Study H-850 January 30, 2001

First Supplement to Memorandum 2001-19

Common Interest Development Law: Scope of Project (Background Study)

INTRODUCTION

Memorandum 2001-19 reviews correspondence commenting on the background study prepared for the Commission by Professor Susan F. French of UCLA Law School, *Scope of Study of Laws Affecting Common Interest Developments* (November 2000). This supplemental memorandum presents additional correspondence received since issuance of Memorandum 2001-19.

We do not reproduce attachments to these letters here. We will consider them during the course of this study in connection with the specific issues to which they relate.

The purpose of this supplemental memorandum is not to deal with the merits of specific issues raised. Rather it is to indicate to the Commission the types of issues people have identified, to assist the Commission in determining the scope of and priorities for this study.

ISSUES ADDRESSED IN SCOPE REPORT

General Reaction

Charles Egan Goff believes that the root source of problems homeowners have with CID governance is the tyranny of the directorate, the solution to which is separation of powers (to avoid concentration of power in one or a few individuals).

Replace Davis-Stirling Act with UCIOA

Skip Daum suggests as an area for Commission review that the Commission investigate the possibility of replacing the Davis-Stirling Act with UCIOA.

Provide Better Protection to Members of CIDs

Suggestions we have received for improvements that might be made to the law to provide better protection for association members include the possibility of audio or video recording of meetings, requiring or encouraging board members to receive education and training, providing homeowners access to records (including those currently subject to executive privilege), subjecting boards and their members to penalties or sanctions, allowing on-line voting by members, allowing certification that an association is restricted to senior housing, requiring automatic disclosure to members of proxies and votes at board elections. See comments of Skip Daum.

Charles Egan Goff advocates a Bill of Rights for all members.

Investigate Nonjudicial Oversight of CIDs

Skip Daum indicates that an appropriate matter for Commission review would be whether the statute should create an oversight entity such as a Bureau of Common Interest Developments. He also suggests that the Commission investigate whether an ombudsman should be required for community associations, including the funding and effectiveness of such a position.

Charles Egan Goff asks, "Why can't an HOA have, besides directors (suggest a better title be found), an ombudsman, some sort of 'due process' against directors, an independent group to decide disputes, and a separate group to propose amendments to CC&Rs and house rules, etc.?" Exhibit p. 12.

Broaden Coverage of CID Law

Mylos Sonka and Cheryl A. Tanasovich provide the example of their community, which is not governed by the Davis-Stirling Act but should be in order to provide reasonable and equitable standards of assessment practice. "We need the law to do what no lawsuit or drafted agreement can do. We need it to bring us to being a D-S HOA *with* D-S norms explicitly spelled out in the law, including curtailing voting rights that allow a majority of owners to shift unreasonable or unfair burdens to the minority of owners." Exhibit p. 3 (emphasis in original). The same point is made by R. Moon.

They also give a number of specific suggestions for principles governing (1) membership in the association, (2) equitable assessments based on access, usage, and special benefits principles, (3) voting rights, (4) coverage of municipal functions such as fire protection, trash pickup, debris clean up, and mailboxes, (5) association governance, and (6) CC&R changes. (The last issue is elaborated below, "Changes in CC&Rs".)

Skip Daum indicates it may be helpful to restate applicability of the Davis-Stirling Act to CIDs formed before its enactment.

Charles Egan Goff indicates that his housing development has a volunteer associations, not controlled by the Davis-Stirling Act. However, it has the same problems as other association, and it should be included in the prospective revised act.

Mary M. Howell urges extension of the CID law to cover non-common interest communities, particularly senior communities. Absent a community association to enforce restrictions, make assessments for maintenance, respond to external legal challenges, amend CC&Rs to adapt to changed circumstances, engage in alternative dispute resolution, and extend CC&Rs after their expiration, these communities slowly fail.

ISSUES NOT ADDRESSED IN SCOPE REPORT

CID Development

Skip Daum indicates a need to consider whether a developer should give all construction plans, change orders, operational schematics, contracts, governing documents, etc., to the community association on its formation.

Education and Disclosure

Skip Daum suggests as an area for Commission review whether and how home buyers may be apprised of CID laws and rules. Should the escrow process be standardized? Should there be a right to rescind an offer to purchase real property tied to receipt of CID disclosure information?

Changes in CC&Rs

Mylos Sonka and Cheryl Tanasovich indicate it is too difficult to amend basic governing documents for changed circumstances. Their experience is that the 75% supermajority vote required by their CC&Rs is too high — a 51% vote

would be better. “It has been our experience that supermajority requirements for CC&R assessment changes tend to further disenfranchise numerical minorities by raising the bar too high for reasonable changes. The path to community functionality should be through more democracy, not less.” Exhibit p. 5.

Skip Daum raises the question whether declarations should be automatically renewed as they expire even if there is no automatic renewal period written in the document.

