, 54 Cal. 3d 245, 264, 284 Cal. Rptr. 718, 814, P.2d 704 (1991) ("The award of unlimited general compensatory damages is neither necessary to [the regulatory] purpose nor merely incidental thereto; its effect, rather, is to shift the remedial

Note that some disputes may involve a mixture of statutory and common law complaints. For example, a homeowner whose proposed property improvement is disapproved by an association may complain that (1) the association did not follow a fair and reasonable procedure in making its decision as required by Civil Code Section 1378, and (2) that the association did not properly apply the architectural standards contained within the association's recorded declaration of covenants, conditions, and restrictions. The Bureau would have jurisdiction to decide the procedural question, which is based on a clear statutory requirement, but could not decide whether the substantive standard contained in the association's declaration had been properly applied. This limitation on the Bureau's jurisdiction would leave some important disputes unresolved.

The proposed limitation on the Bureau's enforcement jurisdiction is consistent with the approach taken in other states that provide for state adjudication of common interest development disputes. In both Florida and Nevada, the state enforces statutory requirements but has no jurisdiction to enforce an association's governing documents.[30]

Sanctions

In addition to ordering that a law violation be corrected, the Bureau could also impose punitive sanctions. The availability of these sanctions would encourage cooperation in resolving disputes informally and would serve to deter intentional misconduct. The possible sanctions would be as follows:

- An administrative fine of up to $1,000 per violation.
- Removal of a director from office.
- Publication of citations on the Bureau's website.

There are a number of limitations on these sanctions. First, a sanction can be entirely avoided by entering into a conciliation agreement. If a violation is remedied through conciliation, a citation would not be issued. This creates an incentive to cooperate with the Bureau in fashioning an acceptable remedy. Other limitations on the imposition of sanctions are discussed below.

Administrative Fines

In determining whether to impose a monetary penalty and the amount of the penalty, the Bureau would be guided by specific criteria: the size of the association, the gravity of the violation, the presence or absence of just cause or

---

focus of the administrative hearing from affirmative actions designed to redress the particular instance of unlawful housing discrimination and prevent its recurrence, to compensating the injured party not just for the tangible detriment to his or her housing situation, but for the intangible and nonquantifiable injury to his or her psyche suffered as a result of the respondent's unlawful acts, in the manner of a traditional private tort action in a court of law."). But see *Konig v. Fair Employment & Housing Comm'n*, 28 Cal. 4th 743, 123 Cal. Rptr 2d 1, 50 P.3d 718 (2002) (damages may be constitutionally awarded through administrative adjudication if statute permits parties to opt out of administrative process).

30. See Fla. Stat. Ann. §§ 718.501; Nev. Rev. Stat. §§ 116.745-116.750.

excuse, and any history of prior violations.[31] This should mitigate against the imposition of an arbitrary or unduly burdensome penalty.

A penalty could not be imposed against an individual unless the Bureau finds by clear and convincing evidence that the person's unlawful conduct involved "malice, oppression, or fraud" as those terms are defined in the statute that governs punitive damages.[32] This is a strict standard of proof and misconduct that would only be satisfied in a clear case of intentional bad faith.

The possibility that a monetary penalty could be imposed against an individual director could deter some from volunteering to serve on a board. However, a person who acts in good faith would never be subject to a fine. Only serious intentional misconduct would result in a fine. If this is properly understood, the deterrent to voluntary service should be minimal.

Removal from Office

Removal of a director from office could be a useful remedy in a case of intentional wrongdoing.[33] The Bureau would not be permitted to remove a person from office unless it finds by clear and convincing evidence that the person's conduct involved malice, oppression, or fraud.[34] This is a strict standard that would not easily be met. Use of the removal power should be infrequent.

Internet Publication of Citations

The proposed law would also require that the Bureau publish all citations on its website.[35] This is similar to existing law that requires the Department of Consumer Affairs to publish the disciplinary history of licensees on its website.[36] This practice would allow a potential CID home buyer to research whether a particular community association has a history of violating the law.

However, negative publicity about an association could adversely affect property values in the association. This would result in losses to all homeowners within the community. Concern about property value loss could deter some homeowners from seeking Bureau assistance in remedying a violation of law.

Request for Legislative Guidance

The Commission seeks guidance from the Legislature on whether the proposed law should include the punitive sanctions described above.

---

31. See proposed Section 1380.410(d) *infra*.

32. See proposed Section 1380.410(e) *infra*.

33. Existing law authorizes a court to remove a corporate director from office in cases of serious misconduct. See Corp. Code § 334

34. See proposed Section 1380.410(f) *infra*.

35. See proposed Section 1380.410(g) *infra*.

36. See, e.g., Bus. & Prof. Code § 27.

Exhaustion of Bureau Enforcement Procedure

There are a number of advantages to requiring that a person exhaust an available administrative remedy before filing a lawsuit:

> In cases appropriate for administrative resolution, the exhaustion requirement serves the important policy interests … of resolving disputes and eliminating unlawful … practices by conciliation …, as well as the salutary goals of easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures, and providing a more economical and less formal means of resolving the dispute….[37]

On the other hand, a homeowner may wish to proceed directly to litigation in a dispute that involves damages or a mixture of statutory and common law claims. An exhaustion requirement would prevent them from doing so.

As a practical matter, it is likely that most homeowners would take advantage of the low cost and expeditious enforcement procedure offered by the Bureau, regardless of whether exhaustion is formally required. For that reason, most of the benefits of exhaustion would be achieved even if exhaustion is not mandatory.

The Commission has not yet decided whether to recommend that the law require exhaustion of the Bureau's law enforcement process. The proposed law includes two alternative versions of proposed Civil Code Section 1380.440, one requiring exhaustion and the other providing that exhaustion is not required. The Commission requests input on which is the better approach.

FUNDING ISSUES

Funding Levels

The cost to operate a state agency that processes tens of thousands of complaints each year would be significant. Under current fiscal conditions, it would not be feasible to fund such an agency from the state's general fund.

