Study H-851 August 13, 2001

Memorandum 2001-73

**Nonjudicial Dispute Resolution Under CID Law: Due Process in Association Rulemaking and Decisionmaking (Staff Draft)**

The Commission has instructed the staff to draft statutory language establishing procedures for decisionmaking by a homeowners association in two contexts: (1) architectural review, and (2) adoption of "operating rules." This memorandum presents draft language for the Commission's review. Two letters from Judge Charles Egan Goff, generally discussing fairness in association decisionmaking, are also attached for the Commission's review.

This memorandum also provides additional information regarding the use of nonjudicial foreclosure to collect monetary penalties.

## ARCHITECTURAL REVIEW

The governing documents of many common interest developments contain aesthetic or architectural standards governing the appearance and design of individual units within the development. Typically, these standards are interpreted and enforced by the board of the homeowners association (or by a separate architectural review committee), which has authority to approve or disapprove proposed property improvements or alterations.

A decision regarding an individual member's request to improve or alter his or her separate interest is adjudicative (it decides a particular case rather than setting a general policy). Adjudicative decisionmaking by a homeowners association may be subject to constitutional due process requirements. See generally Memorandum 2001-55. In addition, the common law requires that a homeowners association provide procedural fairness in making adjudicative decisions affecting its members. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772 (1986) ("When a homeowners' association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable, and that its substantive decision was made in good faith, and is reasonable, not

arbitrary or capricious."); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651 (1983) ("The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing."). Both of the cases cited involve architectural review decisions.

California has no statutory or regulatory procedure for association decisionmaking in the context of architectural review — nor does the Uniform Common Interest Ownership Act (1994). The staff has prepared a draft procedure, which is discussed below.

**Flexibility**

There are a wide range of types and sizes of common interest developments. Some vest architectural review authority in the board of directors, others in an appointed architectural review committee. Some have highly detailed architectural standards, others have very general standards that are fleshed out and interpreted by the decisionmaking body. It would not make sense to impose a "one-size-fits-all" procedure on all homeowners associations. Instead, the staff draft codifies the principles expressed in *Ironwood* and *Cohen*: an association should have a written decisionmaking procedure that is fair and reasonable, should follow its own procedure, and should act in good faith. The staff draft also provides a statutory procedure that an association can adopt for its own use.

**Basic Elements of Proposed Statutory Procedure**

The proposed statutory procedure is designed to limit the procedural burden in straightforward cases, with more rigorous procedures in contested cases or cases that involve a "variance" from established standards. In general, a written application would be submitted and the decisionmaking body would issue a written decision, which would include an explanation of the basis of the decision. If the decisionmaking body fails to issue a decision within 30 days, the request is deemed approved. A hearing would only be required where an applicant appeals a disapproval decision.

If the decisionmaking body finds that a proposed improvement or alteration would require a "variance" from established architectural standards or could have a substantial negative effect on other member's separate interests, the

decisionmaking body would notify members who are likely to be affected and solicit their opinions. This should provide advance notice to third parties in appropriate cases, without requiring third party notice in every case.

A procedure along the lines proposed in the staff draft would have three principal benefits: (1) it would increase the likelihood that a decisionmaker would actually follow a fair procedure, (2) it would add to an applicant's sense that the process is legitimate (especially if the decision includes an explanation for a disapproval), thereby reducing the likelihood of subsequent court challenge, and (3) if there is a court challenge, it would increase the likelihood that the court could decide the case on its merits, rather than simply overturning a decision for failure to follow adequate procedures.

**Neutral Decisionmaker**

As Judge Goff points out in his letter, the neutrality of the decisionmaker is an important element of procedural fairness. However, true neutrality may be difficult to achieve in a decisionmaking body made up of association members. As owners of property in the development, decisionmakers may have personal interests in improvements or alterations proposed by their neighbors. This is especially true in the early stages of a development, when the developer controls appointments to the "architectural committee." During the first year of development, the developer appoints all of the committee members. In years two to five (or until 90 percent of the lots are sold, whichever comes first), the developer appoints a majority of the committee members. Committee members appointed by the developer need not be members of the association. 10 Cal. Code Regs. § 2792.28. In all probability, a developer is going to appoint committee members who will protect the developer's financial interests in the development.