Association Management and Enforcement

Skip Daum suggests the Commission might review a number of issues relating to association management and enforcement, including whether recordation of a Notice of Noncompliance should be allowed, whether disclosure dates and time periods should be standardized and summaries allowed, whether first mortgages should be subordinated to assessment liens, whether payments should be allocated to interest and collection costs before principal, whether associations should be allowed to collect rent from tenants to cover past due assessments of owners, whether the “Denver Boot” should be allowed for violation of parking restrictions as an alternative to towing, whether the time frame in which to distribute operating budgets should be expanded, and whether a member who pays a proportional share of the association’s debt should be free from further assessment for the debt.

Provide Better Protection to Directors and Officers of CIDs

Mary M. Howell urges greater protection in the law for volunteer officers and directors of CIDs. She notes that associations serve municipal functions, but do not enjoy municipal immunities. Dissident homeowners have plenty of remedies available, including the power of recall against board members who fail to perform properly. But board members have no protection against abusive lawsuits by dissident homeowners. “If community associations do perform a socially desirable end (and clearly, the ultimate determination of society, the courts and this legislature is that they ***do***), and if the legislature’s larger goal is to provide safe, strong, attractive communities for its citizens, proper attention must be paid to protecting the volunteers who serve, as well as those they serve.” Exhibit p. 20 (emphasis in original).

General Improvements in the Law

There were general suggestions for improvement of the law governing CIDs that do not fall under any of the preceding general headings. These include the need for greater clarity in the law regarding boundaries, common areas, exclusive use areas, and easements, and revision of the law to reflect recent FCC rules regarding telecommunication devices. See comments of Skip Daum.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Mylos Sonka
Cheryl Tanasovich, M.D.
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Nicasio CA 94946

January 15, 2001

Nathaniel Sterling
California Law Revision Commission
4000 Midlefield Road, Room D-1
Palo Alto CA 94303-4739

Dear Mr. Sterling and Commission members:

Thank you for your call for public comment on a newly-released report relating to revision of the common interest development laws.

You have indicated to us in the past that many of the assessment and fee-related concerns we have regarding our development seem to dovetail with the scope and objectives of the Law Revision Commission. Accordingly, we offer in the attachment to this letter some concrete recommendations for language that addresses problems we understand a number of common interest developments have experienced. By tightening up the language of the Davis-Stirling Act with clear and reasonable standards of assessment practice, or by recommending unambiguous limits on surcharges and disproportionate assessments, much litigation and community ill will may be avoided. Our own community has been paralyzed and dysfunctional for over twenty-five years over these issues; our County Planning Commission has singled out our community as an example to others of how *not* to plan a development. We hope that our real-life experience has provided not only a cautionary tale, but a foundation for practical and effective recommendations that will benefit other California CID residents who find themselves in similar straits.

Thank you so much for the valuable work you are doing. Please feel free to contact us at any time.

Very truly yours,

Mylos Sonka
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Cc: Senator John Burton
Assemblyman Joe Nation

January 15, 2001

Contact: Cheryl A Tanasovich, M.D.
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Common Interest Development Law

Practical Problems and Recommendations

PROBLEMS

Our development was created in the early 1970s and consists of 52 lots along a common roadway. It was created without CC&Rs and there have been numerous attempts to create them over the last 25 years or so. There have been a continuing series of lawsuits over the years and attempts by homeowners to create governing documents, but none have ever been signed by 100% of the property owners. The present assessment scheme came as a result of a court judgment after the 1982 floods washed away parts of the common roadway. An insurance loophole, quickly closed thereafter, provided coverage. This resulted in properties near the end of the road being assessed at 14 times the assessment at the beginning of the road. *This settlement was made between insurance companies*, approved by a judge and had no specific regard to or for assessments formulae that would normally be levied in a functioning homeowners association where all owners using the common facilities assume equal or close to equal responsibility or risk. Unfortunately, the precedent was set by this insurance settlement and unfair allocations of assessments have continued over the years. The 2/3rd majority of the properties within the first half of the development maintained this 14:1 assessment disparity over the numerical minority within the second half. By default, Civil Code 845 had been our governing document for collection of assessments. Almost 30 years of acrimony and litigation over assessments has ensued.

In an attempt to create a real governing document so that collections could be made and the community could function, the majority of the homeowners have signed onto a set of CC&Rs the drafters claim to be drafted in conformity with the Davis-Stirling Act. In order to get a majority of the property owners to sign, however, the assessments in the documents put an even more onerous burden on the minority at the end of the road-- a 77:1 assessment disparity for a roadway damage at the middle of our development. (We would be happy to provide the committee with documentation and further examples if requested.)

Consequently, not everyone has been a signatory. This has resulted in different homeowners being governed by different documents and having different assessment schemes. The majority now denies voting rights and representation by arbitrarily excluding from membership fully paid-up homeowners who have withheld their signatures in protest, effectively bolstering its majority even more.

