Study H-851 August 30, 2002

Memorandum 2002-44

**Nonjudicial Dispute Resolution Under CID Law:
Procedural Fairness in Association Rulemaking and Decisionmaking
(Comments on Tentative Recommendation)**

As part of its general study of common interest development law, the Commission is examining ways in which to minimize reliance on the courts to resolve disputes between homeowners associations and their members. To that end, the Commission circulated a tentative recommendation that proposes three general changes to the Davis-Stirling Common Interest Development Act:

(1) *Addition of chapter and article headings.* Disputes may arise because boardmembers and homeowners are unaware of what the law requires. This is partly because the Davis-Stirling Act lacks organizational headings to guide readers to relevant provisions.

(2) *Creation of a standardized procedure for architectural review.* Existing law provides no procedure for review of a proposed alteration of an owner's separate interest property. Fair and reasonable procedures should lead to better decisions and reduce disputes that arise when owners feel they have been denied a fair hearing.

(3) *Creation of a standardized rulemaking procedure.* Existing law authorizes association boardmembers to create "operating rules." However, there is no statutory procedure for doing so, nor is there any clear limit on the substantive scope of such rules. Members are less likely to dispute application of a rule if they have an opportunity to participate in its formation.

We received the following letters commenting on the tentative recommendation:

This memorandum discusses the comments we received and proposes various changes to address the issues raised. After reviewing the comments, the Commission should decide whether it will adopt the tentative recommendation, with or without changes, as its final recommendation.

Except as otherwise indicated, statutory references in this memorandum are to the Civil Code.

GENERAL RESPONSE

Most of the comments we received are fairly technical, addressing specific elements of the proposed law. Most of this memorandum consists of discussion of these specific comments.

However, there were a few general comments, which are discussed below:

Support for Organizational Headings

Samuel Dolnick, Victor Geretz, Kevin Frederick, and Fred Daniel each expressed support for the proposed addition of organizational headings to the Davis-Stirling Act. See Exhibit p. 5-7, 12. There were no negative comments on that aspect of the proposed law, nor were there any suggestions for change. The staff recommends that the proposal to add organizational headings be included in the Commission's final recommendation.

Support for Decisionmaking Procedures

Fred Daniel, a CID homeowner who has served as an association boardmember in the past, expressed general support for all of the proposed legislation, including the proposed decisionmaking procedures: "Generally, I believe all of the proposed legislation is appropriate and long overdue." See Exhibit p. 12.

Opposition to Decisionmaking Procedures

Kevin Frederick is an attorney specializing in common interest development law. He believes that the Davis-Stirling Act is already unduly complex, leading to errors in association management. He maintains that the creation of additional mandatory procedures for review of architectural proposals and operational rulemaking would add to that problem, increasing rather than reducing the likelihood of disputes between associations and their members. He writes (at Exhibit p. 8, emphasis in original):

> [T]he Commission seems to assume … that regulation of the homeowners' association will keep it out of court. This is simply not true. The regulations themselves will be a source and cause of litigation because most homeowners' associations are not going to know about or follow the procedures.
>
> Homeowners dispute board actions because they disagree with the substantive decision, *not* the way the decision was made. In my experience, *how* the decision was reached is irrelevant to the homeowner who believes they have a right to make the architectural change or violate the rule. Owners litigate the decisions, not the procedures.
>
> The [Commission] correctly notes that homeowners associations are already required by law to use fair and reasonable procedures …. What the [Commission] fails to mention is the lack of reported decisions litigating these issues in the past 15 years. These issues are simply not generating significant amounts of litigation.
>
> The most objectionable aspect of the Commission's proposals for architectural and rulemaking procedures is that they apply to all homeowners' associations. … These proposed procedures may be appropriate for larger Associations of 50 separate interests or larger. These are the associations who are more likely to have professional management and corporate counsel to help them traverse the minefield being created. The vast majority of smaller associations do not have the professional resources to comply, and do not have enough competent owner/directors to fulfill the functions already required by law. To be blunt, most of these smaller associations will not even know about the laws until some aggrieved owner with an attorney starts to use them against an unsuspecting board. I ask that you analyze your proposals from the perspective of a 5-unit condominium complex.

Mr. Frederick makes a good point about the potential disadvantages of universally applicable mandatory procedures. Alternatives that would minimize these disadvantages include (1) limiting application of the statutory procedures to larger associations, or (2) requiring only that fair and reasonable procedures be used, with the detailed procedure recast as a safe harbor. These alternatives are discussed more fully below.

In line with Mr. Frederick's critique of the proposed law, the staff recommends that opportunities for simplification of the proposed procedure be given serious consideration. Such opportunities will be pointed out in the course of this memorandum.

Another step that could be taken to address Mr. Frederick's concern would be to defer operation of the proposed law for one year after its enactment. That

would provide time for news of the statutory changes to spread before they take effect. The staff recommends that proposed Sections 1378.090 and 1380.190 be revised to make the application date of the proposed law one year after the effective date.

MATTERS NOT ADDRESSED BY THE PROPOSED LAW

Some of the comments received raised issues that were not addressed in the proposed law. The staff does not intend to discuss the merits of these issues in this memorandum. However, in the interest of keeping the Commission apprised of issues of concern to the commentators, these comments are briefly presented below. Note that it is the Commission's intention to eventually consider all CID issues that have been brought to its attention. To that end, the staff will retain these comments for future consideration.

Lack of Oversight and Sanctions

Over the course of this study, we have received many comments lamenting the lack of any type of nonjudicial oversight of boardmember conduct, and the lack of any type of direct sanction for boardmember misconduct. Comments received regarding the proposed law raise the same issues:

Charlene and Edwin Henley are homeowners who have had difficulties with their association board (relating to inspection of association records and selective enforcement of rules). They write (at Exhibit p. 3):

> We read with dismay the May 2002, Tentative Recommendation from the California Law Revision Commission. There is no place in this Tentative Recommendation for a bureau, commission or department that would oversee managers and boards in common interest developments. These individuals will still run roughshod over individual homeowners who have no recourse but to spend thousands of dollars (if they can afford it) to get justice served. Your Commission has spent months suggesting revisions to the Davis-Stirling Common Interest Development Act. The lack of any addition of a department, bureau, commission, to give said Act "teeth" is a heartbreaking disappointment to us.

Note that an attachment to the Henley's letter, providing additional background on the problems they have had with their association, was not reproduced in the Exhibit.

Fred Daniel is a homeowner in a large CID. He writes (at Exhibit p. 11):

> As you know, the statutes provide no practical enforcement provisions to deter violations by management or the Board of Directors. Even though it is generally believed "fair and reasonable procedures are already required by law," members like myself have no recourse other than file suit against the association to compel them to act in a fair and reasonable manner. If a member resorts to litigation to get the attention of the Board of Directors, management [and] the Board of Directors characterize any legal action as an attack on the membership treasury, and not to realign the Board's position.
>
> ….
>
> The California Attorney General's office refuses to provide any assistance in securing compliance.

Everette Phillips, another long-time CID homeowner, is also interested in enforcement and oversight. He writes (at Exhibit pp. 13-14):

> As you note in your comments, most homeowners are not familiar enough with the law to adequately make legal assessments of a board's or committee's action, so it seems unfair that the only recourse given to the homeowner is to sue. Is it possible to give the homeowner some other recourse? For example, if the board is not following the current bylaws, should the homeowner not be able to ask the Department of Real Estate to verify compliance with the current bylaws or force the board to update its bylaws to meet current laws? It is unfair for the membership to have one set of bylaws and guidelines and the board to have freedom to do something completely different.
>
> If it is possible, please make sure your recommendations include some penalty, fine or incentive for board directors of common interest properties to follow existing bylaws and update bylaws when needed using the procedures you outline where members vote on the changes and/or at least can petition against them. Please also make the recourse for homeowners in this situation … something less difficult than hiring a lawyer to sue the association. This occurrence is not likely unless a homeowner is fighting a fine or … an architectural issue. In the case of not following the bylaws, most association members are too trusting to identify the abuse or if identified too afraid to take on such a strong and powerful body on their own.

See also Exhibit pp. 17-18, suggesting that Department of Real Estate oversight of an association's governing documents should continue beyond the initial approval of governing documents required under existing law.

Other Miscellaneous Issues

Other issues raised by commentators include: violation of open meeting requirements (Exhibit p. 12), violation of records disclosure requirements (Exhibit pp. 2, 12), overassessment (Exhibit p. 12), selective enforcement of association rules (Exhibit p. 12), developer control of the board of directors (Exhibit pp. 11-12), and board action in violation of the governing documents (Exhibit p. 14-15).

Finally, we received an email from Stanley Fiala: "Please notice that you have made no substantial changes to the CID Law to reassure that CID does not resemble early communistic housing. What is so wrong with you people, that you embrace terror as a viable social concept?" Mr. Fiala seems to be objecting to the fact that the proposed law does nothing to address the general restriction of individual choice inherent in association control over use of separate interest property. The staff is unsure how the proposed law "embraces terror," but the comment illustrates how strongly many homeowners feel about CID issues.

ARCHITECTURAL REVIEW ISSUES

Summary of Architectural Review Provisions

The proposed law would add a statutory procedure to be followed by an association in reviewing an owner's proposed modification of separate interest property. Under the proposed procedure, a member wishing to alter separate interest property would submit a written application. Notice of the application would be posted on the association's official notice board. If the reviewing body determines that the proposed alteration would require a variance from established standards, or could have a substantial negative effect on the separate interests of other members, notice of the proposal would be provided to potentially affected members. Within 45 days after notice of the application is posted, the reviewing body would issue its written decision. If a decision is not issued in the time required, the proposal would be deemed approved. The applicant and any member who opposed the proposal would have a right to appeal the decision to the board of directors. On appeal, the application would be considered de novo, and the board of directors would issue a written decision that includes a statement explaining the basis for the decision.