One approach to achieving neutral decisionmaking would be to impose a rule disqualifying a person from participating in a decision that affects the person's economic interests. This is conceptually similar to the rule prohibiting state officials from participating in making a decision in which the official knows he or she has a financial interest. See Gov't Code § 87100. However, such a rule would probably be impractical. During the early stages of development, or in a small association, it is conceivable that all members of the architectural review body might be disqualified under such a rule. Such a rule would also not address other potential sources of bias, such as personal animosity or favoritism.

Another possible approach would be to require that a homeowners association delegate architectural review decisionmaking authority to a neutral third party, such as a professional management company. However, this would involve significant costs. Despite anecdotal reports of abuse, the staff is not sure that biased decisionmaking is so widespread as to justify requiring that all homeowners associations hire outside decisionmakers.

Another option would be to establish a clear statutory duty of good faith. A director of a mutual benefit corporation is already subject to such a duty. Corporations Code Section 7231(a) provides:

> A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

A similar duty could be imposed on a person making an architectural review decision. This is the approach taken in the staff draft. Eventually, the Commission may wish to consider generalizing the conduct standard provided in Corporations Code Section 7231(a) to apply to all homeowners association decisionmakers. This would then apply to directors or other officers in unincorporated associations.

**Staff Draft**

A staff draft of architectural review provisions is set out below:

> **§ 1378. Review of proposed improvements and alterations**
>
> 1378. (a) If the governing documents require approval of the board of directors or other reviewing body before an association member may improve or alter the member's separate interest, the association shall do all of the following:
>
> (1) Adopt a fair and reasonable procedure for making a decision regarding a proposed improvement or alteration of an association member's separate interest.
>
> (2) Include the decisionmaking procedure in its governing documents.
>
> (3) Follow the procedure provided in the governing documents in making a decision regarding a proposed improvement or alteration of an association member's separate interest.
>
> (b) A person who participates in making a decision regarding a proposed improvement or alteration of an association member's interest shall do so in good faith, in a manner the person believes to

be in the best interests of the association, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

**Comment**. Section 1378 is new. It is consistent with existing law requiring procedural fairness in making a decision regarding a proposed improvement to or alteration of an association member's separate interest. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772 (1986); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651 (1983)

Subdivision (c)(1) requires that an association adopt a fair and reasonable decisionmaking procedure. Section 1379 provides a default procedure to be used by an association that has not yet adopted its own procedure.

Subdivision (c) is drawn from Corporations Code Section 7231(a) (standard of conduct for a director of nonprofit mutual benefit corporation).

**§ 1379. Default procedure**

1379. (a) This section provides a default procedure for making a decision regarding a proposed improvement or alteration of an association member's separate interest where the improvement or alteration is subject to approval by the association. The procedure applies where an association has not yet adopted a fair and reasonable procedure, as required by Section 1379.

(b) An association member who wishes to make an improvement or alteration to the member's separate interest shall submit a written application to the board of directors or other body responsible for reviewing applications.

(c) If a proposed improvement or alteration would require a variance from standards expressed in the governing documents, or if the board of directors or other reviewing body determines that the proposed improvement or alteration could have a substantial negative effect on the separate interests of other association members, the board of directors or other reviewing body shall provide notice of the application to potentially affected members and solicit their opinions regarding the proposed improvement or alteration.

(d) Within 30 days of submission of an application, the board of directors or other reviewing body shall issue its decision to the applicant, by personal delivery or first class mail. The decision shall be in writing and shall include a statement explaining the basis for the decision, including reference to any facts or provisions of the governing documents that support the decision.

(e) If the board of directors or other reviewing body does not issue a decision within 30 days of receipt of the application, the application is deemed approved.

(f) An applicant may appeal a disapproval by submitting a notice of appeal to the board of directors within 30 days of issuance of the decision, by personal delivery or first class mail. The appeal shall be considered and decided at the next regularly scheduled meeting of the board of directors. Any association member may address the board regarding the appeal.

**Comment**. Section 1379 is added to provide a fair and reasonable procedure for review of a proposed improvement or alteration of an association member's separate interest. As subdivision (a) makes clear, the procedure only applies if it has been adopted by an association and included in its governing documents.

## OPERATING RULES

Approval of a majority of association members is required to amend an association's declaration, articles of incorporation, or bylaws. See Memorandum 2001-55. However, there does not seem to be any requirement of member approval for the adoption, amendment, or repeal of an association's "operating rules." The Department of Real Estate's regulations seem to vest authority to "formulate" operating rules in the board of directors, but do not specify any procedure for doing so:

(a) The powers and duties of the governing body of the Association shall normally include, but shall not be limited to, the following:

…

(7) Formulation of rules of operation of the common areas and facilities owned or controlled by the Association.

