

Second Supplement to Memorandum 2002-9

Nonjudicial Dispute Resolution Under CID Law: Procedural Fairness in Association Rulemaking and Decisionmaking (Commentary)

In connection with its consideration of procedural fairness in association rulemaking and decisionmaking, the Commission received the following written materials at or after its meeting of March 14-15, 2002:

	<i>Exhibit p.</i>
1. Marjorie Murray, CID Homeowners Bill of Rights Coalition	1
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3. Karon Cave, Soda Springs	7

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

March 15, 2002

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

Via e-mail: agenda@clrc.ca.gov and by hand

RE: Procedural Fairness in Association Rulemaking and Decision-making

Dear Mr. Sterling and Commission Members:

On behalf of the Bill of Rights Coalition, I wish to comment on Memorandum 2002-9, "Procedural Fairness in Association Rulemaking and Decision-making." [12/21/01.]

We are concerned about core issues the memo doesn't deal with:

- What will compel an association board to follow these new procedures? There are neither inducements nor penalties built into them. A review of testimony presented to the CLRC in the last year indicates clearly that many associations do not follow existing law. What will compel association boards to follow these proposed changes to the law?
- The rulemaking procedures rest on three assumptions:
 - 1) That the board will inform the membership of its intention to create or amend a rule; and
 - 2) That the rule will actually be written down; and
 - 3) That the homeowner, who wants to initiate the referendum has access to association records containing the current names and addresses of his CID neighbors. He needs to collect the signatures of 25% of his neighbors in order to challenge a rule, but what if the associations refuse to give him the records?

We agree that homeowners are entitled to both pieces of information: to a board notice that it wants to make/change a rule; and to homeowner records. But who is going to make the board do this? The CLRC records contain testimony from countless CID homeowners, who are unable to obtain meeting notices and minutes and who are denied association membership records. I count myself among them. This refusal to release records violates Article IV of our Coalition's Bill of Rights

Why do boards refuse to release this information? Because they know how crucial it is to maintaining political control.

I could give you several examples from my association indicating how "rulemaking" now works. But I will give you just one in order to illustrate what I mean.

Formation of Collection Rules

If I am reading the CLRC staff draft correctly, an example of an "operating rule" would be the development of the association's collection rules, which implement (partially) the association's right to impose assessments.

Our association is 48-years old. I have owned property there for 26 years, and I have served on the board many years. As far as I know, the association never had written collection rules until November of 2000. The collection rules published then say that, unless dues are paid by a certain date, that the board will foreclose on the owner's property.

However, despite California Civil Code 1365 requiring that collection rules be in place BEFORE they are enforced, the board had already started enforcing the rules – without the membership's knowledge. In fact, the board had started foreclosure proceedings against two members five months earlier. This kind of secretive behavior violates Article III of our Coalition's Bill of Rights requiring that "No (board) actions shall be taken in secret."

The board was forced to write down the collection rules and send them to the membership, because the fact of the foreclosures became known through word-of-mouth.

This November set of rules

- Was not developed in consultation with homeowners. Homeowners were not notified of the board plan to create these rules.
- Was not voted on by homeowners.
- Contains no hardship provisions or grace periods for making payments.
- Says nothing about disputed assessments or Alternative Dispute Resolution.
- Was not even mentioned at the association annual meeting the previous July, even though the foreclosures were in progress.
- Was revised between board meetings by certain board members and then re-published as though it had full board approval.

The classic argument in support of this kind of board behavior is that we should make allowances for CID boards: after all, they are only "volunteer lay boards." I make no such allowances. First of all our board is comprised of educated, professional people: business executives, engineers, consultants to governments and nonprofit agencies. Almost all have prior board experience; several have served repeatedly on the Snowshoe board. Board officers – all from the Bay Area – routinely attend workshops and seminars put on by the Community Associations Institute.

This board is not, as was suggested at the November 29th public hearing called by the Assembly Committee on Housing and Community Development, sitting befuddled around a table trying to decipher the association's legal documents in order to figure out what rules they need to make.

One reason they couldn't have been floundering was that the attorney advising the board is a partner in a firm specializing in association law. One of the partners himself wrote many of the association laws, including portions of Davis Stirling and the Corporations Code. He has been the board's advisor for five years now.

So...what's the consequence now to the membership of this kind of haphazard rule making?

The membership – which had no hand in making the rules – is going to have to pay – in cash -- for the sloppy rulemaking. How so?