The decision of the reviewing body would not be subject to judicial review. A member dissatisfied with that decision must first appeal it to the board of

directors. The decision on appeal would then be subject to judicial review, under the procedure for administrative mandamus. In effect, this approach requires that the administrative appeal process be exhausted before involving the courts.

In addition, the proposed law would require that an association adopt substantive standards to guide its decisionmaking and would require that a decisionmaker act in good faith.

Need for Procedure

Mr. Frederick questions whether there is any need for a statutory procedure. He maintains that architectural disputes arise because of owner dissatisfaction over the substantive result, not the process by which the result was reached. This is probably true in many cases.

However, there are undoubtedly also association members who would accept a disapproval decision made under a fair and reasonable procedure, but would not accept a decision made under a procedure that appears to be unfair, biased, or unreasonable. An owner who has been subjected to an unfair procedure may have no confidence that the substantive result is correct, or may dispute the result as a matter of principle.

An association that does not follow a fair and reasonable procedure exposes itself to litigation over purely procedural matters, regardless of whether its decision was substantively correct. Such litigation wastes the time and resources of everyone involved.

Mandatory Procedure

As Mr. Frederick observes, a statutory procedure could create pitfalls for small and unsophisticated associations. If boardmembers are unaware that a statutory procedure exists, then all of their decisions will be procedurally defective and subject to challenge, regardless of whether the procedure the board used was actually fair and reasonable.

Limited Application

Mr. Frederick suggests that the statutory procedure might be appropriate for larger associations (e.g., comprised of 50 or more separate interests). Such associations have greater resources to commit to management and are more likely to be professionally managed or advised. This change would be fairly easy to implement.

Safe Harbor

Another alternative would be to make the statutory procedure a safe harbor rather than a mandatory requirement. For example, a provision along the following lines could be added:

> (a) A decision to approve or disapprove a proposed alteration of a member's separate interest shall be made in good faith and in a fair and reasonable manner.
>
> (b) The procedure provided in Sections 1378.050 to 1378.080, inclusive, is fair and reasonable. A court may also find other procedures to be fair and reasonable.

Subdivision (a) codifies the case law requirements of fairness, reasonableness, and good faith. Subdivision (b) makes clear that the statutory procedure satisfies the requirements of subdivision (a), without precluding the possibility that other procedures could also satisfy subdivision (a). This is similar in approach to Corporations Code Section 7341, governing expulsion or suspension of a member of a nonprofit mutual benefit corporation.

One advantage of the safe harbor approach is that it would permit local variation. We have repeatedly heard how common interest developments come in every shape and size, and have been cautioned against one-size-fits-all solutions. In a very small association, minimal procedures might be reasonable and fair. For example, in an association of 10 units, an applicant might personally deliver notice of a proposed alteration to each owner two weeks before the board meeting at which the application will be considered. Such a process might achieve a fair result at a fraction of the cost and delay involved in the proposed statutory procedure. Conversely, an association might wish to impose a procedure that is more rigorous than the proposed law, when considering large or sensitive projects, such as new home construction.

There are advantages to a mandatory approach. To the extent that associations are aware of the law, a mandatory procedure would create uniformly fair procedures statewide. An association that follows the statutory procedure would know that its decision could not be challenged on procedural grounds. Nonetheless, the staff sees considerable merit in the nonmandatory approach. It would preserve flexibility for local variation and would not create problems for very small associations or associations that are unaware of the new procedure. The Commission should consider changing the statutory procedure to a safe harbor, as discussed above.

Substantive Review Standards

The proposed law would require that an association adopt "substantive standards of general application to govern its review of a proposed alteration of a separate interest." Proposed Section 1378.040. Substantive standards would form a uniform and more objective basis for decision.

Mr. Frederick comments: "Ninety-five percent of my associations are not equipped to do this. Neither the directors, nor their management companies have the expertise. You will be creating a new common interest development sub-industry." See Exhibit p. 9.

The staff does not see why it would be so difficult to adopt substantive standards. In many cases, the governing documents may already contain substantive standards for architectural review, in which case no further action would be required. In addition, the proposed law does not specify the scope or level of detail required. Ideally, substantive standards would be detailed and thorough, but an association could satisfy the law by adopting fairly general standards, which should not require the assistance of professionals. However, this raises two issues:

(1) *Should the proposed language be revised to make it clearer that no specific level of detail is required?* Probably so. This could be accomplished by adding a sentence to the provision: "The standards may be as detailed or as general as the association deems appropriate."

(2) *If the requirement can be satisfied by very general standards, would the requirement actually be useful in providing a basis for decision?* Very general standards would not be too useful. On the other hand, a requirement to establish standards may lead many associations to adopt standards with a useful degree of detail.

An alternative worth considering would be to require adoption of standards only as part of the "safe harbor" procedure discussed earlier. Associations that elect to follow the safe harbor procedure would be required to adopt substantive standards; those that use their own decisionmaking procedure would not. This would relieve small associations of the burden of promulgating standards, while preserving the requirement for associations that elect to follow the safe harbor procedure.

A simpler alternative would be to remove the requirement entirely. Associations that impose architectural review requirements probably already have some standards in their governing documents.

Basis of Decision

Proposed Section 1378.040(b) provides: "A member of the reviewing body or of the board of directors of the association shall make a decision on a proposed alteration of a separate interest in good faith, based on the information provided by the participants."

Mr. Frederick writes: "the Board should be allowed to base their decision on relevant information whatever its source, such as the directors, design professionals or attorneys." See Exhibit p. 9.

The language at issue was originally added to make clear that decisionmakers are not under any duty of inquiry or investigation. Apparently, the language was too indirect. The provision could be revised to read as follows:

> In making a decision under this chapter, a member of the reviewing body or of the board of directors may consider any relevant information. A member of the reviewing body or of the board of directors is not required to consider information other than that provided by the participants.

This would be more straightforward.

Notice of Application

Proposed Section 1378.050 sets out the basic application and decisionmaking procedure. Subdivision (a) requires that a person proposing to alter separate interest property submit a written application to the reviewing body. Subdivision (b) then requires that notice of the application be posted on the association's notice board. The notice would include "a brief description" of the proposed alteration.

Mr. Dolnick is concerned that a "brief description" would not disclose important alterations such as changes to electrical or plumbing lines that might affect other separate interests. He prefers that the notice include a "detailed description" and list any government permits that would be required. See Exhibit p. 4.

Listing the permits required for an alteration would provide some basic information about the nature of the job, which might be useful to interested neighbors. Such a list would probably not be too burdensome to prepare. The applicant could be required to include that information on the application.

On the other hand, adding further detail regarding the contents of the notice would slightly increase the complexity of the procedure. The Commission should

decide whether the changes proposed by Mr. Dolnick are worth the minor increase in complexity that would result.

Notice Deadlines

Mr. Dolnick believes that 10 days would not be sufficient time to prepare and post a notice of application. "So many common interest developments (CIDs) are self managed without any staff whatsoever, that 10 days would not be sufficient time to review the application." He proposes changing the deadline to 15 days. He also proposes a parallel change to the deadline for delivery of notice to affected neighbors (in proposed Section 1378.050(c)). *Id.*

Mr. Frederick also believes that the 10-day deadlines are too short: "there is no way a board of directors or their management company can comply with these 10-day deadlines." See Exhibit p. 9.

The staff has no specific objection to extending the 10-day deadlines, but is concerned about the cumulative effect of extended deadlines on the overall time period required to process an application.

More general comments on the efficacy of posted notice are discussed below.

Delay Before Decision

A note following proposed Section 1378.050 asked for comment on whether an association should be prevented from making a decision on an application until some number of days following posting of notice of the application. That would guarantee some time for interested neighbors to comment on a proposal before the association makes its decision.

Mr. Frederick views this question as an example of the "unrealistic procedural traps that are built into this whole concept." See Exhibit p. 9. Presumably, he means that a fixed statutory delay would further increase the complexity of the proposed procedure, creating another opportunity for good faith errors.

Taking a contrary position, Mr. Daniel believes that a decision on an application should be delayed until 20 days following posting of the notice of application: "This would assure neighbors and concerned members some opportunity to offer comment." See Exhibit p. 13.

A compromise approach might be to require delay in decisionmaking only in those cases where a variance is required or an alteration could have a substantial negative effect. That would reduce opportunities for error (by narrowing the

scope of the delay's application). Straightforward and noncontroversial applications could be processed without delay. This approach could be implemented by adding a sentence to proposed Section 1378.050(c):

> If a notice is delivered pursuant to this subdivision, the reviewing body may not make a decision on the application for 20 days following delivery of the notice.

Any delay provision would further increase the complexity of the procedure. A simpler approach would be to leave the procedure as presently drafted and rely on decisionmakers not to act too hastily on a controversial application. The staff is inclined to leave the procedure as drafted, without a statutory delay period.

Deemed Approval

Under the proposed law, if a reviewing body does not make its decision in the time allotted, the application is deemed approved. Proposed Section 1378.050(d). This provides an incentive for the reviewing body to act promptly. A significant disadvantage of "deemed approval" is that it could result in approval of alterations that should be disapproved. A note following Section 1378.050 discusses the advantages and disadvantages of deemed approval and requests comments.

We received two comments on the issue — one in favor of deemed approval, the other opposed. Mr. Daniel writes (at Exhibit p. 13):

> I like the clean and [straightforward] manner the Commission has insisted the reviewing body act, or face deemed approval. Even though some potential exists to violate express restrictions as the Commission has pointed out, the Board of Directors has the final word and can overrule at will. I suggest the paragraph remain as written.