10 Cal. Code Regs. § 2792.21(a). While this regulation is limited to rules relating to the "operation of common areas and facilities," there does not seem to be any statutory limit on the scope of operating rules. Davis-Stirling merely provides that an association's "governing documents" include "operating rules of the association," without defining what is meant by "operating rules." Civ. Code § 1351(j). In practice, it appears that homeowners associations adopt operating rules to govern a range of subjects other than operation of common areas and facilities, including architectural review standards and procedures, noise regulation, monetary penalty schedules, etc.

The Commission knows from its work on the rulemaking provisions of the Administrative Procedure Act that it is important for a person subject to a rule to

have advance notice of the rule and an opportunity to comment on it before it takes effect. It is also important that the rule be readily available to persons who are subject to it. Such basic procedural protections lead to better rules and help ensure that people are not unfairly surprised by the requirements of new rules.

**Scope of Operating Rules**

Considering the ease with which a board of directors can modify operating rules (under existing law, there seem to be no procedural impediments), there may be some areas that should not be subject to regulation by operating rules. For example, matters as significant as monetary penalties for violation of the governing documents, architectural standards, and rules governing conduct on a member's separate interest should perhaps require member approval. This could perhaps be accomplished by requiring that such matters be addressed in the by-laws rather than in operating rules. See Corp. Code § 7151 ("by-laws may contain any provision, not in conflict with law or the articles, for the management of the activities and for the conduct of the affairs of the corporation)"). However, it isn't clear that an unincorporated association would have "by-laws." Another possible approach would be to recognize two classes of association rules: (1) rules governing operation of common areas and facilities, which would be subject to the minimal procedures described below, and (2) all other rules, which would be subject to a more burdensome procedure involving direct member approval. If the Commission favors either of these approaches, the staff will draft implementing language for Commission review.

It may also be advisable to define "operating rule" so as to clearly exclude association decisions that are case-specific. For example, in *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 980 P.2d 940, 87 Cal. Rptr. 2d 237 (1999), an association decided to "spot-treat" a termite infestation, rather than fumigating the entire building. A member sued, claiming that the decision diminished the value of her unit. The court held that "where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." We do not want to create a situation where a member could challenge such a decision by arguing that it is an invalid

"underground rule" (i.e., it should have been adopted under the operating rule procedure, but was not). The staff draft includes a definition of "operating rule" to address this issue.

**Staff Draft**

A staff draft of procedures for operational rulemaking are set out below.

**§ 1357.1. "Operating rule" defined**

1357.1. For the purposes of this title, "operating rule" means a generally applicable rule adopted by an association to govern its operations and the rights or obligations of its members. "Operating rule" does not include a decision by an association in a particular case.

**Comment**. Section 1357.1 is new. It makes clear that "operating rule" means a rule of general application and does not include case-specific association decisions.

**§ 1357.2. Rulemaking procedure**

1357.2. (a) Before adopting, amending, or repealing an operating rule the board of directors shall distribute notice of the proposed rule change to every association member, by personal delivery or first class mail. The notice shall describe the proposed rule change and indicate the date that it will take effect.

(b) After distributing the notice, the board of directors shall accept written comments regarding the proposed rule change for at least 15 days before it takes effect.

(c) If, after distributing the notice, the board of directors revises its proposed rule change, it shall distribute the revised rule change to every association member, at least five days before it takes effect, by personal delivery or first class mail.

**Comment**. Section 1357.2 is new. It establishes a simple notice and comment procedure for changes to an association's operating rules.

**§ 1357.3. Emergency rule change**

1357.3. (a) Notwithstanding Section 1375.2, if the board of directors determines that immediate adoption, amendment, or repeal of an operating rule is necessary to address a threat to public health and safety, or to prevent substantial economic loss to the association, it may adopt, amend, or repeal an operating rule immediately by distributing notice of an emergency rule change to every association member, by personal delivery or first class mail.

(b) Notice of an emergency rule change shall include a description of the rule change and an explanation of why an immediate rule change is required to address a threat to public

health and safety, or to prevent substantial economic loss to the association.

**Comment**. Section 1357.3 is new. It establishes an expedited procedure for making changes to an association's rules as necessary to address an emergency.