Instead, the proposed law would impose a fee on community associations to fund the Bureau's operations.[38] The fee would initially be set at $5 per unit per year. The amount of the fee would be evaluated periodically and adjusted up or down, by regulation, to reflect the Bureau's actual funding needs. However, there would be a statutory cap on any increase in the fee amount. It could never exceed $10 per unit per year.

Assuming that all associations pay their fees, the proposed fee would produce between $15 and $30 million in revenue per year. This is comparable to the budget of other agencies with similar consumer protection responsibilities. For example, the Department of Fair Employment and Housing processes complaints about illegal discrimination in employment and the provision of housing. It has approximately 200 employees, offices in 11 cities around the state, and an annual

37. Rojo v. Kliger, 52 Cal. 3d 65, 83, 801 P.2d 373, 276 Cal. Rptr. 130 (1990) (citations omitted).

38. See proposed Civ. Code § 1380.130.

budget of approximately $19 million. It resolves around 20,000 complaints each year, through a process of mediation, investigation, conciliation, adjudication, and litigation.

However, a comparison between the probable resource needs of the Bureau and the resource needs of other regulatory agencies within California has limited value because of differences in procedure and in the nature of the underlying disputes. For example, the Department of Fair Employment and Housing will represent complainants in litigation in some cases, a procedure that is more costly than anything provided in the proposed law. It also seems likely that housing and employment discrimination cases would be more difficult to resolve than a typical CID complaint because of the large sums of money that may be at stake in a discrimination case.

Funding Procedure

The Bureau would be funded through a fee paid by a homeowner association when registering with the Secretary of State every two years.[39] An association would pass the fee along to its members through an increase in annual assessments.

A per unit fee would spread the cost of agency operations evenly among all CID homeowners. This might seem unfair to a homeowner in a well-run association, where there is little need for the Bureau's dispute resolution and enforcement services. However, the Bureau's educational services would benefit all associations. In addition, Bureau adjudication would produce a body of administrative decisions that could help to fill gaps and resolve ambiguities in the law, reducing the risk of litigation for all associations.[40] The Bureau would also produce empirical data on the nature of problems within CIDs that could help to reform the law in ways that will benefit all CIDs.

A per-unit fee has been used successfully in other jurisdictions that provide education and dispute resolution services to common interest communities.[41]

Filing Fee

In addition to the per-unit fee, the Commission is considering a proposal to impose a modest filing fee to partially defray the cost of law enforcement action (e.g., $25 per formal request for investigation). A filing fee would also have the salutary effect of deterring some frivolous complaints. This would reduce the Bureau's enforcement caseload and the potential for unwarranted harassment of board members. The Commission requests input on whether a filing fee should be included in the proposed law.

---

39. See Civ. Code § 1363.6.

40. See proposed Civ. Code § 1380.420(c) *infra*; Gov't Code § 11425.60 (precedent decisions).

41. See "Experience in Other Jurisdictions" *infra*.

PILOT PROGRAM

The proposed law would be subject to a five year sunset provision. This is a common feature of consumer protection agencies established within the Department of Consumer Affairs.

The Joint Legislative Sunset Review Committee exists to review the operation of a consumer protection agency that is subject to a sunset provision and to make a recommendation on whether there is a continued public need for the agency's existence.[42] An agency under review must provide the Joint Committee with a detailed report analyzing its activities, funding, and expenditures.[43] The Joint Committee then holds a public hearing to receive testimony regarding the continued need for the agency. Under the proposed law, the Common Interest Development Bureau would be subject to review by the Joint Committee. This provides an important measure of agency accountability.

EXPERIENCE IN OTHER JURISDICTIONS

Florida and Nevada have programs that are similar in scope to what is included in the proposed law. Other jurisdictions provide narrower assistance. Experience in other jurisdictions demonstrates the feasibility of government assistance to common interest developments and shows that there is significant public demand for such services. A brief survey of CID programs in other jurisdictions is provided below.

Florida

Florida regulates many aspects of the governance of condominiums and cooperatives. For example, Florida's condominium law regulates record keeping,[44] board meeting procedures,[45] election procedures,[46] and budgeting.[47]

In Florida, the state provides assistance to condominiums and housing cooperatives that is very similar in scope to the proposed law. Florida provides three general types of assistance: (1) education, (2) informal dispute resolution, and (3) law enforcement.

These programs are funded in part by an annual fee of $4 per unit.

Education

The Division of Florida Land Sales, Condominiums and Mobile Homes ("Division") provides a range of educational resources, including training classes,

42. Bus. & Prof. Code § 473.4.
43. Bus. & Prof. Code § 473.2.
44. See Fla. Stat. Ann. § 718.111(12).
45. See Fla. Stat. Ann. § 718.112(2)(c).
46. See Fla. Stat. Ann. § 718.112(2)(d).
47. See Fla. Stat. Ann. § 718.112(2)(f).

a toll-free telephone number, and an Internet website. The website includes information on condominium law and provides answers to over 100 frequently asked questions.[48]

Dispute Resolution

Before a lawsuit can be filed in a case involving any of the following issues, the dispute must be submitted to mandatory nonbinding arbitration or mediation:

> (a) The authority of the board of directors, under this chapter or association document to:
> 1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto.
> 2. Alter or add to a common area or element.
> (b) The failure of a governing body, when required by this chapter or an association document, to:
> 1. Properly conduct elections.
> 2. Give adequate notice of meetings or other actions.
> 3. Properly conduct meetings.
> 4. Allow inspection of books and records.[49]

This is similar to California law requiring an offer of alternative dispute resolution before filing a lawsuit to enforce an association's governing documents or common interest development law.[50]

In addition, the Division now includes the Office of the Condominium Ombudsman.[51] The Ombudsman is authorized to provide a range of informal dispute resolution services, including the monitoring of association elections.