Mr. Daniel's characterization of the powers of the Board of Directors under the proposed procedure is not entirely accurate. The board could only act if the decision of the reviewing body is appealed. The right to bring an appeal is limited to the applicant and "participating members." See proposed Section 1378.070. A "participating member" is a member who comments on an application before the reviewing body makes its decision. See proposed Section 1378.010(b). If an application is deemed approved as a consequence of inaction by the reviewing body, then interested neighbors will not have had notice and an

opportunity to comment on the application before its approval. In such a case there would be no participating members and therefore no appeal. The only recourse would be judicial review.

Mr. Frederick opposes deemed approval. He writes (at Exhibit p. 9):

> [T]he "deemed approval" solution is not a good one, because it unfairly takes advantage of the majority of unsuspecting board of directors who will not know about this proposed law, much less how to comply with it. I suggest that the [Commission] review statistics available from trade industry sources regarding the number of associations that have management. The volunteer directors are not legal scholars. You have set the bar too high, and then penalized the rest of the association for their good-faith errors.

The problem noted by Mr. Frederick would be substantially reduced if the statutory procedure were not mandatory. If that were the case, the deemed approval rule would only apply to those associations that are aware of the statute and have elected to follow the safe harbor procedure.

Nonetheless, the staff has serious concerns about the problems posed by deemed approval. A good faith error by a decisionmaker could result in an unappealable approval. This would be unfair to other interested members who have a right to the proper enforcement of property restrictions. This problem would not exist if the rule were reversed — if the reviewing body does not issue its decision by the indicated date, the application is deemed disapproved. The applicant could then immediately appeal the disapproval to the board. Any member would be able to testify at the appeal, so all interests would be represented.

The only disadvantage of "deemed disapproval" is that the pressure on the reviewing body to meet its deadlines would be relieved. This could result in unwarranted delay. However, some additional delay seems preferable to improper approval, especially if the decision is reached with no notice to interested neighbors and no opportunity to comment or appeal. The staff recommends that the rule be changed to provide for disapproval of an application if the reviewing body does not issue its decision in the time allotted.

Statutory Time Periods Generally

In general, Mr. Frederick believes that all of the procedural deadlines are unrealistic: "the entire schedule of time limits is unrealistic. Although most boards meet monthly, many meet quarterly. Many have no professional

management. These associations cannot comply." See Exhibit p. 9. This is yet another concern that could be addressed by making the statutory procedure an elective safe harbor.

Judicial Review

The proposed law provides that the initial decision of a reviewing body is not subject to judicial review. A decision on appeal to the board of directors would be subject to judicial review. In effect, this means that the administrative appeal process must be exhausted before seeking judicial relief.

The proposed law also makes clear that the existing ADR requirements would apply to judicial review of an architectural review decision. In other words, before suing to challenge an architectural review decision, a member would need to follow the ADR procedure provided in Section 1354.

Mr. Frederick approves of these judicial review provisions: "limiting judicial review to the final decision is a good idea, and requiring Civil Code Section 1354 ADR is even better. Mediation resolves 80% of the architectural disputes which I have encountered." See Exhibit p. 9.

OPERATIONAL RULEMAKING

Mandatory Procedure

The proposed law establishes a mandatory procedure for making changes to an association's operating rules. If the Commission decides to make the architectural review procedure nonmandatory, it may wish to make a parallel change to the rulemaking procedure (for reasons similar to those discussed in the context of architectural review). This could be accomplished by adding a provision along the following lines:

> (a) Except in an emergency, the board of directors shall provide members with advance notice and an opportunity to comment before making a rule change. As used in this subdivision, an emergency exists if an immediate rule change is necessary to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association.
>
> (b) Notice of a rule change shall be delivered to members promptly.
>
> (c) The procedure provided in Article 2 (commencing with Section 1380.110) satisfies the requirements of subdivision (a). A court may also find that other procedures satisfy the requirements of subdivision (a).

The Commission should also consider whether subdivisions (a)-(b) above could substitute entirely for proposed Sections 1380.140-1380.160. This would be a substantial simplification, as it would eliminate all of the procedural detail. On the other hand, if the statutory procedure is nonmandatory, then there is no great disadvantage to including it in the proposed law. Many associations may choose to follow the statutory procedure in order to secure the protection afforded by the safe harbor provision.

Scope of Rulemaking Procedure

Proposed Section 1380.010 exempts certain non-rulemaking actions from application of the rulemaking chapter. Proposed Section 1380.120, then specifies which types of operating rules are subject to the rulemaking procedure. Rules affecting "assessment collection procedures" are included.

Mr. Frederick writes: "the collection of assessments is the most heavily regulated aspect of homeowners association' operations. … By including further regulation here, the [Commission] is creating another defense for an owner who does not pay assessments. Why?" See Exhibit p. 10.

Mr. Frederick does not seem to be objecting to the general policy of requiring notice and comment rulemaking. Rather, he seems to be renewing his concern about the effect of a mandatory procedure on lay boards who do not know that a mandatory procedure exists. If such a board adopts a collection rule without following the proposed rulemaking procedure, a delinquent homeowner could raise a purely procedural objection to the collection proceeding, regardless of whether the money is owed and should be collected.

This point could be partially addressed by making the rulemaking procedure nonmandatory. An association that does not follow the statutory procedure might still satisfy the general requirements of advance notice and an opportunity to comment. For example, an association board might include the agenda of its upcoming board meetings in its regular newsletter to members. Board meetings are generally open to members who are free to speak on matters before the board. In this scenario, the agenda would provide notice of the proposed rule change and the board meeting would provide an opportunity to comment before the board makes its decision. On the other hand, there are probably many boards that make operating rule changes on an ad hoc basis, with no notice to members. Under the proposed law, such rule changes would be invalid.

The proposed deferred operation date would be helpful in addressing this problem, as it would provide time for associations to learn of the new procedure requirements before it takes effect.

However, the most direct response to Mr. Frederick's concern would be to drop assessment collection procedures from the list of rules subject to the rulemaking procedure. That change would undoubtedly be opposed by those who are interested in moderating collection practices. There are good arguments on both sides of this issue. On the one hand, associations need to collect overdue assessments. To the extent that the rulemaking procedure provides a hurdle to legitimate collection efforts it would be counterproductive. On the other hand, if we believe that member participation in rulemaking is important, then why exempt rules that have such a potentially significant effect on member interests?

Emergency Rulemaking

Proposed Section 1380.160 provides an expedited rulemaking procedure for use in emergencies. It requires notice of a rule change within 15 days after promulgation, with an explanation of why an emergency change was necessary.

Mr. Dolnick is concerned about the cost involved in providing special notice of an emergency rule change: "All the extra first class mailings required by the proposed recommendations become a large added expense to the associations. This will mean an increase in the assessments affecting each homeowner. New laws affecting CIDs, which are nonprofit mutual benefit corporations should not place additional expenses on them." He proposes that the notice be mailed in the next general mailing of the association. See Exhibit p. 5.

The proposed law already permits notices to be mailed with a billing statement, newsletter, or other document. See proposed Section 1350.7(c). The question then, is whether it would be appropriate to delay notice of an emergency rule change to reduce mailing costs. Considering that we are dealing with rule changes that are prompted by an emergency, it seems likely that an association would want to disseminate information about the rule change as quickly as possible. The staff suspects that this particular mailing deadline would not pose a significant problem. However, see the general discussion of posted notices and newsletters, below.

Referendum Procedure

Proposed Sections 1380.170-1380.180 provide a "referendum" procedure that can be used by members to reverse an objectionable rule change. If a referendum petition signed by persons representing 25% or more of the separate interests (or 500 separate interests, whichever is smaller) is submitted within 30 days after notice of a rule change, the rule change is suspended. The board may then hold an election to determine whether the suspended rule change should be restored or reversed. Comments regarding the referendum procedure are discussed below.

Possible Alternative Approach

Mr. Frederick suggests that the referendum procedure is "unnecessary and duplicative" because existing Corporations Code Section 7510(e), governing nonprofit mutual benefit corporations, provides that "special meetings of members for any lawful purpose may be called by 5 percent or more of the members." See Exhibit p. 10.

His comment seems to suggest that the members of a homeowners association could call a special meeting to reverse an unpopular rule change. However, the staff does not see how Section 7510(e) grants members that power. That section merely authorizes members to call a special member meeting for a "lawful purpose." It does not define what a lawful purpose would be.

The staff could find no case law discussing the scope of lawful purposes within the context of Section 7510(e). However, other provisions of the Corporations Code give some guidance. Corporations Code Section 7210 provides in part:

> Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board.

In other words, all corporate powers are reserved to the board of directors, except those that are specifically extended to members by law or the articles or bylaws of the corporation. Examples of powers granted to members include changes to bylaws and articles (Corp. Code §§ 7150-7151, 7220, 7812-7813.5), removal of a director (Corp. Code §§ 7222, 7224-7225), approval of director

conflicts and indemnification of agents (Corp. Code §§ 7233, 7235, 7237), sale of all or substantially all assets, merger, and dissolution (Corp. Code §§ 7911, 8012, 8015, 8610-8611). These expressly granted powers do not include authority to modify the operating rules of a homeowners association. The staff does not believe that the power to call a special meeting for "any lawful purpose" empowers the members to take actions that are reserved to the board of directors.

Nonetheless, Mr. Frederick's suggestion raises an interesting possibility. The proposed referendum procedure could be replaced with a provision recognizing the authority of members to reverse a rule change. Members could then hold a meeting to vote on whether to reverse a rule change. As few as five percent of the members would be able to call a meeting, but only a majority could reverse a rule change.