- Assessments are based upon past theories of usage and not upon shared responsibility or importance of access for water or emergency services for all properties (while water and emergency services are accessed through the second half of the development), causing extremely disparate assessments.
- There is no specific language in the CC&Rs regarding assessments for other community functions such as fire protection, mail boxes, or security. Pursuant to the majority interpretation of the CC&Rs, all expenses are assessed with the same 14:1 disproportion originally designated for the indemnified 1982 flood damage. If the minority refuses to pay the majority of the burden, such basic community functions will be lacking.
- Lawsuits have not, and cannot remedy the situation. Legally electing to become a D-S HOA is not

possible, either, because 100% will never sign on to onerous obligations. We need protection of the law to help us bring ourselves into conformity with general standards of assessment practice.

- A homeowners association is supposed to function as a municipal government, but disproportionate payment structure causes community dysfunction. The majority can make the minority pay the bulk of expenses even though access is equal.
- Our association is not in conformity with California constitution and codes. Litigation, or an action of the Attorney General, would be required to enforce minimal rights such as access to membership lists, minutes of meetings, assessment without right of representation or membership, and election and removal of officers. Few can afford to sue and the Attorney General is not reputed to be willing to address these matters.

SOLUTION AND SUGGESTIONS

Like other HOAs, our community needs to be brought into the fold of reasonable standards of assessment practice. We have slipped through cracks between the law and general presumptions of equal shares that govern most other homeowners associations. Previous CC845 judgments have not addressed fundamental issues of fairness and equity. Even our "Davis-Stirling" CC&Rs have not brought us to D-S standards of reasonableness. Our HOA board, dominated by a majority protecting its advantage, routinely functions more like a fiefdom than a democracy. We need the law to do what no lawsuit or drafted agreement can do. We need it to bring us to being a D-S HOA *with* D-S norms explicitly spelled out in the law, including curtailing voting rights that allow a majority of owners to shift unreasonable or unfair burdens to the minority of owners.

We offer the following suggestions for revising the law such that HOAs operating under CC845, or claiming to be Davis-Sterling are brought into the "norms" of Davis-Stirling with explicit reference to:

1. *Membership rights and responsibility based upon ownership of property.*

   Every homeowner or owner of a lot which is subject to assessment shall be a member of the Association.

2. Access, Usage and Special Benefits. Equal assessments based upon equal access.

   Common roadways shall be treated as common areas.

   Areas with equal access shall be assessed equally.

The California Constitution already speaks to the question of special benefits. We urge the committee to adopt its language:

> The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No **assessment** shall be imposed on any parcel that exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel.

A standard for unequal assessments already exists in practice. A CID that contains properties with, for example, waterfront access, might typically levy a twenty percent surcharge. This is reasonable in cases where some properties benefit and others do not. With respect to roadway repair, however, the specious argument "I don't use the end of the road, why should I pay for it?"— could be used by any resident living near the entrance of every common interest development in California. The courts have rebuffed this argument and the law should reflect this by providing reasonable and customary— and explicit-- standards of practice for CID assessments.

USAGE ALTERNATIVE #1:
No special benefit shall be conferred by roadway usage where all residents have equal access or ownership, regardless of usage, and members shall be subject to equal assessment.

USAGE ALTERNATIVE #2
The special benefit conferred by equal roadway access but unequal usage may be assessed by means of a surcharge not to exceed twenty percent (20%). If fire road or emergency egress via the common roadway can be accessed from more than one part of said roadway, no special access or usage may be claimed, and maintenance of the roadway shall be assessed on an equal shares basis alone.

3. Votes should be weighted in proportion to assessment burden. In addition to explicit provisions for equal shares, we suggest weighted voting rights per CA Constitution 13D: The power to make decisions which affect assessments, where unequal, should be weighted in favor of those residents who pay the most for the repairs. Representation in proportion to burden is guaranteed by the California Constitution—Assessments 13D.

> The agency shall not impose an **assessment** if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the **assessment** exceed the ballots submitted in favor of the **assessment**. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property. [CALIFORNIA CONSTITUTION ARTICLE 13D (**ASSESSMENT** AND PROPERTY-RELATED FEE REFORM) SEC. 4. Procedures and Requirements for All Assessments.]

We urge the committee to adopt similar language.
Where the equal shares standard is not adopted, the degree of disproportionate roadwork and other assessment surcharges should be explicitly limited by fair and reasonable standards to be recommended by the Committee.

4. Municipal functions such as fire protection, trash pickup, debris clean up, mailboxes should fall within purview of the association and assessed equally to all or with reasonable limits so no minority bears the burden.

Fire protection measures. Our disproportionate assessment structure has crippled our community: we have been criticized by our county fire officials for inaction and endangerment. We cannot undertake brush clearing for fire protection without great struggle because residents resist paying 14 times their neighbors for the same benefit. Clear language calling for equal shares (or surcharges based upon frontage or square footage) for mutually beneficial municipal activities would help us resolve these issues nonjudicially.

We recommend that other municipal activities be shared equally. We want all the things real homeowners associations can provide, but which we cannot address because of our disproportionate assessment structure: recycling, shredding, costs incidental to County brush clearing and burning, fire storage tanks.