Law Enforcement

Any person may file a complaint with the Division alleging a violation of condominium statutory law. The Division will review the complaint to determine whether it states facts establishing a violation within the Division's enforcement jurisdiction. The Division does not enforce governing documents.[52]

If the Division finds a violation of statutory law, it can attempt to resolve the complaint informally, through a warning, education, or a negotiated agreement. If that is not effective, the Division can issue a corrective order, requiring that the offender cease and desist and take affirmative action to remedy the violation. A corrective order can include a civil penalty of as much as $5,000 per violation. A penalty can be imposed against an association director for a knowing and willful violation.[53]

---

48. See <www.myflorida.com/dbpr/lsc/condominiums/information/faq.shtml>
49. See Fla. Stat. Ann. § 718.1255.
50. See Civ. Code § 1369.520.
51. See Fla. Stat. Ann. §§ 718.5011-718.5012.
52. See Fla. Stat. Ann. §§ 718.501.
53. *Id.*

A Division enforcement decision is subject to administrative and judicial review.[54]

Nevada

Nevada provides education, dispute resolution, and law enforcement assistance to common interest communities. Responsibility is divided between two entities: the Ombudsman for Owners in Common Interest Communities and the Commission for Common Interest Communities.

Ombudsman

The Ombudsman has the following responsibilities:[55]

(1) To assist in processing claims submitted for mediation or arbitration pursuant to Nevada's mandatory ADR statute (as in Florida, mediation or arbitration is required before certain specified types of CID lawsuits can be filed).[56]

(2) To assist owners to understand their rights and responsibilities, including publishing materials relating to rights and responsibilities of homeowners.

(3) To assist board members to carry out their duties.

(4) To investigate disputes involving community association law or the governing documents of an association and assist in resolving such disputes.

(5) To compile a registry of CID associations.

The Ombudsman's office is funded by a fee of $3 per unit per year.

Commission for Common Interest Communities

The Commission for Common Interest Communities ("CCIC") is charged with collecting specified types of information about common interest communities, developing and promoting various educational programs, developing standards for mandatory mediation and arbitration of CID disputes, and developing a program to certify and discipline community managers.[57]

In addition, the CCIC has authority to adjudicate an alleged violation of the common interest community statutes and regulations.[58] It may not adjudicate disputes involving an association's governing documents.

A person who believes that there has been a violation of law must first provide notice to the alleged violator. The notice requirements are designed to provide an opportunity to correct the problem informally. If the problem is not corrected, the aggrieved person may file an affidavit with the Real Estate Division. The affidavit is referred to the Ombudsman who will attempt to resolve the problem by informal

---

54. See Fla. Stat. Ann. §§ 120.569 (administrative hearing); 120.68 (judicial review).

55. See Nev. Rev. Stat. Ann. § 116.625.

56.

57. See Nev. Rev. Stat. §§ 116.745-116.750.

58. *Id.*

means. If the problem cannot be resolved with the Ombudsman's assistance, the Real Estate Division conducts an investigation to determine whether there is good cause to proceed with a hearing. If there is good cause to proceed, the complaint is heard by the CCIC or by a hearing panel appointed by the CCIC. The CCIC has authority to issue subpoenas, which are enforceable by court order.

The CCIC has a number of remedies at its disposal. It may issue an order requiring that the violator cease and desist from unlawful conduct or take affirmative action to correct conditions resulting from a violation. It can impose an administrative fine of up to $1,000 per violation. The CCIC may also order an audit of an association or require that a board hire a certified community manager. A board member or other officer who has knowingly or willfully violated the law can be ordered removed from office.

In general, a board member or other officer is not personally liable for a fine. However, if a board member or other officer is found to have knowingly and willfully violated the law, that officer may be held personally liable.

The CCIC is composed of five gubernatorial appointees, with the following qualifications: one homeowner who has served on an association board, one developer, one member who holds a permit or certificate (i.e., a property manager), one certified public accountant, and one attorney.

Maryland

Montgomery County, Maryland, has by ordinance adopted a complete scheme for nonjudicial resolution of CID disputes. The scheme was established in 1991, following a task force study that identified a number of major concerns and issues, including inequality of bargaining power and the need to provide for due process in fundamental association activities. The law creates a county Commission on Common Interest Communities that, among other activities, seeks to reduce the number and divisiveness of disputes, provide and encourage informal resolution of disputes, or (if necessary) conduct formal hearings.[59]

The Commission is composed of 15 voting members appointed by the County Executive, consisting of six CID residents, six CID professionals, and three real estate professionals. It also has non-voting designees of heads of major county departments (including planning, environment, public works, transportation, housing, and community affairs).

A dispute may not be filed with the Commission until the parties have made a good faith attempt to exhaust all procedures provided in the association documents, and at least 60 days have elapsed since those procedures were initiated.

The Commission will provide mediation services to the parties on request. If mediation fails, or is rejected by a party, the dispute goes to a hearing. The hearing is conducted pursuant to standard county administrative hearing procedures. The

59. See Chapter 10B of the Montgomery County Code.

Commission may compel production of books and records and attendance of witnesses, and may invoke the court's contempt power. The hearing panel may resolve the dispute, award damages, and award costs and attorney's fees in appropriate situations. Its decision is binding on the parties.

The hearing panel's decision is subject to judicial review on three grounds only: (1) the decision does not comply with law, (2) it is not supported by substantial evidence, or (3) it is arbitrary and capricious. The court may award costs and fees. A failure to comply with the decision is a civil offense, and the decision is enforceable by the full enforcement mechanisms of the county, including the County Attorney.

In recent years, an average of 40 to 64 cases have been filed each year (about one dispute for every 2,200 registered units). About half of all complaints filed are resolved without a formal hearing. An average of about three cases per year are appealed to the courts.

The Montgomery County program is funded by a $2.25 annual per-unit fee. There is also a $50 fee to file a dispute.

Hawaii

In Hawaii, the Real Estate Commission maintains a list of local mediation centers that are under contract to the state to mediate condominium governance disputes. The state subsidizes the mediation of specified types of disputes. The parties to a subsidized mediation pay only a filing fee.

The Real Estate Commission also offers information and advice to condominium homeowners and their boards. It publishes information on the Internet and in print, and responds to specific inquiries. In 2003, the Real Estate Commission answered nearly 26,000 requests for information or advice.

The Real Estate Commission's educational function and its mediation subsidy are funded by a $4 per unit annual fee on registered condominium associations.