**§ 1357.4. Availability of rules**

1391.(a) An association shall provide a complete copy of its rules to each of its members.

(b) At the time that the pro forma budget required by Section 1365 is distributed, the association shall also distribute a rule update to each of its members, indicating any changes to its rules that were made in the preceding fiscal year. An update need not be distributed if no changes were made to the rules in the preceding fiscal year.

(c) An association's rules shall be available for inspection by any association member.

**Comment.** Section 1391 is new. It provides for distribution of association rules to association members. Subdivision (c) is a specific application of the general rule permitting member inspection of association records. See Section 1363(f).

## NONJUDICIAL FORECLOSURE

Under existing law, a homeowners association can use nonjudicial foreclosure as a means of collecting an overdue assessment. Civ. Code § 1367. The question has arisen whether nonjudicial foreclosure can be used to collect a fine "assessed" against a member of an association for failure to follow association rules. With two exceptions, it cannot.

Civil Code Section 1367(c) provides as follows:

> Except as indicated in subdivision (b), a monetary penalty imposed by the association as a disciplinary measure for failure of a member to comply with the governing instruments, except for the late payments, may not be characterized or treated in the governing instruments as an assessment which may become a lien against the member's subdivision interest enforceable by the sale of the interest under Sections 2924, 2924b, and 2924c.

Section 1367(b) appears to allow the use of nonjudicial foreclosure to collect monetary penalties in two cases:

*(1) Property damage to common areas.* Section 1367(b) allows nonjudicial foreclosure of a lien to collect a "monetary penalty imposed by the association as

a means of reimbursing the association for costs incurred by the association in the repair of damage to common areas and facilities for which the member or the member's guests or tenants were responsible," so long as authority to impose such a lien is set forth in the association's governing documents. This fairly straightforward rule is complicated by a Department of Real Estate regulation providing:

> A monetary penalty imposed by the Association … as a means of reimbursing the Association for costs incurred by the Association in the repair of damage to common areas and facilities for which the member was allegedly responsible … may not be characterized nor treated in the governing instruments as an assessment which may become a lien against the member's subdivision interest enforceable by a sale of the interest in accordance with the provisions of Sections 2924, 2924b and 2924c of the Civil Code.

10 Cal. Code Regs. § 2792.26(c). Section 1367(b) expressly states the Legislature's intent not to contravene this regulation. Thus, so long as the Department of Real Estate has jurisdiction over an association's governing documents, the association cannot use nonjudicial foreclosure to collect a penalty for damage to association property. However, once the Department loses jurisdiction, an association could amend its governing documents to allow for nonjudicial foreclosure to collect such debts. The staff notes that the relationship between Section 1367(b) and the regulation quoted above is not clear as presently drafted. When the Commission considers ways to improve the drafting and organization of Davis-Stirling, it should consider redrafting Section 1367 to clarify the matter.

*(2) Late payment penalties.* Section 1367(b) provides that a modest late payment penalty (as well as interest and collection costs) can be added to the amount of an overdue assessment that is subject to collection through nonjudicial foreclosure.

Respectfully submitted,

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MEMORANDUM -- July 3, 2001

TO: CALIFORNIA LAW REVISION COMMISSION

RE: HOMEOWNERS' ASSOCIATIONS -- STUDY H-851

In 1791 Thomas Paine wrote in Rights of Man : "Defects of every government and constitution, both as to principles and form, must on a parity of reasoning, be as open to discussion as the defects of a law, and it is the duty which every man owes to society to point them out...." [Emph. added.]

It's a tribute to California's Legislature and Executive that this body exists to improve their work, even to disagree with it when necessary. So it is especially an honor for this worshipper of Our Constitution to address you.

Briefly I beg you to consider turning Homeowners' Associations from purely for-profit business enterprises into democratic societies, recalling Madison's statement: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it is obtained, or until liberty be lost in the pursuit. (Federalist #52.) This is an ancient law: "Justice and only justice you shall pursue." (Deuteronomy 16:19.)

My concerns and recommendations are six.

I. "NO MAN IS ALLOWED TO BE A JUDGE IN HIS OWN CAUSE."

So said Madison in his famed #10 of The Federalist. This ancient rule is well-known to everyone, probably instinctively. See California statutes, especially CCP 170.1 and 170.3. This foundation of Justice is so universally understood that it rarely needs be stated in appellate opinions. But the U.S. Supreme Court once felt compelled to state it thus:
No one "...can be a judge in his own cause or be permitted to try cases where he has an interest in the outcome." In re Murchison (1955) 349 U.S. 133, 156.)

