

First Supplement to Memorandum 2003-18

Alternative Dispute Resolution Under CID Law (Comments on Tentative Recommendation)

We have received a letter from Sandra M. Bonato, chair of the Legislative Committee of the Executive Council of Homeowners. The letter is attached.

The letter is primarily concerned with the tentative recommendation on Alternative Dispute Resolution in Common Interest Developments, but it briefly addresses AB 512 (Bates), which is discussed in Memorandum 2003-23.

COMMENTS ON ADR PROPOSALS

ECHO has a number of criticisms of the proposed law.

- (1) *Extension of prevailing party attorney's fees to actions enforcing the Davis-Stirling Common Interest Development, the Nonprofit Mutual Benefit Corporation Law, and the governing documents of the association (other than its declaration).* See proposed Sections 1369.510(b), 1369.580. Existing Section 1354(d) already provides for prevailing party attorneys' fees for enforcement of the association's recorded declaration. ECHO finds the proposed extension "extraordinary" and urges that it be studied more closely before being adopted as part of the Commission's recommendation.
- (2) *Owner enforcement of operating rules.* The proposed law would amend Section 1354(a) to authorize member enforcement of the association's governing documents, beyond existing authority to enforce the recorded declaration. ECHO's first impression is that this would be "wildly inappropriate." ECHO urges that the change be studied more closely before being adopted as part of the Commission's recommendation.
- (3) *Neighbor-to-neighbor disputes.* ECHO agrees with the other commentators that boards should not be required to mediate disputes between neighbors.
- (4) *Authority of board representative.* The proposed default meet and confer dispute resolution procedure would require that the board appoint a representative to participate in dispute resolution on its behalf. See proposed Section 1363.840(b)(3). An agreement resulting from the process, "that is not in conflict with law or the governing documents of the common interest development or

association” would be binding on the parties and judicially enforceable. Proposed Section 1363.840(b)(5). ECHO believes it is “dangerously unschooled for the Commission to believe that vesting the authority to resolve all disputes in a community association in a single person would not seriously endanger both the corporation and the property rights of every owner in the development.”

Despite those specific concerns, ECHO is interested in the notion of providing “an active internal dispute resolution mechanism for community associations” and feels that the procedure provided in the proposed law has some merit. Given ECHO’s position in favor of mandatory procedures, it is not clear whether ECHO would prefer that the default meet and confer procedure be converted to a mandatory procedure.

ECHO also urges that the Commission review how the proposed ADR procedures would coordinate with other decisionmaking procedures in existing law and in AB 512.

The staff feels that ECHO’s concerns should be analyzed further and recommends that those issues be considered again by the Commission before it adopts a final recommendation in this area.

OPPOSITION TO AB 512

It appears that ECHO has rejected the compromise “statutory default procedure, with affirmative opt-out” approach described in Memorandum 2003-23 at pages 6-12. ECHO states that it cannot support the bill and believes that it should be withdrawn. This is the first official response the staff has received from ECHO in response to the “discussion draft” attached to Memorandum 2003-23. ECHO’s position should be taken into account in discussing the fate of AB 512.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary



Executive Council of Homeowners

June 4, 2003

Of, By and For Homeowners

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, CA 94353

**Re: Review of Community Association Law
Alternative Dispute Resolution**

Dear Mr. Sterling:

We appreciate the opportunity to comment on staff's tentative recommendation to the Commission regarding existing enforcement provisions in the Davis-Stirling Common Interest Development Act. Given the lateness of this letter and your courtesy in seeking our thoughts, we will keep our comments general and brief.

We have the following fundamental concerns with the proposed recommendation, to each of which we urge the Commission to devote further consideration. Our concerns are:

- The extraordinary extension of prevailing party attorneys' fees to enforcement of broad bodies of California law.
- The concept that individual owners should be able to enforce board-made operating rules.
- The concept that boards of directors should be required by law to involve themselves in every neighbor-to-neighbor disagreement.
- The concept that boards of directors should be required to delegate their enforcement role and responsibility to a single individual, with authority to bind the board (and thus their entire community) to that one individual's discretionary decision.
- The lack of discussion as to how the internal dispute committee and mandatory meet-and-confer concepts in this recommendation would be aligned with the burgeoning number of competing and seriatim dispute resolution procedures that exist in associations' governing documents and the Davis-Stirling Act and, additionally, those that have been newly promulgated in Commission-sponsored AB 512 (Bates).

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Attorneys' Fees

Staff notes in its memorandum on this tentative recommendation that it proposes only "minor" changes to Civil Code section 1354. This is to misunderstand the import of the proposal.