The Real Estate Commission also has authority to investigate violations of specific statutes under its jurisdiction. If it finds a violation it can issue a cease and desist order or seek a court injunction. A violation may also be referred for prosecution as a crime.[60] For the most part this authority is limited to laws governing the development and sale of condominiums. However, one of the provisions that can be enforced administratively is a requirement that members have access to association records.[61]

Virginia

Virginia maintains a Common Interest Community Association Liaison in its Department of Professional and Occupational Regulation. The Liaison has the following duties:

60. See Haw. Rev. Stat. §§ 514A-46 to 514A-49.

61. See Haw. Rev. Stat. § 514A-83.5.

> [Serve] as an information resource on issues relating to the governance, administration and operation of common interest communities, including the laws and regulations relating thereto. Such information may include nonbinding interpretations of laws or regulations governing common interest communities and referrals to public and private agencies offering alternative dispute resolution services, with a goal of reducing and resolving conflicts among associations and their members.[62]

The liaison maintains an informational website[63] and funds various educational events and publications. The liaison maintains a telephone number for homeowner inquiries, receiving about 1,200 inquiries per year. The liaison provides information and advice, but does not intervene in disputes.

Liaison operations are funded by an annual fee of $25 per association.

Australia

Australia has state-run dispute resolution programs for "strata schemes" (including condominiums) in three states: New South Wales, Queensland, and Western Australia.

New South Wales has the most fully-developed program. The agency (Strata Schemes & Mediation Services) includes a commissioner, full-time mediators, adjudicators, and an appeals board. The agency provides governmental oversight and public information, as well as dispute resolution services, and employs customer service officers who provide free information to the public on the governing laws. The agency is funded by the state, but a person submitting a dispute for resolution must pay a filing fee of $58 AUS (approximately $45 US).

A dispute is first submitted to mediation with a government-provided mediator. If mediation fails or is deemed inappropriate, the case proceeds to adjudication. There is a written adjudication system, which is based on the documentary record. A decision reached through written adjudication may be appealed to an administrative "tribunal" which holds a formal hearing to decide the matter. Cases may also be appealed to the courts, though that rarely occurs.

In 2003, there were 918 applications submitted for adjudication in New South Wales (out of approximately 750,000 "strata scheme" housing units).

The programs in Queensland and Western Australia are less fully developed, but include some combination of mediation or conciliation, paper-based adjudication, and appeal to a specialist tribunal.

Great Britain

Great Britain offers government assistance in resolving some types of landlord-tenant housing disputes. These services do not apply to the British equivalent of

62. See Va. Code Ann. § 55-530.

63. See <http://www.virginiaca.net>.

common interest development housing, but do provide models for state assistance in resolving similar sorts of housing-related disputes.

Leasehold Advisory Service

The purpose of the Leasehold Advisory Service is to give legal advice concerning housing disputes to anyone who asks for it. It is overseen by a board consisting of representatives of all stakeholders in the housing market.

The concept of this operation is that many disputes are not settled because parties are unaware of, or have a mistaken conception of, their legal rights. By providing independent legal advice to all, the agency helps people involved in disputes understand their legal rights better, which in turn makes them more realistic in coming to a resolution of their differences.

Advice is provided by telephone, written correspondence, email, or in person. The agency publishes information and advice on its website[64] and in print. In addition, the agency provides training to local authorities, housing associations and professional bodies.

The agency's seven consultants processed nearly 27,000 inquiries in 2003.

Independent Housing Ombudsman

The Independent Housing Ombudsman is a quasi-public entity created to provide dispute resolution services in certain landlord-tenant disputes. The Ombudsman receives complaints and resolves them free of charge. The Ombudsman uses a number of dispute resolution techniques, including informal intervention, formal inquiry, mediation, arbitration, and final recommendation. It rarely conducts hearings, performing most of its work on the basis of paper submissions.[65]

CONCLUSION

A program of state assistance to common interest developments would provide a number of important benefits:

- Authoritative advice and education would help an association director or homeowner to understand the requirements of CID law. This would help to avoid problems that result from ignorance or misunderstanding. This is especially important because CID law is complex and most homeowners are not attorneys.
- Informal dispute resolution would help to defuse problems that are based on miscommunication or mistrust. The involvement of a neutral third party can often serve as a catalyst to bring about a mutually acceptable solution to what might otherwise be an intractable problem.

64. See <http://www.lease-advice.org>.

65. See Independent Housing Ombudsman Scheme, Office of the Deputy Prime Minister (available at www.ihos.org.uk/downloads/common/HOS_Scheme.pdf).

- State investigation and correction of a statutory violation would provide an affordable remedy for many common problems relating to CID governance. Imposition of a sanction for serious misconduct would help to deter malfeasance.
- A centralized advice and dispute resolution service could gather reliable information about the frequency and nature of problems within CIDs. This would provide an empirical basis for determining the need for future reforms of CID law.

The proposed law would create a program to provide all of the services described above, at a cost to each CID homeowner of $5 per year.

Experience in other jurisdictions demonstrates that there is a significant demand for state assistance of the type proposed and that it is feasible to provide such assistance. The Commission recommends that California provide similar assistance to its CID homeowners.

Contents

PROPOSED LEGISLATION

Civ. Code §§ 1380.010-1380.410 (added). Common Interest Development Bureau

SEC. ___. Chapter 11 (commencing with Section 1380.010) is added to Title 6 of Part 4 of Division 2 of the Civil Code, to read:

CHAPTER 11. COMMON INTEREST DEVELOPMENT BUREAU

Article 1. Definitions

§ 1380.010. Application of definitions

1380.010. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this chapter.

Comment. Section 1380.010 is new.

§ 1380.020. "Bureau" defined

1380.020. "Bureau" means the Common Interest Development Bureau.

Comment. Section 1380.020 is new.

§ 1380.030. "Homeowner" defined

1380.030. "Homeowner" means the owner of a separate interest.

Comment. Section 1380.030 is new. See also Section 1351(*l*) ("separate interest" defined).

§ 1380.035. "Managing agent" defined

1380.035. "Managing agent" has the meaning provided in subdivision (b) of Section 1363.1.

Comment. Section 1380.035 is new.

§ 1380.040. "Person" defined

1380.040. "Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.

Comment. Section 1380.040 defines "person" broadly to include various forms of legal entity. *Cf*. Evid. Code § 175; Fam. Code § 105.