We suggest:

In the absence of onsite municipal or association-maintained water storage facilities and resources, reasonable compensation for fire protection measures, such as but not limited to water storage facilities, which are maintained by private groups within the development, may be paid to such groups or individuals provided the resources are reserved exclusively for use by county fire officials and logged in the department run books and resource maps. All such municipal costs and services should be assessed on an equal shares basis.

5. Standards set for announcement of Board meetings, election and removal of officers, protocol for executive sessions. Our HOA has not complied with Corporations Codes standards and efforts to correct this, including legal assistance, have been thwarted.

6. CC&R Changes. Our present CC&R document requires 75% approval for any changes in assessment structure to take effect. We therefore recommend a lower bar for CC&R changes – 51% of voting power of owners within the subdivided parcels. It has been our experience that supermajority requirements for CC&R assessment changes tend to further disenfranchise numerical minorities by raising the bar too high for reasonable changes. The path to community functionality should be through more democracy, not less.

AMENDMENT ALTERNATIVE #1
CC&Rs may be changed by a vote of 51% of the membership.

AMENDMENT ALTERNATIVE #2
CC&Rs may be changed by a vote of 51% of the membership. In tabulating the ballots for a vote on CC&R changes where assessments are not levied on an equal shares basis, the ballots shall be weighted according to the proportional financial obligation of the affected properties.

ALTERNATIVE #3
In tabulating the ballots for a vote on CC&R changes where assessments are not levied on an equal shares basis, the ballots shall be weighted according to the proportional financial obligation of the affected properties.

Our community has suffered more than 25 years of ill will and litigation, first under CC845, and continuing today under Davis-Stirling. It is our hope that clear and specific language about standards of assessment practice will provide, instead of more years of community dysfunction and litigation, a mechanism for self-governing that would allow us to move on to such other more mundane problems as pets and fences.

We thank the committee for its attention to these concerns.

Very truly yours,

Myles Sonka

Cheryl A Tanasovich, M.D.

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Mr. Stan Ulrich
Assistant Executive Secretary
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January 24, 2001

RE: Submittal 1 to: Common Interest Development Law [Study H-850]

Dear Stan,

This submittal identifies issues that the Commission might review. It is not a comprehensive analysis as each was discussed at length by a task force convened in Fall 1997 by then-Senator Barbara Lee; see accompanying sets of minutes, notes and summaries. In addition, the Senate Housing Committee, under then-Chairman Byron Sher, convened an interim hearing, a video tape of which is the purest record and is also enclosed. Thus, the issues we herewith submit highlight areas that can be researched further and which the "CID industry" may comment on as they individually arise as part of the commission's deliberations.

Ironically, as we identify issues, flaws, vagaries, conflicts and inconsistencies in the Davis Stirling Act (DSA) we appear to be encouraging "micromanaging" of the community associations (CAs) themselves. Yet, statutory micromanagement is opposed by CAI-CLAC because legislative fiat should not orchestrate how community associations conduct their business as they are corporations established under the law to be self-administered.

Having said that, we realize that so many legislative incursions and amendments to the original body of law have been made that the simplicity of the law has been entangled by numerous changes brought upon it by special interests and sometimes inaccurate factual argument leading to statutory changes. Some of these items are broad, others narrow; I am enclosing materials that identify the issues, propose solutions, and reflect either consensus from the industry, or otherwise. (The CLRC may wish to electronically scan them in order to make them available to the public via the internet.)

1. Whether the DSA should be abandoned in lieu of a broader concept or model act as currently exists and which was analyzed by Attorneys Katharine Rosenberry and Curt Sproul in a publication, enclosed. Also see the Commissioners on Uniform State Laws' proposed "Uniform Common Interest Ownership Act" (UCIOA).

2. Whether the statute should create an oversight entity such as a Bureau of Common Interest Developments. See enclosure by Attorney Jim Lingl.

3. Whether, and how home buyers should/may be apprised about Common Interest Development laws and "rules"; i.e., should the CID Brochure, and relevant other governing documents be required to be delivered to each buyer, and at what time during the purchasing process, in the interest of full disclosure.

4. Escrow disclosures are varied, demanded by real estate brokers and lenders, and lack uniformity. Should this process be standardized and timelier? What information needs to be disclosed to owners, buyers, others? Should such disclosures relieve sellers from the requirement to provide a Transfer Disclosure Document (TDS)? Should/is the CA responsible for disclosing information to prospective sellers, and if so what information?

5. Should there be a right to rescind an offer to purchase real property tied to receipt of CID disclosed information?

6. Should/may meetings be audio or video recorded? Which meetings?

7. Should original Declarations be automatically renewed as they expire even if there is no automatic renewal period written in the document? If nonrenewal or termination occurs it leaves no controlling authority to maintain the development.

8. Whether recordation of Notices of Noncompliance (with the relevant Declaration or Rules) should be allowed/ required in order to achieve compliance.

9. How irregular and perhaps impractical dates and time periods for disclosing certain documents and information to members should be standardized. May summaries suffice to reduce the sheer volume/cost of information?

