Study H-851 April 14, 2004

First Supplement to Memorandum 2004-23

Common Interest Development Law: AB 1836 (Harman); AB 2376 (Bates)

We received a copy of a letter from the Congress of California Seniors (CCS) to the chair of the Assembly Judiciary Committee. See attached. CCS indicates that it will drop its opposition to the CID ADR bill (AB 1836) if the bill is amended to provide that the AB 512 operating rule provisions apply to dispute resolution procedures. See the discussion in Memorandum 2004-23, at pages 10-11. If that change is made, the CCS position will be "support if amended," with its support contingent on making other changes that CCS has suggested.

The CCS letter provides further background on some of its proposals. The main points are summarized below.

The staff received a number of suggestions from Assembly Judiciary Committee consultant Kevin Baker for improvements to AB 1836. For the most part, his suggestions raise nonsubstantive drafting issues. They are discussed below.

Both AB 1836 and AB 2376 are now set for hearing by the Assembly Judiciary Committee on May 4, 2004.

USE OF NEUTRAL IN INTERNAL DISPUTE RESOLUTION PROCESS

CCS reiterates its suggestion that a third party neutral be required as part of an association's internal dispute resolution process. Specifically, CCS suggests that the proposed law should require that associations make "maximum use" of local dispute resolution programs. Voluntary use of local dispute resolution resources makes sense, but mandating such use statewide could create practical problems.

According to the Department of Consumer Affairs' website, only 32 of California's 58 counties provide local dispute resolution services. In the counties that do, funding is drawn from Superior Court fee revenue, in a fixed amount. A statute requiring that all CID disputes be subject to mediation through these programs would impose a state-mandated local program and would probably exceed the available resources.

By way of example, the staff spoke to Jackie Borr of the Sacramento Mediation Center, a Dispute Resolution Program Act program. The Mediation Center depends on a mix of court fee revenue, discretionary county funds, and donations. The Mediation Center is currently in a state of fiscal "crisis," its budget having been reduced by 75% in the last two years. To require that all CID disputes in Sacramento County be channeled through the Sacramento Mediation Center, without providing any additional funding, would probably be unworkable.

Involvement of a third party neutral early in the life-cycle of a dispute would undoubtedly be helpful in many cases. However, the Commission decided against mandatory mediation of CID disputes as a prerequisite to litigation (at least until the results of a mandatory mediation pilot project are available for analysis). To require that an association's internal dispute resolution procedure involve a third party neutral would effectively convert it into a mandatory mediation process, invoked at the option of the homeowner. This would be a significant substantive change that has not been studied under the Commission's public process.

REFUSAL OF ADR

Memorandum 2004-23 discusses an apparent ambiguity in the meaning of "refusal" of ADR. That concept has legal consequence in two contexts: (1) another party's refusal of ADR excuses the filing party's nonparticipation in ADR, and (2) a court may "consider" refusal of ADR in determining the amount of fees and costs awarded to the prevailing party in any subsequent litigation.

Memorandum 2004-23 recommends changes to clarify the meaning of "refusal" in the first context. CCS suggests that a change should also be made in the second context.

Under existing law, a court may "consider" refusal as a factor in determining a fee award. The clear implication is that a court might increase the amount of an award paid by a party who refuses to participate in ADR, as an incentive for participation. In that context, some ambiguity is harmless. It leaves the court free to weigh the significance of one party's "refusal."

For example, suppose that an association intends to sue a homeowner for violation of CC&Rs. Knowing that the homeowner cannot afford legal counsel, the association offers arbitration. The homeowner declines arbitration as too

costly and counter-offers mediation through the local dispute resolution program. The association files suit and wins. Should the fees awarded to the association be increased because the homeowner refused the offer of arbitration? Existing law allows a court to "consider" refusal of ADR but does not mandate any specific outcome. That seems like a flexible and reasonable approach.

ADR AND ASSESSMENT DISPUTES

Under existing law, the pre-litigation ADR requirements do not apply to an assessment dispute, unless the homeowner pays the disputed amount under protest. The existing ADR requirements then apply as they would to any dispute heading toward litigation.