Article 2. Administration

§ 1380.100. Legislative findings and declarations

1380.100. The Legislature finds and declares all of the following:

(a) There are more than 36,000 residential common interest developments in California, comprising more than 3,000,000 dwellings. Common interest developments comprise approximately one quarter of the state's housing stock.

(b) Managing a common interest development is a complex responsibility. Community associations are run by volunteer directors who may have little or no prior experience in managing real property, operating a nonprofit association or corporation, complying with the law governing common interest developments, and interpreting and enforcing restrictions and rules imposed by the governing documents of the common interest development. Homeowners may not fully understand their rights and obligations under the law and the governing documents. Mistakes and misunderstandings are inevitable and may lead to serious, costly, and divisive problems. The Common Interest Development Bureau seeks to educate community association officers and homeowners as to their legal rights and obligations. Effective education can prevent or reduce the severity of problems within a common interest development.

(c) Under prior law, the principal remedy for a violation of common interest development law was private litigation. Litigation is not an ideal remedy for many common interest development disputes, where the disputants are neighbors who must maintain ongoing relationships. The adversarial nature of litigation can disrupt these relationships, creating animosity that degrades the quality of life within the community and makes future disputes more likely to arise. Litigation imposes costs on a common interest development community as a whole — costs that must be paid by all members through increased assessments. Many homeowners cannot afford to bring a lawsuit and are effectively denied the benefit of laws designed for their protection. The Common Interest Development Bureau provides a neutral, nonjudicial forum for resolution of common interest development disputes. Many disputes can be resolved inexpensively, informally, and amicably through bureau facilitated mediation. As a last resort, the bureau has authority to issue a citation for violation of the law.

(d) Anecdotal accounts of abuses within common interest developments create continuing public demand for reform of common interest development law. This results in frequent changes to the law, making it more difficult to understand and apply and imposing significant transitional costs on common interest developments statewide. By collecting empirical data on the nature and incidence of problems within common interest developments, the Common Interest Development Bureau provides a sound basis for prioritizing reform efforts, thereby increasing the stability of common interest development law.

(e) The costs of the Common Interest Development Bureau shall be borne entirely by common interest development homeowners, through imposition of a biennial fee.

Comment. Section 1380.100 is new. See also Section 1351(a) ("association" defined), 1351(c) ("common interest development" defined), 1351(j) ("governing documents" defined), 1380.030 ("homeowner" defined).

§ 1380.110. Common Interest Development Bureau

1380.110. (a) There is in the Department of Consumer Affairs the Common Interest Development Bureau, under the supervision and control of the director of the Department of Consumer Affairs.

(b) The director of the Department of Consumer Affairs may employ a bureau chief and other officers and employees as necessary to discharge the duties of the bureau. The chief shall have the powers delegated by the director.

(c) The bureau shall adopt rules governing its practices and procedures. A rule adopted under this subdivision is subject to the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(d) Information and advice provided by the bureau has no binding legal effect and is not subject to the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.)

(e) There shall be no liability on the part of, and no cause of action of any nature shall arise against, the State of California or any of its employees, agents, or representatives for providing or failing to provide information or advice pursuant to this chapter.

(f) The bureau chief may convene an advisory committee to make recommendations on matters within the bureau's jurisdiction. A member of an advisory committee shall receive per diem and expenses pursuant to Section 103 of the Business and Professions Code. In selecting the members of an advisory committee, the bureau chief shall ensure a fair representation of the interests involved.

Comment. Section 1380.110 is new. Subdivision (c) authorizes the Bureau to adopt rules governing its practices and procedures. Such rules are subject to the rulemaking requirements of the Administrative Procedure Act.

Subdivision (d) provides that information or advice provided by the bureau has no binding effect and is not a regulation under the rulemaking provisions of the Administrative Procedure Act.

Subdivision (e) immunizes the bureau from liability for any information or advice that it provides or fails to provide. Provisions immunizing state agencies from liability for information disclosure are common. See, e.g., Bus. & Prof. Code § 10176.1 (Department of Real Estate); Health & Safety Code § 1799.105 (poison control center); Ins. Code § 932 (insurance bureau).

See also Section 1380.020 ("bureau" defined); Bus. & Prof. Code §§ Sections 10 (delegation of powers or duties), 310 (powers and duties of the director).

§ 1380.120. Annual report

1380.120. The bureau shall report annually to the Legislature, no later than October 1 of each year. The report shall include all of the following information:

(a) Annual workload and performance data. For each category of data, the bureau shall provide totals and subtotals based on the different types of disputes involved. The data shall include all of the following:

(1) The number of inquiries received and the final disposition of those inquiries.

(2) The number of requests for investigation filed and the final disposition of those investigations.

(3) The number of citations appealed administratively and the final disposition of those appeals.

(4) The number of administrative decisions on appeal submitted for judicial review and the final disposition of judicial review of those decisions.

(5) Analysis of the time required to resolve inquiries, conduct investigations, and complete administrative adjudication of appeals.

(b) Analysis of the most common and serious types of disputes within common interest developments, along with any recommendations for statutory reform to reduce the frequency or severity of those disputes.

Comment. Section 1380.120 is new. See also Sections 1351(c) ("common interest development" defined), 1380.020 ("bureau" defined),

§ 1380.130. Fee

1380.130. (a) On filing information with the Secretary of State every two years, pursuant to subdivision (a) of Section 1363.6, an association shall submit a Common Interest Development Bureau Fee. This fee is in addition to the fee submitted pursuant to Section 1363.6. Failure to submit the Common Interest Development Bureau Fee is deemed noncompliance with Section 1363.6.

(b) The Common Interest Development Bureau Fee shall equal the number of separate interests within the association multiplied by the biennial fee amount. The initial biennial fee amount is ten dollars ($10).

(c) If a separate interest is part of two or more associations, only one of the associations is required to pay the fee for that separate interest. An association can avoid paying the fee for a separate interest by certifying, on a form developed by the bureau, that another association has paid the fee for that separate interest.

(d) The bureau shall increase or decrease the biennial fee amount every two years to provide only the revenue that it estimates will be necessary for its operation during the next two year period. The biennial fee amount shall not exceed twenty dollars ($20).