[Contrary: Vyshinski in his Law Of The Soviet State; "There is a firm and indissoluble bond uniting the judiciary and the Office of the State Prosecutor."]

As Madison said in The Federalist (#10), placing all power, executive, legislative, and judicial in the hands of one person or one group of persons is the very definition of tyranny.

The standard homeowner ass'n CC&Rs place all three powers in one board of directors, almost always of less than ten persons. These directors make rules for their respective associations (CC&Rs), interpret and enforce them as they interpret each rule, then decide what penalties to impose on any homeowner they decide is guilty of a violation, then enforce the penalties they have imposed.

If the directors write a rule governing the association and decide to accuse any owner, do you truly think they will not interpret a rule, even a vague one, in a way consistent with the owner's guilt? Or even to permit the owner to argue its vagueness? And if the directors decide the owner is guilty, who is to decide the issue of the penalty? The directors, of course. IS THIS BASIC JUSTICE? Clearly the directors are judges in their own punitive proceedings against any owner. This is exactly like having the State Prosecutor sit as judge at a criminal trial, Soviet style. Yet California courts appear to be heavily prone to enforce such decisions.

The U.S. Supreme Court ruled in a civil proceeding that a fundamental requisite of Due Process of law, which is guaranteed by the U.S. Constitution, is notice to any named defendant and the opportunity to be heard.(Greene v Lindsay (1981)456 US 444.)

Example: Mrs. Cave's statements to you February 2: The Caves were fined a total of $35,000 for plowing the snow on their own road -- they were given no notice of the charges against them, there was no hearing or chance to dispute the charges -- just notices to pay. Cave's lot is just west of Donner Summit and close to Highway 80 -- incredible amounts of snow, three children to get to and from school, carpenter husband to get to and from work, and a partially disabled Mrs. Cave. The family name is most unfortunately appropriate to that proceeding. It means the end of their membership in that association, too.

II. CURRENT CC&R RULES ARE CERTAINLY NOT DEMOCRATIC

One wealthy and therefore powerful owner in our association once argued that our association was democratic because the directors are elected by the owners.

The above answer to that is: directors in not one association I'm aware of are elected in a way essential to democracy: one person, one vote. NO -- they are almost invariably elected by ONE LOT ONE VOTE. Several owners in our association have multiplied their votes by subdividing. In another association with which I'm familiar the developers and their successor have retained a majority of member votes by the subdivision ploy -- lots now range in size from 20 acres to proposed but yet unbuilt condominiums. Plutocracy at its worst.

The point is: developers and subdividers are in business to maximize profit and they have developed a standard form of Homeowners Association to do just that. A business is like a military organization -- it must be run from the top or fail. A democracy must be run by the citizens and as Madison said,

quoted above, else it is not in truth a democracy. That is why the framers of our Constitution carefully avoided giving the power to start war to the President as commander in chief -- another democratic concept which has been lost or buried in 1984 Newspeak.

III. SUBDIVISIONS RELIEVE GOVERNMENTS, SO ARE QUASI-PUBLIC

One of the oft-mentioned advantages of HOAs is that they relieve state and local governments of expenses for many roads and their maintenance and cleaning, and supervision and other services.

A person who lives in a city or town who violates an ordinance may be punished by a criminal process with due process rights assured. S/he must be given written notice of any violation charged, the statute or ordinance must be clear and published, and the accused may have a lawyer and present a defense and have a jury trial, and cannot be punished unless found guilty beyond a reasonable doubt by a unanamous jury. The judge and the jurors must all be unbiased. California Chief Justice Ronald George has called the jury the linchpin of our democracy. Having tried many jury cases as a lawyer and judge, with and without juries, I say my loudest AMEN to the Chief's words.

But in our HOAs the accusers are the judges in the cases they initiate. That's not Justice by any definition.

IV DIRECTORS ARE TRUSTEES OF OWNERS' MONEY AND PROPERTY.

Directors set association assessments, collect them, and punish non-payment. They decide how and for what owners' money will be spent and inevitably which lots benefit most by their decisions. Directors are therefore in the most real sense trustees of owners' money and also their realty.

For example directors have the power to favor their own properties -- using all owners' money -- in matters of repair, maintenance, improvement, etc. This is also an aspect of trusteeship because it directly affects the fair market value of every lot in the association.