Nathaniel Sterling, Executive Secretary
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Attorneys for the disabled homeowner whose property the association tried to seize filed a lawsuit in Federal Court in October. As a matter of public record, the suit names as defendants the people responsible for the sloppy rulemaking: the association, present and past board members, the law firm of Weintraub Genshlea Chediak & Sproul, and the firm's partner, who advised the board.

And guess who gets to foot the bill for the lawsuit....

Two weeks ago, the board sent mailed the association newsletter stating that, though the insurance carrier may cover most of the litigation expenses, the association may be required to spend reserve funds or to impose a special assessment on the members to pay the costs of litigation.

What this means is, that homeowners -- who had no part in designing the rules leading to foreclosure -- are now going to have to foot the bill for the lawsuit, possibly in the form of increased assessments or increased insurance premiums or in decreased reserves, which could be put to better purposes than paying for lawsuits.

Surely a set of rules affecting property rights ought to be a joint project of both board and membership? Surely membership participation is one way to help ensure due process and to ensure that existing state laws are followed.

Articles V, VI, VII, and IX of our Bill of Rights demand membership participation. However, even the Executive Council of Homeowners (ECHO) concedes in its January 2002 article that "rules that affect the basic property rights of member should be made openly"...and that..."Some rule making might be appropriately subject to member vote (perhaps rules that directly limit or restrict use of an owner's separate interest...")

Surely collections rules -- containing the threat of liens, the threat of foreclosure, which deprive people of their property -- qualifies as just the kind of rule that ECHO had in mind.

Again: our concerns about the proposed rulemaking procedures are:

- They do not require that the rules be written down;
- There are neither inducements or penalties built into them; and
- Their successful implementation rests on proper notification of the membership and the release of records, and there is no assurance that these two events will take place....

Respectfully submitted,

Marjorie Murray, for the
CID Homeowners Bill of Rights Coalition
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BILL OF RIGHTS

On September 25th we will celebrate the 210th anniversary of the ratification of the federal Bill of Rights. To honor this occasion, we the undersigned have ratified ten resolutions comprising a Common Interest Development Homeowner Bill of Rights. Modeled on the Preamble and the Amendments to the U.S. Constitution, this document is meant to inspire public confidence in the concept of the CID, to ensure that this local government institution pursues benevolent goals, and to prevent abuses of power. Any changes to California law governing CIDS must conform to these inviolable principles. We resolve **THAT**,

- I** *Since* living in a common interest development (CID) requires an individual citizen to enter into a contract with a governing association, the prospective homeowner must give written informed consent to the terms of the association's rules and governing documents, but most especially to the Codes, Covenants, and Restrictions (CC&Rs) ten days before close of escrow. The governing documents comprise the contract between the association and the buyer.
- II** No CID board shall abridge a citizen's freedom of speech or of the press either through direct order or through intimidation or any kind of public abuse; that no board shall abridge the right of homeowner citizens to assemble peaceably or to petition the board for a speedy redress of grievances. No CID board shall abridge freedom of religion.
- III** *Boards* give a full, true and accurate accounting in writing of all association actions. No actions shall be taken in secret.
- IV** *Homeowner citizens* shall be entitled to speedy access to all association records, particularly to financial records, contracts, and records of governance at any time without exception.
- V** *Homeowner citizens* shall not be deprived of liberty or property, without speedy due process of law. Nor shall private property be taken without just compensation, specifically, there shall be no non-judicial foreclosure. .
- VI** *Homeowner citizens* shall have the absolute right to vote on any changes to the terms of the original contract, i.e. changes in rules and amendments to governing documents or fines they are expected to pay. No fine shall exceed the true costs of the remedy.
- VII** *If accused* of violating rules, homeowner citizens are entitled to a speedy and public hearing by an impartial body not selected by the board; the impartial body shall determine the guilt or innocence of the accused and determine what fines, if any, be imposed; that the accused be informed of the nature and cause of the accusation; be confronted with witnesses; and have a compulsory process for obtaining witnesses, records, and advocates. Use of this system does not cancel a citizen's rights of appeal in the courts.
- VIII** *Residents* shall be treated equally, and not in an arbitrary fashion, without reference to age, race, gender, cultural lifestyle, sexual orientation, national origin, marital status, disability or familial status as established by both state and federal laws and regulations.
- IX** *Rules* enacted by a CID association and amendments to its governing documents must conform to all state and federal fair housing and health, safety and welfare laws.
- X** *Elections* shall be in the hands of the homeowner citizens, not the CID board: ballots shall be secret; no homeowner citizen shall be denied the right to vote for failure to pay any fine or tax, including assessments; directors shall serve no more than two terms and be held accountable for their decisions; the makeup of the board shall reflect the makeup of the association membership. **September 21, 2001.**

TO: Nathaniel Sterling, Exec Secy, CLRC

FROM: Marjorie Murray, Co-Chair
CID Bill of Rights Coalition

RE: Addendum to the Coalition's March 15/02 testimony

Please enter the following into the record as an addendum to our March 15 testimony on "Fairness in Association Rulemaking."