10. Applicability of the DSA to CIDs formed prior to the Act may need to be restated in law.

11. The necessity to subordinate fist mortgages by establishing a "priority lien" for collection of unpaid assessments owed to the CA. (CC 1367) (AB 1545, Bornstein, 1994, vetoed by Governor)

12. Amend CC 1367 (a) to require payment first to interest and cost of collection instead of principal, to align with rights of other creditors who typically apply payments in this manner.

13. Should CA Board Members be required to receive education and training in order effectively participate as a corporate director? Are there incentives available that would encourage such volunteers to attend training classes in order to educate themselves?

14. Should an ombudsperson role be required for CAs? How would such a potion be funded? Is it efficacious and practical?

15. Should CA members be entitled to access all records , including those that are now subject to executive privilege? (AB 2031, Nakano, 2000; Corp Code 8333)

16. Should the DSA impose penalties or sanctions on CAs or their Board Members and, if so under what conditions?

17. DSA needs more clarity in regard to boundaries, common areas, exclusive use areas, and easements (CC 1351), and the CAs need more flexibility to determine their respective uses.

18. Should CC 1376 be deleted given the recent FCC rulings regarding telecommunication devices, etc?

19. Should CAs have authority to collect rent from tenants in order to collect past due assessments from owners?

20. Permit association member voting online. The problem is that many association members do not vote. Permitting member voting online could encourage voting. The following are statute sections related to member voting: Corporations Code Sections 7510 through 7616.

21. Permit the use by associations of the "Denver Boot" as an alternative to towing vehicles. The Denver Boot is a device that immobilizes improperly parked vehicles. The problem is that there is no express authority for associations to use Denver Boots. The use of Denver Boots by associations will make it cheaper and easier for associations and their members to enforce and comply with parking restrictions. Vehicle Code Section 22658.2 concerns removal of vehicles from common interest developments.

22. Allow associations to annually distribute the operating budget "not less than 45 days nor more than 75 days prior to the beginning of the association 's fiscal year" rather than "not less than 45 days nor more than 60 days prior to the beginning of the association's fiscal year." The problem is that it is unduly difficult for association board members to comply with the current short time-frame in which to distribute operating budgets. The applicable statute is Civil Code Section 1365.

23. Certification that an association is restricted to senior housing. Such a law could enable senior housing associations to avoid litigation concerning the issue of whether they may restrict residents to seniors. The applicable statute is Civil Code Section 51.3.

24. Require associations to disclose at board member elections, without a need for a member to make such a request, the number of proxies and/or ballots voted for each board member nominee or candidate. The problem is that there is currently an appearance of secrecy concerning elections. A relevant statute is Corporations Code Section 8325.

25. Provide that an association member who pays their proportional share of a debt to a creditor is no longer responsible for any assessments related to the debt. The applicable statute is Civil Code Section 1366.

26. Developers should give all construction plans, change orders, operational schematics, contracts, governing documents, etc. to the CA upon its formation.

Respectfully,

Skip Daum
Administrator/Advocate

Enclosures enroute via mail
cc: CAI-CLAC Delegates
CAIN
ECHO
CACM
CAR

R. Moon
601 Cedarberry Lane
San Rafael, CA 94903

January 18, 2001

Nathaniel Sterling
California Law Revision Commission
4000 middle field Road Room D-1
Palo Alto California 94303-4739

Mr. Sterling:

Our H O A one requires all single point repairs to our common roadway to be paid by it those living past the point of repair. This has resulted in next-door neighbors in our community pain widely disparate assessment. If a major failure to or, roadway costing $100,000 or to court near the end of or development, we have calculated that but be at the end of our common roadway we would be responsible for more than $95,000 well the rest of those in the development would be billed at about $100 each.

Lacking explicit definitions of reasonableness in Davis starling most of our neighbors vote their pocketbooks and prefer to pass the costs on to their neighbors.

Absent explicit language calling for fairness and equity in matters of assessments, such anomalous assessments cannot be over, without a destructive community antagonism and costly litigation.

The final purpose and principal benefit of homeowners associations are cost sharing and risk sharing. Assessment methods like these distort this fundamental purpose. I urge the committee to adopt sense will explicit guidelines are limits in order to bring aberrant H zero A's into the field of reasonable and customary assessment practice.

Sincerely,

R. Moon

Judge (Ret.) Charles Egan Goff
P.O. Box 8129
Truckee, California 96162
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January 29, 2001

Professor Susan F. French
C/o California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

RE: NON-DAVIS STERLING ACT
HOMEOWNERS ASSOCIATIONS

Dear Professor French:

The Law Revision Commission kindly sent me a copy of its Memorandum 2001-19 re the Commission meeting this Friday. Unluckily I don't yet have a copy of your report, but I do look forward to studying it. I hope to attend the meeting.