In a society in which the bilious phrase "greed is good" has even been the subject of a one-hour TV network program, this provides an opportunity to adherents to "greed is good" materialism to get on the board of directors and increase their lot's (or lots') value -- upon sale of which their profit

will not be shared with other owners who contributed to the seller's profit. The association in which we are members, is not, as required of most fiduciaries, required by its CC&Rs to get bids for any service to it. All its service contracts appear to go to one firm, although members are not advised who all contractors have been.

V THE RIGHT TO FAIR PROCEDURE RESIDES IN EVERY OWNER

"The purpose of the doctrine of Fair Procedure is to protect, in certain situations, against arbitrary decisions by private organizations. As this court has held, this means that, when the right to fAIr procedure applies, the decisionmaking 'must be both substantially rational and procedurally fair.'" (Potvin v Metropolitan Life etc. (2000) 22 C.4th 1059, 1066.) "California courts, too, are loathe to enforce contract provisions offensive to public policy." A contract will not be enforced if it violates the common or statutory law. (Ibid. at 1074;: Nahrstedt v Lakeside Village etc. (1994) 8 Cal. 4th 361, 381, citing Shelly v Kramer (1948) 334 US 1.)

Homeowners Associations are precisely the kinds of organizations which are bound to provide that "... the decision-making must be both substantively rational and procedurally fair." Such organizations are described in Potvin as those which (1) hold funds for association members; (2) are private organizations affecting the public interest (common law examples: innkeepers and common carriers); or (3) organizations which are quasi-public in character.

Because HOAs are ruled by directors who make and enforce regulations and sit as judges in alleged cases of violations, deciding guilt or innocence and imposing any penalties without noticed hearing or unbiased judges, it cannot be argued that they provide procedural fairness.

HOAs fit the above description of organizations which are required to provide Fair Procedure, which includes decisions which are substantially rational. As Caves' case demonstrates -- the standard CC&Rs permit directors at least to claim to be and and act as such organizations. All such organizations collect assessments and use them to maintain to some extent common areas and roads. They all affect the public interest: I'm reliably advised that about 42 million Americans live in HOAs. They are quasi-public in nature because they perform almost all the functions of a county or city within their own limits: collect taxes (aka "assessments"), make "laws", enforce them, control and spend members' assessments, etc.,etc.

But despite the HOAs' duties to provide substantively rational

and procedurally fair rules, the Caves' HOA:

(1) Punished the Caves with a total of $35,000 in fines for plowing their own road in a heavily-snowed area. The Caves have three children to take to and from school, Mr. Cave must go to work and back, and Mrs. Cave is partially and painfully disabled, often needing to go to physicians. That cannot possibly be classified as substantively rational. In the humorous phrase of a late-great lawyer: "It was also nuts."

(2) Gave the Caves no notice of any prospective fine nor of their procedure to obtain it, no notice of any specific allegation of wrongdoing, no hearing, no opportunity to present a defense, and a fine which certainly to the Cave family is both cruel and unusual punishment as outrageously excessive. To pay this fine would certainly and in practicality expel the Caves from membership in the association which would doubtless have to take their house to satisfy and judgment. It would also cost them excessively in forced sale and prospective profit from any voluntary sale by the Caves in what is a rapidly growing area with currently fast-rising land prices. Sale of Caves' home and lot would go into the HOA treasury and so would benefit all owners, including directors.

Again, the Cave's example demonstrates: the disaster of one group acting as legislature, executive, and judge in its own cause, "the very definition of tyranny", as Madison warned us.

What is happening to the Caves could happen to any member of almost any homeowners' association as the law now stands. With the Golden Rule in mind, would you want this to happen to you? To your family?

If California's lawmakers will require HOAs to provide Fair Procedures the benefits to all of California would be at least three-fold: (1) owners would not have to the burden to prove by lawsuit that they have been wrongfully deprived of the Right to Fair Procedure;(2) HOAs would establish and use Fair Procedures, all parties knowing in advance of dispute what those rules are. These benefits would also decrease lawsuits in which, today, it must be decided what actions constitute Fair Procedure on a case by case basis. And (3) All members of all HOAs would finally get the equal protection of the law vis-a-vis their HOA.

Americans want a free enterprise economy. Such an economy must rest in great part on mutual trust of citizen with citizen. The present governmental system of HOAs is built on the business model, not the person-to-person neighborhood model. The result is ever-growing distrust which can only damage the freedom and success remaining in our economy.