"Operating rules do not exist in a common interest development when the original developer is selling the units to initial buyers. Only after the developer sets up the association structure and turns the association over to a board of directors are operating rules developed. We know from the California Research Bureau report on CIDS [1997] that 1000 new CIDS are added each year to California's housing stock.

"This timeline -- and these facts -- are a strong argument for having the operating rules developed by both the association and the homeowners. Why?

Because at the time of purchase, no rules even exist for the CID consumer-homeowner to review, much less agree to.

"Rules pertaining to what the CLRC is characterizing as "the association's business practices" are prime candidates for joint development by the association and by homeowners. In particular, rules governing the collection of assessments should be developed jointly. Why? Because, in Mr. Hebert's words "These rules seem to be generating the bitterest complaints."

"Not only would this approach be democratic, it is also consistent with Article I of the CID Homeowner Bill of Rights [attached to our other March 15 testimony]:

'Since living in a CID requires an individual citizen to enter into a contract with a governing association, the prospective homeowner must give written informed consent to the terms of the association's rules and governing documents, but most especially to the Codes, Covenants, and Restrictions (CC&Rs) ten days before close of escrow. The governing documents comprise the contract between the association and the buyer.'

"The Coalition urges the CLRC to establish in law that any rules pertaining to the association's business practices which have a direct effect on the member's separate interest be developed jointly by association and by homeowners. I think we can all agree that collection rules that can lead to

depriving a member of his property altogether -- through foreclosure, e.g. -- fall into this category.

"Not only should such business practice rules be developed jointly, but they should be subject to a vote by the entire membership -- especially in new CIDs, where no operating rules exist at the time of purchase."

Respectfully submitted,

Marjorie Murray, Co-Chair
CID Homeowners Bill of Rights Coalition

March 15, 2002

California Law Revision Commission
Meeting to discuss "Rulemaking" and "Dispute Resolution" Prodecures for 'Common Interest
Developments'--Revision of the laws of the
"Davis-Stirling Common Interest Development Act"

Dear Commissioners,

My name is Karon Cave, I am here today to plead with the Commissioners to help the Individuals living in and/or owning property within a C.I.D.'s.

I've been fined a total of \$50,500.00 by my H.O.A. Board for driving on my access road to my home. The State of California Dept. of Fair Employment and Housing has investigated my H.O.A. and there is already an existing lawsuit against the H.O.A., for illegal housing discrimination, harassment, coercion, etc. against me, based on my disability and the HOA's refusal to try to help accomodate me in their snow removal service, (which I pay for), yet I'm being fined again for using the road, we are just trying to live, this is the only accomodation we have, yet the association is attempting to stop us, harass us, fine us, and soon foreclose on our property.

It does not matter what laws this or other law makers write if no one can actually enforce them. I've heard it said by this Commission that there is no funds to give to create a State Enforcement Agency to report abuses commonly found in communities like mine, where the Board of Directors use Taliban tactics. The Attorney General recently wrote back to me recently; after I made a written complaint of crimmlinal actions my Board and their employees; to say he could not help me because his office isn't allowed the funds to; My H.O.A. Board has chosen to retaliate against me causing me duress and fear, yet these crimmlinal actions can not be acted upon by the Attorney General's Office because, the Legislature does not give them the funds to acts on my behalf and the local law enforcement agency calls my situation 'Civil' because I Live in a "private" community. (!!!!) So basically, no agency has a say when laws are being broken.

As for the topic of the Agenda today:

The H.O.A. Board makes up whatever "Rules" they want.

If you break them or are 'accused' of breaking them, the Board Fines you, liens your property, forecloses on your home.

Resolution for the Homeowner/tenant:

You go to a meeting, write to the Board about what your views of the problems are, the Board ignores your side, go into Executive Session and the rest is history.

Please do something to create an enforcement agency, find the funds, ignore the 'Big money interests', protect our individual Civil Rights to protection, privacy, due process of the law, and mostly peace and enjoyment of our home.

Thank you,

Karon Cave
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