My wife and I live within the Martis Peak Homeowners Association just east of Truckee. It has about 100 lots of ten to forty acres with about 35 homes. It is a volunteer association, ergo it is not controlled by Davis-Sterling, see section 1352. However we have the same problems with directors as other HOAs nationwide, exemplified by the letters in Memo 2001-19. It would be quite unjust if such HOAs were not included in the prospective revised Davis Sterling Act. It would certainly appear to deprive those of us not included of the Equal Protection of California Law.

The suggestions I have had time to read in Memo 2001-19 all appear aimed to clean up specific problems in specific ways. My read is that the real cause of all of these problems is precisely what the authors of our U.S. Constitution saw (as did Plato, Hobbes, Locke, Montesquieu, and many others) and designed it to solve: Human Nature. A large part of The Federalist Papers and the records of the Constitutional Convention discuss what and how we humans are and how to form a democratic government despite our greed, power-addiction, dishonesty, ad naus. In #72 Hamilton refers to "...the folly and wickedness of mankind...." and in #6 he says: "...men are ambitious, vindictive, and rapacious...." after which he states several historical examples of what such weaknesses have done in history. In #15 he says that sovereign power carries with it an "... evil eye upon all external attempts to rstrain or direct its operations...." Sounds like home as well as any HOA.

Madison (#47): "The accumulation of all powers, legislative, executive, and judiciary, in the same hands,whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of

tyranny...." That is precisely what HOAs provide -- the opportunity to a few people to enjoy complete power over their community. The almost universal form (apparently from the same legal formbook) attracts to directorships persons who most enjoy running things, the wretched self-appointed alpha dogs. It also provides marvellous and inviting opportunities for self-dealing (like street improvements near your house, etc.) and even theft of association funds.

The solution (Madison #5):"Ambition must be made to counteract ambition....", i.e. separation of powers, independent powers, which seems to provide the best solution to avoid full concentration of power in one or a few individuals.

Why can't an HOA have, besides directors (suggest a better title be found), an ombudsman, some sort of "due process" against directors, an independent group to decide disputes, and a separate group to propose amendments to CC&Rs and house rules, etc.?And a Bill of Rights for all members -- probably this is best designed by the State Legislature.

The fact that these HOAs in their present form exist in Our Country is an embarrassing disgrace to every American.

Thank You,

Charles Goff

PS (Cartoon Herewith)

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SHERYL J. ROSANDER OF COUNSEL

January 25, 2001

California Law Revision Commission
Attn: Nathaniel Sterling, Executive Secretary
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Common Interest Development Law Request for Public Comment
Our File No. 9995.04

Dear Members of the Commission:

Enclosed is a letter I sent recently to the Senate Subcommittee on Aging and Long-Term Care regarding the Commission's report on Common Interest Developments and the effects on senior communities throughout the state. Please be so kind as to include it in your deliberations regarding the common interest development law study.

Your kind consideration is most appreciated. Please call if you have any questions regarding the enclosed.

Very truly yours,

EPSTEN GRINNELL & HOWELL, APC

Mary M. Howell

MMH/vsp
Enclosure

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January 19, 2001

TRANSMITTED BY FACSIMILE (916-327-8260)
AND FIRST-CLASS MAIL

Sen. John Vasconcellos
Senate Subcommittee on Aging and Long-Term Care
1020 N Street, Ste. 545
Sacramento, CA 95814

Re: California Law Revision Commission Report on Common Interest Developments
Our File No. N/A

Dear Sen. Vasconcellos:

This letter is written in support of the notion of extending the provisions of the Davis-Stirling Common Interest Development Act, or CIDA (Civ. Code §§1351 *et seq.*) to non-common interest communities, particularly to senior communities. Also included are observations pertaining generally to common interest developments, and comments on the need for enhanced legal protections for volunteer officers and directors of community associations.

Pursuant to a revised deadline of February 1, 2001 received through your office, I am responding to your letter of December 15, 2000 regarding the Commission's report on Common Interest Developments. I write as the legal advisor for many community associations, but most specifically for the purposes of this letter as an advocate for "senior citizens housing developments." I have represented such developments since 1977, and thus was providing counsel before the advent of *Marina Point v. Wolfsen*, the 1985 amendments to the Unruh Act which established the exemption for "senior citizens housing developments," and the 1988 amendments to the federal Fair Housing Act (42 USC §§3601 *et seq.*) which established the "housing for older persons" exemption.

There is some academic criticism of "all senior" communities, with comments to the effect that seniors benefit from living in "all age" communities. While interaction with

persons of all age groups is no doubt desirable, seniors do not agree with the academics. Seniors point to the supportive presence of living in a community of persons sharing the same experiences, needs, and crises. The absence of young persons sometimes fosters a sense of security as well: the young do not always appreciate that seniors can be frail, and that they need patience (something lacking not only in today's youth, but on our public thoroughfares as well). Thus, let us accept as a starting point that senior communities–which are specifically permitted under both state and federal law–are a "good thing," and turn instead to the changes in existing laws pertaining to community associations which might help such communities.