This would eliminate nearly all of the procedural complexity, while establishing some degree of member control over rulemaking. This could be accomplished by deleting proposed Sections 1380.170-1380.180 and adding a new Section 1380.170, along the following lines:

> 1380.170. (a) Members may reverse a rule change within 120 days after notice of the rule change is delivered.
>
> (b) A rule change may only be reversed on the approval of members casting a majority of the votes at a member meeting constituting a quorum and conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Section 7613 of, the Corporations Code.

Note that Corporations Code Section 7512 sets a quorum of one-third of the voting power, represented in person or by proxy, unless the bylaws set a different quorum. Proxy voting is permitted under Corporations Code Section 7613. Note too that actions authorized at a meeting may be performed without a meeting, if the corporation distributes a written ballot to every member entitled to vote on the matter. Corp. Code § 7513.

The proposed 120-day window would allow sufficient time for the meeting to be organized and held. Note that Corporations Code Section 7511(c) requires that a special meeting be held within 90 days after a request by persons entitled to call a special meeting. If notice of the meeting is not given within 20 days, a person entitled to call the meeting may seek a summary court order compelling that the meeting be held and making other appropriate orders (including setting the time

and place of the meeting). This provides a simplified enforcement mechanism to ensure the meeting is actually held.

The staff finds the simplicity of this alternative attractive. It is also helpful that it employs established corporate law mechanisms. One disadvantage of this approach is the opportunity it might provide for mischief by an organized minority. Five percent or more of the members could call repeated special meetings to challenge rule changes. However, scope for mischief already exists. There is nothing in existing law that prevents an organized minority from calling repeated special meetings to move for removal of directors. The staff does not believe that the potential for abuse of the special meeting option is a serious problem.

If the Commission decides not to use this alternative, it will need to consider the following suggestions regarding the procedure proposed in the tentative recommendation.

Petition Deadline

Mr. Daniel suggests that the 30-day deadline for submission of a petition is too short: "I believe the petition delivery should be extended to 60 days. Many new rules that turn out being objectionable to the members, will require a longer recognition period. Under normal circumstances, once a new rule is enacted, it may be several weeks before enforcement occurs." See Exhibit p. 13.

Suspension Pending Election

Both Mr. Dolnick and Mr. Frederick oppose suspension of a rule change pending the election to determine its ultimate fate. Mr. Dolnick writes (at Exhibit p. 5, emphasis in original):

> The petition's purpose should be to call for a vote of the operating rule. The rule should continue in effect until the results of the vote are known. A vote of a majority of the separate interests would have to vote to rescind the rule.... The rule *should not be suspended* until a vote is taken.

Mr. Frederick writes (at Exhibit p. 10):

> Should there be any suspension at all? It takes months to enforce rules. An association must give an owner a board hearing (Corporations Code Section 7341; Civil Code Section 1363(h)). An association must offer ADR (Civil Code Section 1353). Only then can an association sue to enforce.

The benefit of suspending a rule immediately is the incentive it provides to the board to hold an election. If a petition merely requires that a vote be held, the board could drag its feet and the rule would remain in effect.

Note that under the new approach outlined above, there would be no effect on a rule change until the members voted to reverse it. This is essentially what Mr. Dolnick suggests. Nor would there be any need for an incentive to compel the board to hold the member meeting. Corporations Code Section 7511(c) already provides an expedited judicial remedy for board foot dragging.

Voting Power

The referendum petition and election provisions provide for voting power based on the number of separate interests owned, rather than a rule of one person one vote. That rule is generally consistent with the Department of Real Estate regulation governing member voting rights, which provides a default rule of "one vote for each subdivision interest owned." 10 Cal. Code Regs. § 2792.18(a). It is also consistent with the default statutory procedure for amending a declaration. See Civ. Code § 1355(b) (requiring approval of "owners representing more than 50 percent … of the separate interests in the common interest development"). A note following Section 1378.170 specifically asks for comments on that rule.

Mr. Dolnick and Mr. Frederick both favor voting power based on interests owned. Mr. Dolnick writes (at Exhibit p. 5):

> All petitions and all votes should be on the basis of one vote per separate interest, regardless of how many members own a separate interest. A separate interest may contain four members for three years and then the separate interest is sold. The new owner of the separate interest is a single individual. The association would have to keep an up-to-date census of how many members are in a separate interest and adjust the percentages each time a vote takes place because the amount of a majority would change. Also, to amend the CC&Rs, where it is necessary to have 66% or 75% of affirmative votes, the association would have to always recalculate the exact number of votes necessary. One vote for each separate interest is the fairest and simplest to monitor.
>
> Also, in regards to someone owning more than one separate interest. If the voting is one vote per separate interest and the same owner owned two separate interests, the owner [would] have two votes, one for each separate interest.

Mr. Frederick writes (at Exhibit p. 10):

> [T]here is no question that there … should be only one vote per separate interest owned. Multiple owners of a single, separate interest are all "Members", subject to the governing documents. However, if six people own 1 separate interest, there is no justification for giving them 6 votes. Think in terms of a 5-unit condominium complex.

Mr. Daniel writes in favor of one person one vote (at Exhibit p. 13):

> I believe the "number of individual members" should be adopted rather than the "interests owned". This would tend to balance the interests of the homeowners with that of the developer. Currently, with developers controlling the selection of board members during a multi-year buildout, the homeowners are left powerless in every way, until the project is sold out.

The staff sympathizes with the frustration one might feel living in a development where the developer still owns a majority of the separate interests and therefore personally controls the composition of the board. However, that seems necessary to protect the developer's investment, at least until a majority of the units have been sold. Furthermore, as Mr. Dolnick points out, there are significant difficulties inherent in administering a one person per vote system in a homeowners association. Nor would it be fair to give greater power to those who co-own a separate interest over individual owners. The staff recommends that the interest-based rule be retained.

Note that the alternative to the referendum procedure, discussed above, uses general language to describe the required majority for reversal of a rule change: "approval of members casting a majority of the votes." This leaves the question of who has a vote to be determined by other law. The result would be a rule of one vote per separate interest owned, pursuant to the DRE regulation cited above. The phrase "approval of members casting a majority of the votes" is drawn from other provisions of the Davis-Stirling Act. See Sections 1355.5(d), 1366(a)-(c).

PROVISION OF RULES

Proposed Section 1380.030(a) provides: "As soon as practicable after a person becomes an association member, the board of directors shall deliver to the member a complete copy of the operating rules of the association."

Mr. Dolnick and Mr. Frederick object to this responsibility being placed on the association. Mr. Dolnick writes (at Exhibit p. 5):

> Many associations' operating rules contain restrictions of various types, plus fines and charges for violations of the governing documents. Therefore the operating rules should be turned over before the close of escrow so that the buyer can rescind the sale if the operating rules under which he/she will have to live do not agree with the buyer's life style. If the operating rules are given after escrow closes, the buyer is "caught" because there was not full disclosure before the sale was completed. Since the association is not a party to the sale of the separate interest, it is up to the seller to turn over the document. If the seller does not have a copy, it is the seller's responsibility to get a copy from the association.

Mr. Frederick writes: "associations do not always know when they have a new member. The seller currently has the duty to disclose the association's governing documents to a purchaser. See Civil Code Section 1368(a). Why not put this duty on the seller?" See Exhibit p. 10.

The staff recommends that Section 1380.030(a) be deleted, and that Section 1368(a) be revised as follows:

> 1368. (a) The owner of a separate interest, other than an owner subject to the requirements of Section 11018.6 of the Business and Professions Code, shall, as soon as practicable before transfer of title to the separate interest or execution of a real property sales contract therefor, as defined in Section 2985, provide the following to the prospective purchaser:
>
> (1) A copy of the governing documents of the common interest development, including any operating rules.
>
> …
>
> **Comment.** Section 1368 is amended to require that an association's operating rules be provided to a prospective purchaser, along with the association's other governing documents.

POSTED NOTICES AND NEWSLETTERS

The proposed law requires that an association "establish and maintain a notice board in its common area." Proposed Section 1350.8. The notice board would serve as the location for posting documents that are required to be posted by the Davis-Stirling Act. The idea is to provide a simple mechanism for constructive notice.

We received a number of comments on the subject of posted notice, all of them negative. Mr. Dolnick writes (at Exhibit p. 5):

> The posting of a rule change on the notice board is not sufficient as many owners rent their units and live out of town. … Owners are responsible for their tenants and have to receive any changes in the rules especially when fines are involved or other charges imposed.

Mr. Geretz writes (at Exhibit p. 6):

> I think that posting applicable notices on a "notice board" located in the development property would not be adequate. I would recommend that in each instance when a notice is required to be posted it should also be served on the individual owner-members. This is particularly important in those situations where the common interest development is largely a resort type recreational facility which is not the permanent residence of all the owner-members; some members may visit only two or three times annually.
>
> As a former member of the Board and President of such a condominium development in Palm Springs I know from experience that "notice boards" are largely ignored. If the purpose of the proposed revisions is to give members the opportunity to anticipate and review proposed changes in governing rules as well as potential changes to the architectural integrity of the development, notice must be served on each member of the association.
>
> If you incorporate my suggestion into your final recommendation you will have to consider extending some of the time periods to take into account the additional time required for mailing the notices. In that connection, in order to save the expense of separate mailings every time a request to alter separately owned property is received, the revision to the law should permit serving of all notices on members to be made at the time the next scheduled association newsletter is mailed, which is usually monthly.

Mr. Frederick writes (at Exhibit p. 8):

> In my experience, those associations which have natural locations where their members pass regularly, such as elevator lobbies or locked pedestrian entrances, already use a notice board. For the majority of associations, however, this will not work due to the physical layout of the association. Some associations have no common area. Some associations are comprised of single-family developments who share a pool which is closed in the winter. Some associations have 1,000 units, 10 entrances and 5 satellite pools. Where does the "notice board" go? More importantly how does a "notice board" impart any legal notice to an absentee offsite owner? The only way to give effective notice to the members is by mail, as required by Corporations Code Section 7511(a).