(e) Section 1366 does not limit an assessment increase necessary to recover the fee imposed by this section.

Comment. Section 1380.130 is new. Subdivision (b) provides that the Common Interest Development Bureau fee equals the number of separate interests within an association multiplied by the biennial fee amount. The biennial fee amount is initially set at $10. Because the fee is paid every two years, the total annual cost to a homeowner would be $5.

Subdivision (c) provides that a separate interest should only be counted once in determing the fee under this section, regardless of how many associations the separate interest belongs to. This allows overlapping associations to make whatever arrangement for paying fees that suits their circumstances. For example, the separate interests in a 200 unit planned development and a 200 unit condominium project are also included in a master association. The master association pays the fee for all 400 units. The planned unit development association and condominium association are then excused from paying the fee for their separate interests, provided that they document payment by the master association.

See also Sections 1351(a) ("association" defined), 1351(*l*) ("separate interest" defined), 1380.020 ("bureau" defined).

☞ **Staff Note.** Should an undeveloped separate interest be included in calculating the CID Bureau fee? For example, a planned unit development may have 100 separate interests, with homes built on only 50 of them. Should that development be charged a fee based on the 50 units or 100? Many undeveloped units will be owned by the developer rather than by individual homeowners. A developer who owns 50 undeveloped lots would not put the same strain on the Bureau's resources as 50 individual homeowners. The Commission requests public comment on this issue.

§ 1380.140. Deposit and use of funds

1380.140. (a) Common Interest Development Bureau fee revenue received by the Secretary of State and fee revenue received by the bureau shall be transferred to the State Treasurer and placed in the Fee Account of the Common Interest Development Bureau Fund, which is hereby created. All funds in the Fee Account are continuously appropriated to the bureau, to be used exclusively for expenditures necessary for the proper administration of this chapter.

(b) Money paid to the bureau that is attributable to administrative fines imposed by the bureau, or cost recovery by the bureau from enforcement actions and case settlements, shall be transferred to the State Treasurer and placed into the Penalty Account of the Common Interest Development Bureau Fund, which is hereby created. Funds in the Penalty Account shall, upon appropriation by the Legislature, be available exclusively for expenditures necessary for the proper administration of this chapter.

Comment. Section 1380.140 is new. See also Sections 1380.020 ("bureau" defined), 1380.130 (Common Interest Development Bureau fee).

§ 1380.150. Application of chapter

1380.150. (a) This chapter is repealed by operation of law on January 1, 2011, unless a subsequent statute repealing this section or extending the date of repeal of this chapter is enacted and takes effect on or before January 1, 2011.

(b) The bureau is subject to review by the Joint Legislative Sunset Review Committee pursuant to Chapter 1 (commencing with Section 473) of Division 1.2 of the Business and Professions Code.

(c) The bureau may investigate and remedy a violation of law that occurred before January 1, 2006, but may impose an administrative fine only for a violation that occurs on or after January 1, 2006.

Comment. Section 1380.150 is new. See also Sections 1351(c) ("common interest development" defined), 1373 (this chapter not applicable to nonresidential CID).

Article 3. Education

§ 1380.200. Association training

1380.200. (a) The bureau shall offer training materials and courses to common interest development directors, officers, and homeowners, in subjects relevant to the operation of a common interest development and the rights and duties of an association or homeowner.

(b) The bureau may charge a fee for training materials or courses, not to exceed their actual cost.

Comment. Section 1380.200 is new. See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development" defined), 1380.020 ("bureau" defined), 1380.030 ("homeowner" defined).

§ 1380.210. Toll free telephone number

1380.210. The bureau shall maintain a toll free telephone number to be used for information or assistance.

Comment. Section 1380.210 is new. See also Section 1380.020 ("bureau" defined).

§ 1380.220. Internet website

1380.220. (a) The bureau shall maintain an Internet website, which shall provide all of the following information:

(1) The text of (i) this title, (ii) the Nonprofit Mutual Benefit Corporation Law, and (iii) any other statute or regulation that the bureau determines would be relevant to the operation of a common interest development or the rights and duties of an association or homeowner.

(2) Information concerning nonjudicial resolution of disputes that may arise within a common interest development, including contacts for locally available dispute resolution programs organized pursuant to Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code.

(3) A description of the services provided by the bureau and information on how to contact the bureau for assistance.

(4) An analysis, prepared each year, of legislative changes to common interest development law.

(5) Any other information that the bureau determines would be useful to an association or homeowner.

(b) Information provided on the bureau's Internet website shall also be made available in printed form. The bureau may charge a fee for the purchase of printed material, not to exceed the actual cost of printing and delivery.

Comment. Section 1380.220 is new. See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development" defined), 1380.020 ("bureau" defined), 1380.030 ("homeowner" defined).

§ 1380.230. Director and managing agent certification

1380.230. (a) Within 60 days of assuming office as an association director or providing services as a managing agent, an association director or managing agent shall certify that the director or managing agent has read each of the following:

(1) The declaration, articles of incorporation or association, and by-laws of the association that the director or managing agent serves.

(2) This title or, if the bureau prepares a detailed summary of the requirements of this title, that summary.

(b) A director shall file the certification required by this section with the bureau. A managing agent shall file the certification required by this section with the association served by that managing agent.

Comment. Section 1380.230 is new. See also Sections 1351(a) ("association" defined), 1380.020 ("bureau" defined), 1380.035 ("managing agent" defined).

Article 4. Informal Dispute Resolution

§ 1380.300. Dispute resolution assistance

1380.300. (a) Any interested person may request the bureau's assistance in resolving a dispute involving the law governing common interest developments or the governing documents of a common interest development. On receipt of a request for assistance the bureau shall, within the limits of its resources, confer with the interested parties and assist in efforts to resolve the dispute by mutual agreement of the parties.

(b) Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code applies to any form of informal dispute resolution initiated under this section.

(c) The bureau shall take reasonable steps to ensure that confidential information obtained in providing informal dispute resolution assistance is not used in investigating an alleged violation of law.

Comment. Section 1380.300 is new. Subdivision (b) makes clear that a statement made during mediation is subject to existing mediation confidentiality rules.