Consider first the problem of a "non-common interest development," which is not subject to the CIDA. Many senior communities were created in this fashion, and do not offer recreational amenities, thus keeping the cost of operation low. Typically such developments simply have a set of CC&Rs with use (including age) and architectural restrictions, but lack a community association. Enforcement is therefore solely by one owner against another. In my experience, absence of a community association vested with the ability to assess all homeowners within the tract for enforcement of age restrictions results in a "slow death" for a senior community. As you know, both state and federal law require enforcement of age-based restrictions in order to maintain the senior status of a community.[1] This does not pose a great problem for the typical common interest development, since it can assess its members to enforce all its restrictions, including its age restrictions. In a non-common interest development, however, the restrictions do not typically establish either an association for enforcement, or mandatory assessments to fund enforcement. Enforcement of age restrictions in a non-common interest development must be funded, if at all, by individuals within the community who feel strongly about senior status. Those individuals cannot sustain the effort forever. Age, disability, and exhaustion take their toll. (Lest you conclude that these concerns are hypothetical, I am aware of several senior communities which lacked the funds to enforce age restrictions; when families with children moved in, there was no ability to remove them, and the communities were forced to relinquish their senior status.)

[1]For example, 42 USC §3607 requires a 55+ community to publish and adhere to rules and regulations designed to effectuate the intent to provide housing for older persons.

The underlying problem is, of course, lack of affordable housing for families with children. Senior housing is typically affordably-priced housing, particularly when the community has no expensive common area facilities to maintain. Therefore, senior communities (particularly non-common interest developments) are prime targets for low to middle income families with children. Such families are also guaranteed free or low-cost legal assistance (in the form of fair housing councils, DFEH and HUD); senior communities are not. It is becoming very common for families with children to consult with one of these entities, which then generates a letter accusing the community of violating fair housing laws, demanding substantial amounts of documentation, and threatening legal action. This is very intimidating to most seniors. Many simply surrender rather than respond. Let me provide an example: a senior resident in a senior community in Riverside County provided housing for her grandson (seven years old) who had been displaced by court action involving the mother. The community tried to enforce its age restrictions. The grandmother went to a fair housing council, which provided an attorney, who wrote alleging the community had no legal right to enforce its age restrictions, that it was not a proper senior community and therefore was indulging in discriminatory acts, and further insisting that the grandson was entitled to reside as a "permitted health care resident" providing substantial physical support to his grandmother. This was despite the fact that the child was in school full-time. Ultimately the community agreed, because to fight to enforce the restrictions would be expensive and disruptive, and would have put into question the enforceability of its age restrictions for all time. The danger of permitting the grandson to stay is, of course, that the community might be held to have failed to "adhere" to its age restrictions, as the federal law requires. (Both houses of the legislature last year approved SB 1382, which would have provided senior communities with the ability to obtain a two-year certification, through DFEH, of their qualification to enforce age restrictions. Obviously, this would have provided senior communities with a way of avoiding many of the legal costs associated with trying to "prove" a community satisfied the senior housing exemption and was therefore able to enforce its age restrictions. This bill was vetoed by Gov. Davis.)

Consider also that the forced conversion of senior communities by this tactic results in children being placed within a school district which did not receive developer school fees (since the development was exempt, as senior housing). For this reason, CASH (the Coalition for Adequate School Housing) has informally expressed interest in supporting actions which strengthen the ability of senior communities to retain their senior status.

As noted in the materials circulated by your office, there are substantial reasons to extend some of the provisions of the CIDA to non-common interest communities, which includes many senior communities. Some of those reasons include:

1. The inability of a community to amend its CC&Rs effectively. Many non-common interest communities lack any amendment provisions within their CC&Rs, or have a provision which vests amendment rights in some other governmental body, such as a local water district board. Over the years, those boards are dissolved or absorbed, and the developers go out of business, which gives the community virtually no way to amend. (Under the CIDA, a community may amend either according to its documents, or as provided in the Act.)

   Furthermore, this is a critical deficit for senior communities. Federal and state law have changed substantially between 1988 and present. Federal law requires governing documents which correctly embody the federal standard. State law has a complicated scheme of "qualified permanent resident" (Civ. Code §§51.3 and 51.11) which has been changed repeatedly between 1985 and the present. Without a feasible procedure for amending, it is impossible for the senior community to keep up with the changes in the law. Such communities require an expedited method of obtaining amendment.

   Civ. Code §1356, which provides for amendment pursuant to court action if the community is able to obtain a majority vote in favor of amendment, does not apply to non-common interest developments. The section was based on the ruling in *Greenback Townhomes v. Rizan* (1985) 166 Cal.App.3d 843, which in turn was based on Corporations Code §7515. Most non-common interest developments do not have an association, let alone an incorporated association. Those developments thus are saddled with virtually unworkable amendment provisions, without the prospect of judicial relief. It would be a great boon for such communities to have the benefit of Civ. Code §1356.