Mr. Daniel writes (at Exhibit p. 13):

> Simply posting a proposed rule change is not adequate to inform members. Typically, management mails to each member a monthly bill. Newsletters are normally included within that mailing. Therefore, it should provide little inconvenience or cost to notify members, while providing the members reasonable time to comment.

It is clear that posted notice is considered an inadequate substitute for actual notice, especially where absentee owners are concerned. More than one of the commentators suggests deferring the various notices until they can be included with the next scheduled general mailing (with a newsletter or assessment billing statement). That approach would provide much better notice, at not too great a cost. However, the staff is unsure whether every association has regular monthly mailings. If an association bills for assessments quarterly, or even less frequently, then procedural time periods could be substantially extended.

The staff sees four alternatives. (1) Leave the posting provisions as presently drafted. The deficiencies of this approach are understood. (2) Replace posting with delivered notice. This is the most costly alternative, as it would require complete membership mailings whenever a member submits an architectural review application or the board proposes a rule change. (3) Defer mailing of notices until the next regularly scheduled general mailing. Depending on the interval between mailings, this could create more or less of a delay, while controlling costs. (4) Implement option three, and also require that associations make regular mailings at some fixed interval (e.g., monthly).

The staff is inclined toward option (4). In all probability, most associations are already mailing monthly billing statements to members, in which case there would be little additional cost involved. Proposed Section 1350.8 could be replaced with a provision along the following lines:

> **Civ. Code § 1350.8. Monthly newsletter**
>
> 1350.8. An association shall prepare and deliver a newsletter to its members each month. The newsletter may be a separate document or incorporated in a monthly billing statement or other mailing. The newsletter shall include any notices required by this title.
>
> **Comment**. Section 1350.8 is new.

The architectural review and rulemaking procedures would then need to be significantly retooled to work within the monthly notice cycles. This would result in some additional delay in these procedures, but there would also be advantages. For example, if notice of a proposed alteration were mailed to every member, there would be no need for the reviewing body to determine whether neighbors should be given notice — all members would receive notice. The changes necessary to implement this approach are numerous and technical. In outline, the results would be something like this:

Architectural Review

A member would submit an application. Notice of the application would be included in the next newsletter. The notice would inform members of how to find more information regarding the application and would invite comment. The reviewing body would have 45 days from the date of published notice to make its decision. The decision would be published in the next newsletter after the decision is made. A decision could be appealed within 30 days after published notice of the decision. The date on which the board of directors would consider the appeal would be announced in the next newsletter. The board's decision would be announced in the newsletter following its decision.

Under this scheme, an unappealed decision made by the reviewing body would take a minimum of 60 days to become final — publication of a decision could take place 30 days after publication of the notice, then 30 more days would need to pass in order to provide an opportunity for appeal.

An appealed decision would take a minimum of 90 days to reach resolution — publication of the decision 30 days after publication of the notice, publication of notice of appeal 30 days after that, then publication of the board's decision 30 days later.

Of course, the actual time to complete the process would depend on where in the cycle of monthly mailings events fall. If a decision is rendered one day after a newsletter is prepared (as opposed to one day before), 30 more days would be added. In the worst case, an appealed decision might require six or more months to resolve.

Operational Rulemaking

In an emergency, the board would simply publish its rule change in the next scheduled newsletter, along with its explanation of the emergency (this is consistent with Mr. Dolnick's suggestion, discussed above).

In a regular rulemaking , the board would publish a proposed rule in the scheduled newsletter, inviting comments on the proposal and providing information about the board meeting at which the proposal would be considered. After the board makes a final decision, any resulting rule change would be included in the next newsletter.

The period for member reversal of a rule change (by whatever mechanism) would be measured from the date the final rule change was published in the newsletter.

Conclusion

The changes described above should be fairly easy to draft. If the Commission is interested in this approach, the staff will implement it in the next draft of the proposed law.

DEFINITION OF MEMBER

Mylos Sonka writes to suggest that the proposed law use the term "owner of a separate interest" rather than "member." Mr. Sonka suggests that the term "member" is ambiguous and that this ambiguity has been exploited to disenfranchise some members. The details of how that has happened were not related. See Exhibit p. 1.

As has been discussed before, the term "member" is used throughout the Davis-Stirling Act, without being defined. Eventually, the Commission should develop a definition of the term.

Considering how common the use of the term "member" is in both the Davis-Stirling Act and the Nonprofit Mutual Benefit Corporation Law, the staff does not believe that use of the term in the proposed law would create any new problems. Until the Commission has an opportunity to study this issue more generally, the staff is inclined to continue use of the term "member."

REORGANIZATION

The staff would like to reexamine the location of the rulemaking provisions. In the proposed law, they are located at the end of the Davis-Stirling Act. That works, but the provisions might be better located with other provisions relating to an association's governing documents (i.e., in proposed Chapter 2). With the Commission's assent, the staff will experiment with the organization of these provisions to see where they fit best.

RECAP OF MAJOR PROPOSALS

A number of changes are discussed in this memorandum. It is worth recapping the major ones, to make it easier to place them in context of each other. The major proposed changes are as follows:

(1) In general terms, require procedural fairness in architectural review decisionmaking. Then provide that the detailed statutory procedure is a safe harbor that satisfies the general requirement.
(2) In general terms, require advance notice and an opportunity to comment before a board of directors changes an association's operating rules. Then provide that the detailed statutory procedure is a safe harbor that satisfies the general requirement.
(3) Replace the notice board requirement with a monthly newsletter requirement. Then retool the proposed statutory procedures to incorporate newsletter publication of notices, rather than posting of notices.
(4) Replace the rulemaking referendum procedure with a provision authorizing member reversal of a recent rule change, at a properly convened member meeting.

WHAT NEXT?

If the Commission is satisfied with the proposed law, as modified by any decisions made after consideration of public comments, the staff will prepare a draft final recommendation for the Commission's review and approval.

Respectfully submitted,

Brian Hebert
Staff Counsel

Exhibit

EMAIL FROM MYLOS SONKA

From: "Mylos Sonka" <mylossonka@direcpc.com>
Subject: Re: CLRC - RFC on Common Interest Development Law
Date: Sun, 9 Jun 2002 14:40:51 -0700

Dear Mr. Ulrich,

I did a word search on this file, looking for new language relating to use of proxies. I could find no reference to the use of proxies, by owners or officers.

Also, I would recommend that the terms "owner(s) of separate interest" be substituted for "member(s)" throughout, or that at least a clear definition of the distinction between the two be provided. As you have indicated in past memos, the terms are often used interchangeably. You have further indicated your intention to address this issue in your deliberations.

In the case of my own association, the ministerial designation of some fully paid-up owners of separate interests as "non-members" has resulted in the effective gerrymandering of blocks of votes. All owners of separate interests who are not in arrears should be entitled to vote to be represented on the board, participate fully in community affairs and to have access to the records of the association that levies assessments on their properties. It is at bottom a question, basic in our history, of making representation a concomitant of taxation.

A word count of the Open Meetings Acts, if memory serves me, revealed that "owners of separate" interest was used rather more frequently than "members."

This ambiguity in the Davis-Stirling Act has been mischievously exploited in our case, and we are embroiled in litigation that might otherwise have been avoided. Your attention to this detail might save other communities the expense and hard feelings of court battles.

Very truly yours,
Mylos Sonka

5275 Country Oak Court
San Jose, CA 95136
June 19, 2002

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

Gentlemen:

As members of a homeowners' association, we have been following the meetings of the California Law Revision Commission with great interest and concern.

When Commission began its meetings, it was our hope that it would be the conduit for the establishment of a State bureau, commission or department that would oversee the actions of association managers, board members, attorneys, and other vendors associated with Common Interest Developments.

My husband and I have owned a single family home in a planned development for almost fourteen (14) years. For approximately ten (10) of those fourteen years we have had to deal with association managers, board members and an attorney who will stop at nothing to be in total control of what goes on in the association, even if this control is in violation of the law. The Board's latest action is a "Resolution" that waters down an association member's right to review association records. This "Resolution" was voted upon by the Board Members only, and wasn't even shown to the homeowners prior to the vote by the Board. This "Resolution" is illegal according to the California Civil Code (Section 1363), and our Association's CC&Rs. We have now filed a Request for Resolution (see enclosed) with the Monarch Park Homeowners Association in the hope that this meeting will result in the voiding of the "Resolution" voted upon by only the Board of the Monarch Park Homeowners Association.

On three different occasions we have sought the advice of two different attorneys because our board members' actions to deny my husband and me access to the association books, records, etc. as per Article 6.07 of our CC&Rs. We have also participated in an ADR (alternative dispute resolution). After the ADR, there was no improvement of the behavior of the board members, association manager, and the association attorney . The ADR was in May, 1995, and to this day the association manager, board members and the association attorney ignore the agreements, save one, that all parties agreed upon. We have spent approximately $13,000 so far on legal fees. It should be obvious that my husband and I supported the idea that if the Attorney General were part of the oversight process, that his/her determination on an issue would be paid by the Association!

We are particularly concerned about the amount of input the Commission has accepted from ECHO. ECHO is an organization of vendors of associations: attorneys, property managers, board members, realtors, etc. It lobbies in Sacramento on behalf of homeowner

vendors. It does not protect individual homeowners unless these homeowners support the opinions of the vendors of their associations.

Our Board of Directors sent us letters accusing us of a variety of "crimes". When we requested a hearing to discover who made the accusations, the Board ignored our request. We have no way of forcing the Board to meet with us, so we remain accused with no proof provided to us. Other homeowners, however, requested a hearing, and the hearing was held within two weeks of the request. In other cases the Board will cite one homeowner for a violation (campaign signs, long term parking), but will let others continue to violate the CC&Rs with no letter or fine. Selective enforcement runs rampant in our Association!