Subdivision (c) requires the Bureau to take reasonable steps to prevent the use of confidential information obtained during informal dispute resolution in a subsequent law enforcement investigation. For example, the Bureau might adopt a procedure to keep dispute resolution and investigative files and personnel separate.

See also Sections 1351(c) ("common interest development" defined), 1351(j) ("governing documents" defined, 1380.020 ("bureau" defined), 1380.040 ("person" defined).

§ 1380.310. Election monitoring

1380.310. (a) If the bureau receives a petition requesting monitoring of an association election that is signed by homeowners representing 15 percent of the voting power of an association, or six separate interests, whichever is greater, the bureau shall appoint a person to serve as monitor of the election.

(b) The monitor shall be permitted to observe election procedures and examine election materials, including ballots cast. The monitor shall certify the results of the election to the bureau and shall report any irregularities in election procedures.

(c) The cost of monitoring shall be borne by the association.

Comment. Section 1380.310 is new. See also Sections 1351(a) ("association" defined), 1351(*l*) ("separate interest" defined), 1380.020 ("bureau" defined), 1380.040 ("person" defined).

☞ **Staff Note.** Section 1380.310 is based on a similar provision of Florida law, which allows the Condominium Ombudsman to appoint an election monitor in response to a homeowner petition. See Fla. Stat. Ann. § 718.5012(9). It is included for discussion purposes and has not yet been approved by the Commission. The Commission invites comment on whether such a provision would be helpful.

Article 5. Law Enforcement

§ 1380.400. Investigation and conciliation

1380.400. (a) Any interested person may file a request for investigation of an alleged violation of this title or of the Nonprofit Mutual Benefit Corporation Law as it applies to a common interest development. The request shall be submitted in writing, on a form provided by the Bureau [, along with a $25 filing fee].

(b) The bureau shall review the request and decide whether to conduct an investigation. If the bureau declines to investigate, it shall [refund the filing fee and] provide the person who requested the investigation with a written explanation of the basis for its decision.

(c) If the bureau finds that a violation has occurred, it shall contact the person accused and attempt to abate and remedy the violation through conciliation. A conciliation agreement shall be in writing and signed by the person to be bound by the agreement. The bureau shall provide a copy of the conciliation agreement to the person who filed the request for investigation.

(d) If the bureau finds that the alleged violation did not occur, it shall provide written notice of its findings to the person who requested the investigation and to the person accused.

(e) The procedure provided in this article shall not be used to enforce the obligation of a homeowner to pay an assessment.

Comment. Section 1380.400 is new. It provides for Bureau investigation of an alleged violation of common interest development law. The Bureau would have discretion as to whether to investigate a particular case. This allows the Bureau to judge the significance of a violation in deciding whether to allocate investigative resources to it.

Subdivision (e) makes clear that the procedure provided in this article is not to be used for the collection of assessments. Other procedures exist for that purpose. See Sections 1366-1367.1.

As part of the Department of Consumer Affairs, the Bureau could have a broad range of delegated investigative powers. See Bus. & Prof. Code § 310(e) (director of DCA authorized to "Hold public hearings, subpoena witnesses, take testimony, compel the production of books, papers, documents, and other evidence, and call upon other state agencies for information.").

See also Sections 1351(c) ("common interest development" defined), 1380.020 ("bureau" defined), 1380.040 ("person" defined).

☞ **Staff Note.** The bracketed language would be included if a filing fee is imposed — a matter not yet decided by the Commission. A filing fee would help to deter frivolous complaints and provide another source of revenue to partially offset the cost of an investigation. The tentative figure of $25 was chosen to provide a meaningful deterrent without being unaffordable to those of limited means.

§ 1380.410. Citation

1380.410. (a) If a violation cannot be abated and remedied through conciliation under Section 1380.400 the bureau may issue a citation. The citation shall be served on the person responsible for the violation. If the bureau decides not to issue a citation, it shall provide written notice of its decision to the person who filed the request for investigation.

(b) A citation shall identify the statute that has been violated and the facts constituting the violation. The citation shall order abatement of the violation and may order additional equitable relief as appropriate.

(c) A citation may include an administrative fine of not more than $1,000 per violation, to be paid to the bureau.

(d) In determining whether to impose a fine and the amount of any fine imposed, the bureau shall consider the size of the association, the gravity of the violation, the presence or absence of just cause or excuse, and any history of prior violations.

(e) A fine shall not be imposed against a director, officer, or managing agent unless the bureau finds, by clear and convincing evidence, that the violation involved malice, oppression, or fraud, as those terms are defined in Section 3294.

(f) If the bureau finds, by clear and convincing evidence, that a violation by an association director or officer involved malice, oppression, or fraud, as those terms are defined in Section 3294, the citation may order removal of the director or officer from office and state a period of time, not to exceed one year, during which the person removed may not serve as a director or officer.

(g) If a citation is either not contested or is upheld after administrative and judicial review, the bureau shall publish the citation on its Internet website for a period of three years.

Comment. Section 1380.410 authorizes issuance of a citation to correct a violation of law that cannot be remedied through conciliation. *Cf*. Bus. & Prof. Code § 125.9 (authority to issue corrective citations). The bureau's authority to order a remedy for a violation of law derives from this chapter and is not limited by any provision of the governing documents of a common interest development.

An association's governing documents may provide for indemnification of a director or other agent of an association who is investigated by the Bureau for an alleged violation of law. However, the power of a corporation to indemnify an agent is limited by Section 7237 of the Corporations Code.

Subdivision (e) provides for Internet publication of a final citation. *Cf*. Bus. & Prof. Code § 27 (Internet publication of disciplinary status of Department of Consumer Affairs licensee).

See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development" defined), 1380.020 ("bureau" defined), 1380.035 ("managing agent" defined), 1380.040 ("person" defined).

§ 1380.420. Administrative and judicial review

1380.420. (a) A person named in a citation may contest the findings or orders included in the citation by filing a written request with the bureau for an administrative hearing.