2. The inability of individuals to assess and enforce restrictions effectively. Many non-common interest developments have CC&Rs which provide no mechanism for enforcement, other than suits by one homeowner against another. There is no requirement for alternative dispute resolution, which

the CIDA mandates. The only persons with standing to enforce are the owners themselves. Thus, an owner can either take legal action against his neighbor, or live with the problem. This is hardly as conducive of neighborly relations as vesting enforcement rights in a third party, *viz.*, a community association, with the right to invoke alternative dispute resolution before litigation.

3. Expiration of CC&Rs without any workable means of extending them. Courts have commented in recent years on the desirability of a coherent and enforceable set of private use restrictions. The CIDA provides that such CC&Rs may be extended upon approval of more than 50% of the members; in a non-common interest development, when the CC&Rs are silent as to extending the term, the consent of 100% of the members is required (as it would be to reinstate the CC&Rs once they had expired). Again, for senior communities, the inability to retain age restrictions spells termination of senior status.

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Most of the comments which have been provided are critical of the authority placed in the hands of board members of associations. I suspect those comments are not reflective of the larger reality. I have taught on community associations in law schools and to managers and other attorneys throughout the United States. I have authored materials for national law journals and treatises. But the bulk of my experience and concerns are a direct outgrowth of nearly 24 years of advising, creating, and defending associations, and their officers and directors. These directors are *volunteers*, often untrained in law, administration or finance. Since local municipalities have relinquished services due to income restraints, at least some of the community's needs have been met by community associations. Yet the community association enjoys none of the immunities provided by law for municipalities. [2]

[2]Individual directors are afforded protection, provided they have obtained liability insurance which complies with the amounts set forth in Civ. Code §1365.7. Yet affordable D&O insurance is increasingly difficult to obtain, and policies are rewritten to eliminate many areas formerly covered, with concomitant denials of coverage in areas where traditionally coverage was afforded. Consider the plight, too, of a volunteer board which changes carriers: unless the board has the benefit of informed

Directors (other than developer-related directors) are residents of the community. If they increase assessments, they pay those increased assessments. If they make poor financial decisions, they suffer as well as other residents from the outfall of the decision. Generally, these men and women are doing the best they can under substantial burdens. Instead of focusing on alleged rudeness by directors, why not consider the homeowners who disrupt meetings, hurl unfounded accusations of illegal activities, and then letters of complaint to the Attorney General's office with vague and rambling accusations of poor business judgment? The law provides remedies aplenty for homeowners who dislike the way the association is being run. Chief amongst them is the ability to recall directors ***at any time***; if a homeowner believes his or her association is poorly administered, and if that homeowner can persuade his fellow homeowners of the perspicacity of his conclusions, then the homeowner can remove objectionable directors forthwith. No court action is required. No state agency need intervene. Yet disgruntled homeowners refuse to assume that degree of responsibility. Where are the penalties for *homeowners* who refuse to permit the business of the association to be carried on in a reasoned, expeditious and cost-conscious manner?

Consider too the fact that these volunteer directors and officers are frequently unjustly maligned while serving in office. Unless there is a clearly defamatory statement, the usual legal response is that there is nothing that can be done. In light of the anti-SLAPP statutes, a homeowner with a "grudge" against the board can make all kinds of absurd and false statements about the volunteers, and unless such statements cross the line into defamation, the volunteers can do nothing, except resign. (Case law holds that the anti-SLAPP statute applies to directors/officers of homeowners associations.) And these directors are resigning. Ultimately, it is the associations and their residents which are the losers, since most of the persons who resign were performing competently, and were the victims of a vendetta by a few unhappy residents.

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management or legal counsel, the board may neglect to obtain "tail" or extended reporting coverage (coverage which pertains to breaches which occurred during the life of the policy which do not come to light until after the policy period has terminated). Without such coverage, the association and its officers and directors lack insurance which would permit defense of legal action, and afford a source of funds to pay judgments. Many D&O (directors and officers) providers do not even offer such coverage, and if they do, the cost is prohibitive.

Most associations are not 501(c)(3), (c)(4) or (c)(7) entities. Accordingly, their directors are also denied the defense established in CCP §425.15, which mandates that before a suit can be filed against a volunteer officer or director of a nonprofit corporation, the plaintiff must present verified pleadings to the court so that the court may determine whether the plaintiff has "established evidence that substantiates the claim." Instead, these volunteers must tender to the carrier, which may or may not provide a defense, and litigate for several years, at great cost, before the case is ultimately determined to have no merit. If community associations do perform a socially desirable end (and clearly, the ultimate determination of society, the courts and this legislature is that they ***do***), and if the legislature's larger goal is to provide safe, strong, attractive communities for its citizens, proper attention must be paid to protecting the volunteers who serve, as well as those they serve.

I therefore respectfully request this committee take into account the needs of those for whom few have spoken, that is, residents of non-common interest developments, seniors who have elected to "age in place" in safe, age-qualified communities, and volunteer officers and directors under attack by misinformed and malcontent homeowners.

Very truly yours,

EPSTEN GRINNELL & HOWELL, APC

Mary M. Howell

MMH/vsp