Broadly extending attorneys' fees in section 1354 to the enforcement of the Davis-Stirling Act and, an even more complex notion, to enforcement of the entire Nonprofit Corporation Law is an extraordinary proposal, hardly minor. Sweeping away the American Rule can have serious consequences for all potential litigants. We are aware of no other segment of California's citizenry or of nonprofit corporations that are subject to a similar scheme. While we take no formal position on this at the moment, we urge the Commission to request a full briefing on the subject and to give this proposal the exploration and discussion that it deserves.

Owner Enforcement of Rules

This proposal is also hardly minor. It derives from the centuries-old principle (correctly articulated and embodied in existing Civil Code section 1354(a) with respect to the "declaration") that permits any owner of property that is benefited by a covenant running with the land, to enforce it. However, the Commission's proposal is an extraordinary extension of that principle to a corporate board of directors' rules, of unlimited kinds. First impression tells us this is wildly inappropriate. At the very least, the concept demands an examination of its consequences to community life, the social and financial costs, and why owners' existing legal remedies to compel the board to enforce (or change) its rules are not sufficient.

Neighbor-to-Neighbor Disputes

We agree with other commentators that placing the board between neighbors in every manner of disagreement is bad policy for California. While boards might voluntarily get involved where they deem it appropriate, mandating that involvement by statute poses significant risk to the social and financial stability of communities. We too agree the principle could chill the volunteer spirit in common interest developments on which the state so heavily relies.

Committee-of-One Decisions

The proposal that boards be required by law to delegate their authority to a single individual to decide every community dispute is insupportable. We know of no legal authority for this concept and believe it is antithetical to both corporate and real property law. We fear it is dangerously unschooled for the Commission to believe that vesting the authority to resolve all disputes in a community association in a single person would not seriously endanger both the corporation and the property rights of every owner in the development.

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In certain procedural concepts and related notes that the Commission has proposed in AB 512, we have observed that the Commission somehow believes that owners of property in small communities are entitled to less protection of their property rights. We have never agreed with that position, and this proposal now suggests that the Commission believes that owners of property in huge communities will somehow necessarily be less impacted by decisions of a single board delegatee. This ignores the principles of precedent that apply to communities of whatever size, the unknowable liability inherent in endowing any single agent with binding authority over what might be either a corporate or property interest (or even both), and the undeniable and harmful impact on the ability of associations to adequately manage and insure against risk.

Parenthetically, we have noted with interest the concept of an active internal dispute resolution mechanism for community associations in the tentative recommendation. We think this concept has sound merit. However, the Commission may not realize that communities that currently employ such procedures do so to meet their pre-filing obligations under Civil Code section 1354, not in addition to them as proposed in the tentative recommendation.

Aligning Dispute Resolution Procedures

Frankly, the layers and layers of proposed and existing procedure are now completely out of hand. We urge the Commission to decide once and for all what it believes communities and their associations should do. As you know, ECHO's frustration over the messy and soon-to-be completely ineffectual principles espoused in AB 512 has reached the point where we no longer can support the Commission's effort.

We urge the Commission to re-visit the original reason it looked into the area of dispute resolution in the first place – that something better was needed than what we have now. *We think, if it does, it will agree that the relatively straightforward and no-nonsense procedure proposed in this tentative recommendation is, so far, the best of the lot, the clearest, and the one most likely to be effective.* The toothless, voluntary procedures in AB 512 will change nothing, and we are discouraged that the Commission has seemingly moved so far off its original goals. We suspect that, having considered the labyrinthine procedure it devised, the Commission has itself lost confidence in the theories that originally underlay the recommendations it made to the legislature. Proof can be seen in the proposed amendments to AB 512 that would simply let associations continue to do exactly what they do now.

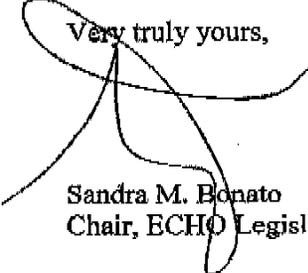
We believe AB 512 should be withdrawn. Community associations need clear, cleanly articulated principles to live by, applicable to all community associations. If we do not provide such principles, we will lose the volunteer leaders of communities across California as they refuse to serve in the face of an overly complex, risk-fraught, and incomprehensible regulatory scheme. Rather, we believe this recommendation and the way it would re-structure dispute resolution in community associations are a much finer example of legislation that provides regulation with the flexibility that the Commission seemingly seeks. At least with respect to

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basic statutory drafting, this recommendation comes far closer to realizing the Commission's charge with respect to community association law.

Again, we appreciate your willingness to accept our comments.

Very truly yours,



Sandra M. Bonato
Chair, ECHO Legislative Committee

SMB/

cc: Tyler P. Berding, Esq., President, ECHO
Oliver Burford, ECHO Executive Director
Members, ECHO Legislative Committee
S. Guy Puccio, Wallace/Puccio, ECHO Advocate
The Honorable Patricia Bates, Assembly Member
Skip Daum, CAI/CLAC Legislative Advocate
Karen Conlon, President, CACM