As Mrs. Cave told you February 2: Their HOA fined them $500 in 1999 and $34,500 in 2000 for their plowing the snow from their own road. They were given no notice of the charges against them, there was no hearing or chance to dispute the charges -- just notices to pay the fines. Their lot gets incredible amounts of snow. They must use their road for school, work, and medical access.

Most important: California laws, including Supreme Court decisions, appear to give considerable weight to decisions of HOA boards. This appears true despite the fact that procedures effected by many boards manifestly do not provide an accused owner with anything like constitutional due process. Deprivation of the right to notice and hearing, and with directors both prosecutor and judge, defendants like the Caves are deprived of a civil jury trial despite the guarantee thereof by the Seventh Amendment. (Assuming that the matter is civil, not criminal.) Yet California courts enforce these soviet-like decisions and procedures and impliedly approve and reward the deprivation of owners' rights guaranteed by our Constitution.

The too obvious is often unseen: accused owners, like the Caves, are generally assumed to be in the position of civil litigants. But a "fine" of $34,500 (their 2d fine) was for violation of an HOA's "law" and cannot be labelled anything but punitive. No government in the United States could get away with this. If an American government "fined" anyone $34,500 for a law violation, it would have to be in a criminal court with all its protections -- but a business organization and even an individual, an HOA, can get away with this kangaroo prosecution and yet California's government tolerates it.

Can one imagine any state prosecuting or fining directors for their acts as directors except in a criminal proceeding? There is manifestly an equal protection issue. Simply put: as it now is, goose and gander don't share the same sauce. Equality is, I assert, part and parcel of an American citizen's inalienable right to liberty.

And what if some CC&Rs were to "sentence" forced labor, lockup time, physical punishment, or exclusion from her/his home for a time? Note: to pay a "fine" of $34,500 would produce physical pain on a workingman who must come up with the money or build another home for his family. This is truly, in fact, forced labor.

Re the jury trial right, see Declaration of Independence which accuses George III of many acts attempting to establish absolute power over the Colonies: "For depriving us, in many cases, of the benefits of trial by jury." And above that: "He has combined

with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws, giving his assent to their acts of pretended legislation." Kangaroo courts are clearly "a jurisdiction foreign to our constitution".

VI PLEASE DO NOT UNITE EXECUTIVE AND JUDICIAL DUTIES

At the June 29 meeting the Commissioners appeared to approve, tentatively, resorting to some sort of arbitration or mediation group, to be within the executive branch, to hear and decide HOA directors vs. homeowners disputes.

May I respectfully, as a citizen only, ask the Commission to reexamine this position most carefully. "'...there is no liberty if the powers of judging be not separated from the legislative and executive powers.'"(Hamilton, Federalist #78, quoting Montesquieu, Spirit of the Laws.) The nuts and bolts concern in our context is that the members of any executive branch panel could and probably would, in the minds of citizens, be carefully chosen and to at least some extent controlled by folks who contributed or may contribute to election campaigns. Big money appears to control not only parties and elections. Hamilton refers to "...the influence with which men in office naturally look up to that authority to which they owe their official existence." (Federalist #22.) Until now, except for 1986, contested judicial elections have been uncommon and incumbants rarely voted out. Further, judges do not run as party nominees in California. Point: an executive does represent a political party and needed a lot of money to gain that office. As Rablais's Judge Bridlegoose said in a hilarious fictional interview: "Pecuniae obediunt Omnia" -- everything obeys money.

If an executive body does not do the arbitration/mediation, use of non-governmental firms or persons presents another serious problem: permitting adoption by each HOA or group of them of one or more particular firms or individuals to do all arbitrations and mediations involving that or those particular association(s). Example: such a "rule" was introduced (in one-point type) by a credit card firm which serves many San Francisco attorneys. This means a large volume of work for the chosen arbitrator/mediator, and as Hamilton (again) wrote: "In the general course of human nature a power over a man's subsistence amounts to a power over his will." (Emph. in original.)

In his Republic (original title in Greek: The State, or Justice) Plato considered the question of what is Justice largely as an answer to Thramychus's definition that Justice "means nothing but the interest of the stronger party." Per Adam Smith in Wealth of Nations: "Wealth, as Mr. Hobbes said, is power."