We read with dismay the May, 2002, Tentative Recommendation from the California Law Revision Commission. There is no place in this Tentative Recommendation for a bureau, commission or department that would oversee managers and boards in common interest developments. These individuals will still run roughshod over individual homeowners who have no recourse but to spend thousands of dollars (if they can afford to do so) to get justice served. Your Commission has spent months suggesting revisions to the Davis-Stirling Common Interest Development Act. The lack of an addition of a department, bureau, commission, to give said Act "teeth" is a heartbreaking disappointment to us.

Yours truly,

Charlene Henley

Edwin Henley

Charlene Henley
Edwin Henley

SAMUEL L. DOLNICK
5706-348 Baltimore Drive
La Mesa, CA91942-1654
Phone/Fax 619-697-4854

July 8, 2002

VIA FAX: 650-494-1827

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

Re: Comments on Tentative Recommendations on Common Interest Development Law, H-850, 851, May 2002.

Dear Mr. Sterling:

After reviewing the Tentative Recommendations, I would like to offer the following suggestions and comments.

Page 11, Line 24: Change "10 days" to "15 days"

Comment: So many common interest developments (CIDs) are self managed without any staff whatsoever, that 10 days would not be sufficient time to review the application.

P. 11, L. 27: "...a brief description of proposed alteration" to be changed to "...a detailed description plus any governmental permits required because of the proposed alteration."

Comment: Many alterations, especially those involving new electrical and plumbing lines, require governmental permits for code compliance. "A brief description" would not disclose these additions or changes and thus would be useless. Also "a brief description" would not disclose if bearing walls, which are common area, would be affected, or if an internal non-bearing wall is removed whether or not electrical or plumbing lines in the wall feeding other separate interests would be affected. If ceramic tile or wood would replace carpeting there should be assurance that sound proofing underlayment would be installed to prevent transmission of noise to the separate interest below. There may be other situations where detailed plans are necessary.

P.11, L. 33-34: "The notice [of the reviewing body] shall be delivered within 10 days after the notice of application is posted.

L. 35: "Within 45 days after the notice of application is posted..."

Comment: No mention is made as to when the affected separate interest members have to respond. The affected separate interest members should have to respond within 10, 15, 20 (?) days after receiving notice. After this time period expires, then the reviewing body can analyze the data. If the reviewing body has not been able to make a decision within 45 days, the application should be automatically **disapproved**, and the reviewing body then has another 30 days to make a decision. If the reviewing body asks for more information, such as presentation of governmental permits or other facts, the 45 days would automatically be extended for the number of days that it takes the applicant to present the requested material.

P. 15, L. 12: "(a)" This to be changed to "(a) At least 5 days before the close of escrow, the seller of the separate interest shall deliver to the buyer of the separate interest, a complete copy of the operating rules of the association."

Comment: Many associations' operating rules contain restrictions of various types, plus fines and charges for violations of the governing documents. Therefore the operating rules should be turned over before the close of escrow so that the buyer can rescind the sale if the operating rules under which he/she will have to live do not agree with the buyer's life style. If the operating rules are given after escrow closes, the buyer is "caught" because there was not full disclosure before the sale was completed. Since the association is not a party to the sale of the separate interest, it is up to the seller to turn over the document. If the seller does not have a copy, it is the seller's responsibility to get a copy from the association.

P. 16, L. 9-11: **Legally required rule change**

Comment: The posting of a rule change on the notice board is not sufficient as many owners rent their units and live out of town. Posting the rule change is a good idea, but the rule change can be placed in a newsletter, if there is one, with the monthly assessment billings, or other type of association mailings. Owners are responsible for their tenants and have to receive any changes in the rules especially when fines are involved or others charges imposed.

P. 17, L. 16-17: Change "...but not more than 15 days..." to "but not later than the next mailing of the association..."

Comment: All the extra first class mailings required by the proposed recommendations become a large added expense to the associations. This will mean an increase in the assessments affecting each homeowner. New laws affecting CIDs, which are nonprofit mutual benefit corporations should not place additional expenses on them.

P. 17, **Referendum procedure**

Comment: Referendum is not the proper term to use. A referendum connotes placing the issue on a ballot for a vote. The way this section is worded means that a petition signed by "25% of the separate interests, or more than 500 separate interests, whichever is less" immediately suspends the operating rule. The petitions purpose should be to call for a vote of the operating rule. The rule should continue in effect until the results of the vote are known. A vote of a majority of the separate interests would have to vote to rescind the rule. If a vote rescinds the rule then the board has 15 days to notify the membership. Proposed 1380.180 is the mechanism to be used. The rule should not be suspended until a vote is taken.

P. 18, L.32-34

Comment: All petitions and all votes should be on the basis of one vote per separate interest, regardless of how many members own a separate interest. A separate interest may contain four members for three years and then the separate interest is sold. The new owner of the separate interest is a single individual. The association would have to keep an up-to-date census of how many members are in a separate interest and adjust the percentages each time a vote takes place because the amount of a majority would change. Also, to amend the CC&Rs, where it is necessary to have 66% or 75% affirmative votes, the association would have to always recalculate the exact number of votes necessary. One vote for each separate interest is the fairest and simplest to monitor.

Also, in regards to someone owning more than one separate interest. If the voting is one vote per separate interest and the same owner owned two separate interests, the owner who have two votes, one for each separate interes.

Organization of the Davis-Stirling Act

The chapter and article headings, in my opinion, are a good addition and it will be much easier to find the area of interest by these headings

Sincerely yours,

Sam Dolnick

Sam Dolnick

VICTOR O. GERETZ
Attorney At Law

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Canoga Park, CA 91307-2637

Telephone: 818-340-2229

August 6, 2002

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

re: Common Interest Development Law

I agree that descriptive headings to sections of the Davis-Sterling Act would be useful.

I think that posting applicable notices on a "notice board" located in the development property would not be adequate. I would recommend that in each instance when notice is required to be posted it should also be served on the individual owner-members. This is particularly important in those situations where the common interest development is largely a resort type recreational facility which is not the permanent residence of all the owner-members; some members may visit only two or three times annually.

As a former member of the Board and President of such a condominium development in Palm Springs I know from experience that "notice boards" are largely ignored. If the purpose of the proposed revisions is to give members the opportunity to anticipate and review proposed changes in governing rules as well as potential changes to the architectural integrity of the development, notices must be served on each member of the association.

If you incorporate my suggestion into your final recommendation you will have to consider extending some of the time periods to take into account the additional time required for mailing the notices. In that connection, in order to save the expense of separate mailings every time a request to alter separately owned property is received, the revision to the law should permit serving of all notices on members to be made at the time the next scheduled association newsletter is mailed, which is usually monthly.

Victor O. Geretz

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August 7, 2002

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

Re: COMMON-INTEREST DEVELOPMENT LAW

Dear Commissioners:

This letter is sent in response to the request of the Commission for comments on the Commission's tentative recommendation dated May, 2002. I am an attorney that specializes in common interest development. I represent over 300 homeowners' associations.

On page 1, lines 13 to 19, the Commission correctly identifies some of the major problems with existing laws. Unfortunately, recommendations 2 and 3 are contrary to the Commission's findings in these regards, as will be pointed out below.

Also, on page 1, lines 25 and 26, the Commission states that its purpose is "to determine to what extent common interest housing developments should be subject to regulation." However, the Commission has demonstrated by recommendation 2 and 3 that is has already determined that all associations, from 5 units to 5,000 units, should be subject to extensive, confusing and costly regulation. I believe the only beneficiaries of these recommendations will be the attorneys hired to litigate the issues created by the recommended legislation.

Proposal one, for the restructuring of the Davis-Stirling Act, will improve the accessibility of the law to lay persons, judges, and attorneys who are not familiar with the law. I believe it is a good idea.

On proposal two, page 3, lines 5 through 12, the Commission makes two findings that I do not believe are supported by the facts. First, why should homeowners' associations or their members be denied access to the courts? If there is a dispute between a homeowner association and its member, existing law (Civil Code Section 1354) provides for a board hearing, an ADR process, followed by court action if necessary. This is very flexible and effective.

Instead, the Commission seems to assume, (page 3, lines 10 through 12), that regulation of the homeowners' association will keep it out of court. This is simply not true. The regulations themselves will be a source and cause of litigation because most homeowners' associations are not going to know about or follow the procedures.

Homeowners dispute board actions because they disagree with the substantive decision, not the way the decision was made. In my experience, how the decision was reached is irrelevant to the homeowner who believes they have a right to make the architectural change or violate the rule. Owners litigate the decisions, not the procedures.

The Committee correctly notes that homeowners associations are already required by law to use fair and reasonable procedures (page 3, lines 13 through 14) citing Ironwood v. Soloman (1986) 178 Cal.App3rd 766. What the Committee fails to mention is the lack of reported decisions litigating these issues in the last 15 years. These issues are simply not generating significant amounts of litigation.

The most objectionable aspect of the Commission's proposals for architectural and rulemaking procedures is that they apply to all homeowners' associations. (page 4, lines 5 through 6; page 5, lines 12 through 13). These proposed procedures may be appropriate for larger Associations of 50 separate interests or larger. These are the associations who are more likely to have professional management and corporate counsel to help them traverse the minefield being created. The vast majority of smaller associations do not have the professional resources to comply, and do not have enough competent owner/directors to fulfill the functions already required by law. To be blunt, most of these smaller associations will not even know about the laws until some aggrieved owner with an attorney starts to use them against an unsuspecting board. I ask that you analyze your proposals from the perspective of a 5-unit condominium complex.