(b) A hearing held pursuant to this section is subject to the administrative adjudication provisions of the Administrative Procedure Act (Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code). The Department of Consumer Affairs shall appoint the presiding officer, who shall be qualified as an administrative law judge. The presiding officer may be an employee of the Office of Administrative Hearings or of the Department of Consumer Affairs but may not be an employee of the bureau.

(c) If the bureau determines that an adjudicative decision involves a significant legal or policy determination of general application, the bureau may designate the decision as a precedent decision under Section 11425.60 of the Government Code.

(d) An adjudicative decision made pursuant to this section is subject to review under Section 1094.5 of the Code of Civil Procedure.

Comment. Section 1380.420 is new. See Gov't Code § 11400 ("administrative adjudication provisions of the Administrative Procedure Act" defined). See also Sections 1380.020 ("bureau" defined), 1380.040 ("person" defined); Gov't Code § 11523 (judicial review of final agency decision).

§ 1380.430. Enforcement of conciliation agreement or citation

1380.430. (a) The bureau may enforce a conciliation agreement or citation by commencing a civil action in superior court, in the county in which the common interest development named in the conciliation agreement or citation is located.

(b) A citation is only enforceable if the court finds that the citation was not contested or was upheld after administrative and judicial review.

(c) In a proceeding under this section, the court shall not review the merits of a conciliation agreement or citation.

(d) A judgment under this section is nonappealable and has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action.

Comment. Section 1380.430 provides for judicial enforcement of a conciliation agreement or citation. See also Section 1380.020 ("bureau" defined).

☞ **Staff Note.** Two alternative versions of Section 1380.440 are set out below. The Commission has not yet decided whether to recommend that a person be required to exhaust the Bureau's law enforcement procedure before filing a civil claim within the Bureau's law enforcement jurisdiction. The two sections below set out the alternative approaches.

§ 1380.440. First Alternative: exhaustion of administrative remedy <u>required</u>

1380.440. (a) A person may not commence a civil action based on an alleged violation of this title or of the Nonprofit Mutual Benefit Corporation Law as it applies to a common interest development, unless the person files a statement

certifying that the person requested bureau investigation of the alleged violation and that the bureau's investigative process reached one of the following conclusions:

(1) The bureau declined to investigate the alleged violation.

(2) The bureau found no violation.

(3) The bureau reached a conciliation agreement with the accused.

(4) The bureau failed to reach a conciliation agreement but declined to issue a citation.

(5) The bureau issued a citation and the citation was either not contested or was upheld after administrative and judicial review

(b) The statute of limitations on a cause of action based on an alleged violation of this title or of the Nonprofit Mutual Benefit Corporation Law as it applies to a common interest development is tolled from the time of filing a request for investigation to the time that one of the events listed in subdivision (a) occurs.

Comment. Section 1380.440 requires exhaustion of the Bureau's law enforcement process before filing a civil action based on an alleged violation within the Bureau's law enforcement jurisdiction. Subdivision (a) lists the events that must occur before the Bureau's process is deemed to have been exhausted.

Subdivision (b) provides that the Bureau's law enforcement process tolls the statute of limitations on a civil action that is based on an alleged violation within the Bureau's law enforcement jurisdiction.

See also Section 1380.020 ("bureau" defined).

§ 1380.440. Second Alternative: exhaustion of administrative remedy <u>not required</u>

1380.440. A person is not required to exhaust the administrative remedy provided in this article before filing a civil action based on an alleged violation of this title or of the Nonprofit Mutual Benefit Corporation Law as it applies to a common interest development.

Comment. Section 1380.430 excuses a person from exhausting the Bureau's law enforcement procedure before filing a civil action that is based on an alleged violation within the Bureau's law enforcement jurisdiction. See also Sections 1351(c) ("common interest development" defined), 1380.040 ("person" defined).

RELATED CHANGES

Civ. Code § 1363.7 (added). Information on Common Interest Development Bureau

SEC. ___. Section 1363.7 is added to the Civil Code, to read:

1363.7. An association shall provide its members with annual written notice of the Internet website address and toll-free telephone number of the Common Interest Development Bureau established pursuant to Chapter 11 (commencing with Section 1380.010).

Comment. Section 1363.7 is added to require that an association provide its members with contact information for the Common Interest Development Bureau.

Civ. Code § 1369.510 (amended). Definitions

SEC. ___. Section 1369.510 of the Civil Code is amended to read:

1369.510. As used in this article:

(a) "Alternative dispute resolution" means mediation, arbitration, conciliation, or other nonjudicial procedure, including informal dispute resolution pursuant to Section 1380.300, that involves a neutral party in the decisionmaking process. The form of alternative dispute resolution chosen pursuant to this article may be binding or nonbinding, with the voluntary consent of the parties.

(b) "Enforcement action" means a civil action or proceeding, other than a cross-complaint, for any of the following purposes:

(1) Enforcement of this title.

(2) Enforcement of the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code).

(3) Enforcement of the governing documents of a common interest development.

Comment. Section 1369.510 is amended to make clear that "alternative dispute resolution" includes an attempt to mediate a dispute under procedures established by the Common Interest Development Bureau.

Civ. Code § 1373 (amended). Nonresidential associations

SEC. ___. Section 1373 of the Civil Code is amended to read:

1373. (a) The following provisions do not apply to a common interest development that is limited to industrial or commercial uses by zoning or by a declaration of covenants, conditions, and restrictions that has been recorded in the official records of each county in which the common interest development is located:

(1) Section 1356.

(2) Article 4 (commencing with Section 1357.100) of Chapter 2 ~~of Title 6 of Part 4 of Division 2~~.

(3) Subdivision (b) of Section 1363.

(4) Section 1365.

(5) Section 1365.5.
(6) Subdivision (b) of Section 1366.
(7) Section 1366.1.
(8) Section 1368.
(9) Section 1378.
(10) Chapter 11 (commencing with Section 1380.010).

(b) The Legislature finds that the provisions listed in subdivision (a) are appropriate to protect purchasers in residential common interest developments, however, the provisions may not be necessary to protect purchasers in commercial or industrial developments since the application of those provisions could result in unnecessary burdens and costs for these types of developments.

Comment. Section 1373 is amended to exempt a nonresidential CID from the jurisdiction of the Common Interest Development Bureau and to delete unnecessary language.