CLOSING THOUGHTS ON JUSTICE

In REX v HADDOCK (A.P. Herbert, Uncommon Law (1935), Case #9) Justice Lugg asked in his opinion "Is Magna Carta law?" He referred in part to Chapter 29 of that Charter: " 'To no man will we sell, to no man deny, to no man delay, justice or right.'" (Italics in original.) Justice Lugg observed: "All that can be said is that much justice is sold at quite reasonable prices, and that there are still many citizens who can afford to buy the more expensive brands."

If the scalawag King John could make that promise in writing to his barons, California's government should be well able to provide Justice to all of its inhabitants, homeowners included. If it cannot or does not provide Justice, that government has failed in its foremost duty: to provide Justice to all of its citizens. Therefore nothing is "practical" if it compromises Justice. Hamilton (again) warned against a government that does not perform its obligations for economic reasons and says, in effect: "Thus far the ends of public happiness will be promoted by supplying the wants of government and all beyond this is unworthy of our care or anxiety." (Federalist #30.) Result: that government will fail.

May I again thank the Commission for its great patience and attention to this matter and, I'm certain, to all legislative matters presented to it.

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CALIFORNIA LAW REVISION COMMISSION

RE: Homeowners Associations - Study H-851

May the Commissioners kindly forgive my adding to the prolix memo of July 3, 2001. My apology for missing a point possibly too obvious for a trial lawyer or judge to mention it. The short statement of the point is the truism: "Out of the facts comes the law." Point: legislatures and appellate courts make legal rules. But just what rules of law apply to a specific dispute depends upon what the finder of the true facts, jury or judge, determines them to be in that particular case.

Therefore the most important decisions in $9^{5}$+% of cases are: what are the true facts.

Oliver Wendell Holmes said it most succinctly in The Common Law:

> "Every right is a consequence attached by the law to one or more facts which the law defines,.... When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding right;...."
> (Chapter V.)

Because no man may be judge in his own case, to place any value on the fact (or, of course, law) decision of HOA directors makes them "judges" in any case in which they decide what the true facts are.

Any trial lawyer or judge will tell you exactly that. They'll also add: human nature being what it is (as far back as Genesis 6:13) some fact-presenters, witnesses, and fact-deciders will urge facts or find to be true facts because those facts are favorable to themselves. To permit this to happen in any case is injustice.

Lamden v La Jolla Shores (etc.) (1999) 87 Cal. Rptr.2d 237 observes "... the relationship between the individual owners and the managing association is complex..." A more accurate term comes from WWII: FUBAR. In Lamden the California Supreme Courtheld a decision by HOA directors deserved "deferantial review", a 1984 Newspeak term which seems from Dickens's Bureau of Circumlocution. The decision in fact adopted the decision of the directors. The Court rested upon association

directors'(in general) relative competence to make detailed economic decisions better than the courts' (p. 251) and refers to their "reasonable investigation, in good faith and regard for the best interests of the community association and its members". (P. 247.)

WHO DECIDES these facts: (1) Was the investigation truly reasonable? (2) Was it and the directors' decisionmaking procedure done in good faith? (3) Was the decision in the best interest of the community? and (p. 238) (4) Did the directors exercise disinterested discretion?

The Lamden court also referred to directors' "presumed expertise".(P. 251.) Who decides that fact question? (A former director of our ass'n said he didn't think any of the other directors had even read the CC&Rs!) The last line of the opinion refers as one reason for "deference" the "conservation of scarce judicial resources"!! Is JUSTICE now too expensive for the citizens of California? If so it is certainly not "the end of [California's] government."

Francis T. v Village Green Owners Ass'n (1986) 42 Cal. 3d 490, seems inconsistent in that it ruled a condo owner injured as a result of directors' decision re lighting should appropriately go to a court for resolution. Lamden distinguished Francis T. by pointing out that no physical injury was involved. Mrs. Lamden's complaint: termite damage from a poor maintenance decision by directors, no injury. Question: When directors make a decision which might cause either physical or only money damage, how do they know at that time what will be the result of their decision? What if Ms. Lamden's condo caved in upon her after termite damage? What if Francis T.'s faulty lighting forced her to pay for its improvement but she was never attacked or injured?

Point: If the true facts determine what law must be applied to resolve a dispute, to give directors "deference" (i.e. to adopt their factual decision(s) is precisely to let them be the judges of their disputes with homeowners. That's simply basic Injustice.

Thank you and congratulations on your great patience.

Charles Egan Goff