Another problem is the proposal for a mandatory "notice board" for all associations. (page 6, lines 3 through 9). In my experience, those associations which have natural locations where their members pass regularly, such as elevator lobbies or locked pedestrian entrances, already use a notice board. For the majority of associations, however, this will not work due to the physical layout of the association. Some associations have no common area. Some associations are comprised of single-family developments who share a pool which is closed in the winter. Some associations have 1,000 units, 10 entrances and 5 satellite pools. Where does the "notice board" go? More importantly, how does a "notice board" impart any legal notice to an absentee offsite owner? The only way to give effective notice to the members is by mail, as required by Corporations Code Section 7511(a).

On page 10, line 25 and following, Article 2 sets forth detailed procedures for reviewing architectural applications. The extent of the over management can be illustrated by the Commission's theory that all associations have architectural control committees whose decisions could be reviewed by the Board. In fact, of the 300 associations I represent, only a handful have functioning architectural control committees. Most of this article is aimed at solving procedural issues which do not exist in real life.

At page 11, lines 13 through 18, proposed Section 1378.040(a) requires the Board to adopt substantive standards. Ninety-five percent of my associations are not equipped to do this. Neither the directors, nor their management companies have the expertise. You will be creating a new common interest development sub-industry. In subsection (b), the Board should be allowed to base their decision on relevant information whatever its source, such as the directors, design professionals or attorneys.

On page 10, lines 24 and 25, Sections 1378.050(b) and (d), there is no way a board of directors or their management company can comply with these 10-day time limits. What is the penalty for noncompliance? If notice is to be given, it should be given to everybody by mail.

On page 12, note (1), as stated above, notice by posting will rarely, if ever, work. It simply is not practical.

On page 12, note (2), the "deemed approval" solution is not a good one, because it unfairly takes advantage of the majority of unsuspecting board of directors who will not know about this proposed law, much less how to comply with it. I suggest that the Committee review statistics available from trade industry sources regarding the number of associations that have no management. The volunteer directors are not legal scholars. You have set the bar too high, and then penalized the rest of the association for their good-faith errors.

On page 12, note 3 is another illustration of the unrealistic procedural traps that are built into this whole concept.

On page 13, Section 1278.070, the entire schedule of time limits is unrealistic. Although most boards meet monthly, many meet quarterly. Many have no professional management. These associations cannot comply.

On page 13, Section 1378.080, limiting judicial review to the final decision is a good idea, and requiring Civil Code Section 1354 ADR is even better. Mediation resolves 80% of the architectural disputes which I have encountered.

On page 15, Section 11380.030, associations do not always know when they have a new member. The seller currently has the duty to disclose the association's governing documents to a purchaser. See Civil Code Section 1368(a). Why not put this duty on the seller?

On page 16, Section 1380.110(e), the collection of assessments is the most heavily regulated aspect of homeowners associations' operations. See Civil Code Section 1366, 1366.1, 1366.3 and 1367. By including further regulation here, the Committee is creating another defense for an owner who does not pay assessments. Why?

On page 17, the note at line 7, for the reasons stated above, posting would not be effective.

On page 17, Section 1380.170, the referendum procedure is unnecessary and duplicative of Corporations Code Section 7510(e), which only requires 5% of the members to call a meeting.

On page 18 note 1, the Commission's request for comments begs the question: Should there by any suspension at all? It takes months to enforce rules. An association must give an owner a board hearing (Corporations Code Section 7341; Civil Code Section 1363[h]). An association must offer ADR (Civil Code Section 1353). Only then can an association sue to enforce.

Under Corporations Code Section 7510(e), 5% of the members can call a special meeting, and under Corporations Code Section 7511(c), the meeting must held within ninety days. Given this, why are these added rule-making review procedures need at all?

On page 18, note 2, there is no question that there is should be only one vote per separate interest owned. Multiple owners of a single, separate interest are all "Members", subject to the governing documents. However, if six people own 1 separate interest, there is no justification for giving them 6 votes. Think in terms of a 5-unit condominium complex.

Sincerely,

KEVIN D. FREDERICK

KDF:has

Cc: Quentin Kopp

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Aug. 8, 2002

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

RE: Comments on Common Interest Development Law

Dear Commissioners,

My wife and I are residents of Newport Beach, California, within the community known as Newport Coast. We have lived within the city for more than 9 years and at our current address for 18 months. As you may know, this area was owned by the Irvine Company and is now being developed into numerous gated communities, which are Common Interest Developments (CID). We found when moving to Orange County, virtually all new developments were CID's.

When we inquired with local Realtors, as to what choice we had. We were told city and county planning officials preferred CIDs for all new developments. The reason seemed to center around more available park and recreation space. I do not dispute the clear advantages to everyone, when reasonable management and direction occurs. Therefore, we had very little choice but to purchase within a CID.

When we purchased our home, I read and understood the CC&Rs. I am not an attorney, but a retired businessman who has lived in more than 8 CIDs over the past 35 years. In several cases, I was asked to serve on the Board of Directors for a term or two. Therefore, I believe I am generally well informed as to the dynamics of CIDs.

I was led to your Commission via research on the Internet regarding possible enforcement issues of the Davis-Stirling Act. As you know, ***the statutes provide no practical enforcement provisions to deter violations by management or the Board of Directors***. Even though it is generally believed "fair and reasonable procedures are already required by law", members like myself have no recourse other than file suit against the association to compel them to act in a fair and reasonable manner. If a member resorts to litigation to get the attention of the Board of Directors, management & the Board of Directors characterize any legal action as an attack on the membership treasury, and not to realign the Boards position.

In our case, our association for the last 4 years has been indirectly controlled by the developer, by retaining the exclusive right to appoint the Board of Directors, until virtually all of the 324 homes are sold. This fact had not escaped the Board of Directors.

To illustrate some of the abuses of our CID, let me list some of the frustrating actions taken by management or the Board in clear violation of community association statutes.

Open Meeting Requirements - The Board routinely goes into *executive session* immediately after the Homeowner forum. This forces the members to vacate the meeting and all remaining business is conducted in secret. Threats of arrest are offered is anyone who refuses to vacate.

Records Disclosure - Since the vast majority of the decisions regarding management of the CID occurs in executive session, normal board minutes available to the members are void of any meaningful information. Minutes of executive sessions are not available to the members.

Due Process - Members, including myself, have requested membership lists and have been refused, even though we have clearly indicated the use will be to communicate with other members and will be non-commercial. This is in violation of Corporations Code Section 8330.

Assessments - Even though we are operating with fully funded reserves of about $90,000, the Board has over assessed the members almost $400,000, which is being carried in the general operating account. The DRE study for "level assessments" indicates we should carry about $25,000 at this time. No explanation is offered or provided for retaining this excess cash.

Ethics Disclosure - The board has failed to properly inform the members that their voting for Board members was meaningless in years past, and simply acted as if the membership actually voted for the successful Board members. This annual meeting, the Board simply announced no Board members were up for re-election. The developer simply controls the process.

Selective Enforcement - It is typical for individual Board members, instead of an unbiased security agency, to patrol the community looking for offenses that can be reported to management for a violation notice. These offenses are usually cited without any verification or substantiation. It is typical for violations to carry fines of $250 for the first offense, and double for every succeeding violation. Members are unable to confront their accusers in any forum. Harsh rules relating to parking have been enacted. Residents cannot park in the street in front of their home for more than 4 hours in any day. Guests risk having their cars towed, without notice, unless they are parked in a driveway. Members are told it is to protect the many from the few.

Lack of Oversight - Today, there is no practical enforcement provisions available to remedy the abuses noted above. The California Attorney General's office refuses to provide any assistance in securing compliance. Oddly enough, the President of our Board of Directors is a practicing attorney and laughs at any attempt to secure compliance. Even though he is suppose to be an "officer of the court", he is the most qualified to understand what the Board can get away with.

What is really an insult, is 3 of the 5 Board members do not live within the CID. They are merchant builders appointed by the Irvine Company, the developer. These individuals freely admit they have little interest in the community, beyond selling the remaining homes in inventory. They admit to deferring to the wishes of the two residents on the board. Needless to say, these two individuals are seemingly drunk with power and self importance.

I could continue on endlessly, but in a desire to correct some of these unbelievable abuses, I must focus on the proposed legislation. Therefore, I welcome the opportunity to comment on the current work before the Commission, in anticipation of further improvements later.

Generally, I believe all of the proposed legislation is appropriate and long overdue. All of the proposed time frames are reasonable. More specifically, the Commission requested comment on the following topics:

Public Posting - I believe posting a members application on the notice board would be appropriate. Typically, the documents would only be accessible to other members of the CID and not the general public. Members, other than the reviewing body, should have the opportunity to informally review applications. This would serve as a means to "monitor" the monitors, without exposing the application to the world at large.

Deemed Approval - I like the clean and straight forward manner the Commission has insisted the reviewing body act, or face deemed approval. Even though some potential exists to violate express restrictions as the Commission has pointed out, the Board of Directors has the final word and can overrule at will. I suggest the paragraph remain as written.

Period of Delay - I believe there should be a 20 day period-of-delay, prior to approving any proposed alteration. This would assure neighbors and concerned members some opportunity to offer comment.

Posting Rule Change - Simply posting a proposed rule change is not adequate to inform members. Typically, management mails to each member a monthly bill. Newsletters are normally included within that mailing. Therefore, it should provide little inconvenience or cost to notify members, while providing the members reasonable time to comment.

Referendum Procedure - The Rulemaking "package" should be suspended until carefully reviewed by the Board of Directors, with the help of the members who initiated the referendum. In regards to the standards to qualify petitions, I believe the "number of individual members" should be adopted rather than the "interests owned". This would tend to balance the interests of the homeowners with that of the developer. Currently, with developers controlling the selection of board members during a multi-year buildout, the homeowners are left powerless in every way, until the project is sold out. In addition, I believe the petition delivery should be extended to 60 days. Many new rules that turn out being objectionable to the members, will require a longer recognition period. Under normal circumstances, once a new rule is enacted, it may be several weeks before enforcement occurs.

I hope my comments have been helpful.

Sincerely,

Fred W. Daniel

EMAIL FROM EVERETTE PHILLIPS

Date: Tue, 20 Aug 2002 22:44:56 -0700
From: "Everette Phillips" <ephillips1@adelphia.net>
Subject: Real Estate Law Revision of Davis Stirling and Common Interest Law

Dear Mr. Hebert,

I have read your reports with great interest and would like to thank you for taking up this timely and important project. I am sorry that I only discovered your work after the August 15th deadline for comments.

In the aftermath of Enron and WorldCom, there has been increased interest in accountability of boards - any boards, whether public corporations, non-profit corporations and even common interest boards.

I am a businessman, not a lawyer. I have no current dispute with my homeowners association, but I have expressed concerns to them that I feel that their actions do not accurately reflect what is written in our current bylaws nor in the Davis Stirling Act. They claim that they have had legal guidance to their actions, but they have not been clear as to what questions they have asked or what answered they received.

My understanding of the Davis Stirling Act is that it gives the board some power to modify the existing bylaws if those bylaws are too restrictive and do not provide a mechanism for change. The Davis Stirling Act gives relief to prevent a common interest association from going bankrupt. However, what is the test of "too restrictive"? For example, the board has increased dues beyond the limit stated in the bylaws without having the members vote. Another example it that the board has decided to stop maintaining a clubhouse and pool restroom/changing facility because they want to replace the facility with something different. The current bylaws however require them to maintain common property and requires a vote of membership before any improvements are authorized. Can the board deem something as "too restrictive" without first testing the bylaws effectiveness? Shouldn't the board be required to try to use the current bylaw, meet some test or burden of proof before it can deem something as too restrictive? Please make sure that your revision clearly outlines the test for "too restrictive".

As you note in your comments, most homeowners are not familiar enough with the law to adequately make legal assessments of a board's or committee's action, so it seems unfair that the only recourse given to the homeowner is to sue. Is it possible to give the homeowner some other recourse? For example, if the board is not following the current bylaws, should the homeowner not be able to ask the Department of Real Estate to verify compliance with the current bylaws or force the board to update its bylaws to meet current laws? It is unfair for the

membership to have one set of bylaws and guidelines and the board to have freedom to do something completely different.

If it is possible, please make sure your recommendations include some penalty, fine or incentive for board directors of common interest properties to follow existing bylaws and update bylaws when needed using the procedures you outline where members vote on the changes and/or at least can petition against them. Please also make the recourse for homeowners in this situation is something less difficult than hiring a lawyer to sue the association. This occurrence is not likely unless a homeowner is fighting a fine or fight an architectural issue. In the case of not following the bylaws, most association members are too trusting to identify the abuse or if identified too afraid to take on such a strong and powerful body on their own.

Thank you again for taking on this important issue. If you have a list of people who want to be notified about this law and its progress, please put me on that list. I am not sure that I can do anything about their increases in dues nor the replacement of the current clubhouse with a new one of fewer facilities. However, I might be able to help our board update the bylaws to protect common property and the association from future problems.

Kindest regards,

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EMAIL FROM EVERETTE PHILLIPS

Date: Thu, 22 Aug 2002 15:42:11 -0700
From: "Everette Phillips" <ephillips1@adelphia.net>
Subject: CID Law Revision Comments Updated

Dear Mr. Hebert,

Thank you for your email and your kind consideration of my comments.

Below, I have organized my thoughts in a way that might be more useful to you. Your work in this area is very important. Residing in a CID was a matter of choice and convenience 40 years ago, however today it is a necessity for many people as so many communities since 1960 have been developed around the CID concept. They have replaced the concept of the town or village, and your work to bring the legal responsibilities and framework of a town or village to the CID is welcome indeed.

My comments are under the headings below:

A) Focus on Architectural Issues vs. Focus on Board Compliance with Law: I find your focus on the architectural review interesting. I can understand that one of your goals is to reduce the number of court battles involving CID's, and I can imagine that architectural review issues comprise a large portion of court cases. It would be logical because the increased property value or cost of moving would be motivating factors to take on the risks and costs of using the courts. Please don't let the easily identified architectural issues blind you to the importance of protection for interest owners from a board that does not follow its bylaws and the lack of recourse for those members. In my own community, older residents on fixed incomes are being threatened by increasing annual assessments, but, the bylaws are so outdated, these residents do not understand their recourse or cannot afford the use of courts to assist them.

B) Operating Rules and Bylaws:

You mention "operating rules" but it is not clear how these are different from bylaws registered with the county recorder's office. All rules should be registered after adoption and should be required to be distributed to members and should be required for property transactions. The new law should require all associations to have updated their "operating rules" or bylaws by January 2004. Your reports indicate that almost every association has obsolete bylaws or rules, so it would be best for the law, the associations and for the consumer to set a target for bringing things up to date. Associations already have to comply with the laws, they have just done a poor job of notifying members what those laws are. For example, I have seen an association simple attach a note in 1988 saying that its bylaws have been superceded by some new laws without specifying or noting what the laws were or specifying which bylaws were impacted.

C) Exclusion of Increased Assessments from your proposed revision: You seem to limit the right of association members from limiting the board's ability to increase assessments. However, my observation is that this is sometimes a tool used by boards to achieve goals that are not desired by a majority of association members. In one association, maintenance was deferred on the current clubhouse and it became a derelict while members of the board justified withholding funds because they desired a replacement building. Their ability to plan increasing the assessment 20% per year for the next few years gave them the power to achieve this goal without a vote - even though the current bylaws state a vote is needed for both the dues increase and for the purchase or remodeling of common property. They cited Davis Stirling Act as a reason to ignore the bylaws, but they have taken not actions to update the bylaws. There is no incentive for them to do so.

The control of assessments, the size of assessments and the restrictions that can be proposed by members should be spelled out in your updated version of Davis Stirling. Instead of simply referring to other laws by name, they should be referred to and addressed in detail to help the many association members and directors who will read it to understand all the relevant information in one place. California has a culture of limiting funds available to government as a way of controlling power, yet members are denied this same ability with associations, which are in reality a type of government - could the law be revised to recognize assessments as taxes and thus allow them to be controlled by laws governing taxation?

D) Responsibilities of the board and recourse of homeowners: The process of nomination and selection of boards give power to very few people who often have similar views due to the selection process. Please consider one or more of the solutions:

1) The law should give a procedure for allowing members to petition for a spot on the ballot after the board declares it nominations. Members should have 60 days to get some number of signatures on a petition - 5% or 10% of total votes - thus included on the ballot there is a greater chance for a more varied board representing the entire constellation of the community. This could be significant in reducing the number of lawsuits before the courts.

2) The law should specify that a city or county reviewing a petition for construction or remodeling request a copy of the current bylaws and a certification provided by the homeowners association that those bylaws are current, legal and have been followed for the project which is being petitioned.

3) The law should not allow DRE to end its responsibilities regarding CID bylaws and operating rules. DRE requires that these documents are transferred during a real estate transaction, but that rule is not effective because these operating rules and bylaws are obsolete. One method of bring in the DRE would be that DRE should be a recourse for any homeowner with 5 years of the purchase of their unit. The homeowner would thus have the time to understand if the conditions of the sale including the bylaws and operating rules were valid. Another

method would be for the DRE to have responsibility for verifying current bylaws and "operating rules". In either case, DRE would take recourse against the board and not the prior homeowner if the bylaws and operating rules on file are not being adhered to. The DRE should be given the power to fine the association collecting against the directors insurance that the association is paying or directly fine directors. This source of revenue will help DRE develop the resources to enforce the law.

4) Directors must sign an affidavit that they have reviewed the bylaws and "operating rules" and file a notarized copy with the association's documents within 60 days of becoming a board member. (I am amazed at the number of board members who have not read the bylaws or operating rules and simply depend on what prior members tell them.)

5) The association must certify each 2 years the compliance of current bylaws and "operating rules" with current law. If the bylaws fail to be certified they need to be modified within 6 months according to the procedures outlined in Davis Stirling. The Davis Stirling Protection (1365.7) of volunteer board members would only hold for associations with current bylaws and "operating rules" that have been certified within the last 2 years.

E) Suggestions for your requested comments: Regarding your question on "packaged" changes to bylaws and "operating rules" proposed by boards to their members. Since this is going the be the most common form of change, the members should be able to challenge the proposed changes line by line. Let's face it, a board of volunteer directors is going to delay modifying the bylaws and "operating rules" until there is some "event" that forces them to make a review. During the time of review, there will be various changes proposed. It would give the board too much power to allow a package without line by line challenges by the membership. It would be tempting to package items not required by law with items required by law in one package.

Again thank you for addressing CID issues and working to make improvements. I look forward to helping my own association modify its bylaws to bring them current. Your work could make is feasible for a volunteer board to review their bylaws, keep them current and improve the interaction of association members and their boards. Most board members are trying to do a good job, but they don't fully understand their responsibilities. In addition, my observations are that the board tends to forget its need to outreach to the community. It is too easy to focus on the loudest voices in the community or those association members that the board member considers to be peers. In this way, they appear to avoid public input and work hard to avoid bringing items to the community for a vote. Votes and public input might impact the time needed to achieve a task or may force a compromise on an issue important to a board member. It is not uncommon for board members, as volunteers, to feel an entitlement to a greater voice or special privileges that would be considered illegal by any other public office of authority. It is one of the

greatest shortcomings with current CID legislation that CID board members can have this entitlement without oversight.

Kindest regards,

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