CCS notes that some homeowners have paid a disputed assessment and requested ADR, only to find that the association refuses to participate in ADR. That seems consistent with the right of a nonfiling party to refuse to participate in ADR. At that point, the homeowner may file a lawsuit to recover the disputed amount. If the amount in dispute is under $5,000, the homeowner could file suit in small claims court, without first offering ADR.

CCS suggests that something more should be done to help resolve assessment disputes. Short of requiring participation in ADR, it isn't clear what more could be done. A more significant issue with respect to assessments is the association's power to foreclose to collect an overdue assessment. That issue is currently the subject of close legislative scrutiny and is beyond the scope of AB 1836. See SB 1527 (Oller), SB 1682 (Ducheny).

SHOULD USE OF THE INTERNAL DISPUTE RESOLUTION PROCEDURE BE LIMITED?

Mr. Baker wonders whether some limit on the frequency of use of the internal dispute resolution process would be appropriate. For example, language could be added to provide that the procedure may only be used once per dispute. Alternatively, language could be added limiting the number of times that a particular person may invoke the procedure. For example, existing law provides that a person may only use the ADR process to dispute an assessment twice in one year and no more than three times in five years. Civil Code Section 1366.3.

Should there be a limit on how often the internal dispute resolution may be used or is the procedure so modest and informal that it is not worth regulating it at such a level of detail?

Proposed Section 1369.550 extends the statute of limitations if the limitation period would run within the 120 days provided for completion of ADR:

> 1369.550. If the applicable time limitation for commencing an enforcement action would run within 120 days after service of a Request for Resolution, the time limitation is extended to the 120th day after service. If the parties have stipulated to an extension of the alternative dispute resolution period beyond the 120th day after service of a Request for Resolution pursuant to Section 1369.540, a time limitation that would expire during the alternative dispute resolution period is extended to the end of the stipulated period.

Mr. Baker has pointed out a potential problem with this approach. If the ADR process actually runs the full 120 days, it will end on the same day as the extended time limitation — 120 days after service of the request for resolution. That could make it difficult or impossible to file a timely action that includes the required certificate of completion of ADR.

The second sentence of Section 1369.550, which addresses extension of the ADR period by stipulation of the parties, has the same problem. The statutory deadline for filing an action would also be the last day allowed for completing ADR.

The staff recommends addressing this by replacing existing Section 1369.550 with a simpler provision:

> 1369.550. If the applicable time limitation for commencing an enforcement action would run within the period provided by Sections 1369.530 and 1369.540 for completion of alternative dispute resolution, the time limitation is extended to the 30th day after the end of that period.
>
> **Comment**. Section 1369.550 supersedes the first clause of former Section 1354(b), which excepted a dispute where the applicable time limitation for commencing the action would run within 120 days. Under Section 1369.550, a Request for Resolution is required even if the statute of limitations would expire within 120 days of the request. Instead, if the statute of limitations would run during the time provided for completion of alternative dispute resolution, the time limitation is extended to thirty days after the end of that period.
>
> Section 1369.530(c) provides 30 days for response to a request for resolution. If a request is rejected and the time limitation runs during the 30 days provided for a response, the time limitation is extended to the 30th day after the period provided for a response, i.e., the 60th day after service of the request for resolution. It would

not be extended to the 30th day after the period provided in Section 1369.540, because that period only applies if a request is accepted.

If a request is accepted, the parties have the additional period of time provided by Section 1369.540 in which to complete alternative dispute resolution. The section provides either 90 days or a longer period of time as stipulated to by the parties. If the time limitation expires during the time provided by Section 1369.540, the time limitation is extended to the 30th day after the end of that period, i.e., either the 120th day after acceptance of the request or the 30th day after the end of the stipulated period.

TECHNICAL DRAFTING SUGGESTIONS

Mr. Baker made a number of suggestions on the drafting of the proposed law. Given the likelihood that AB 1836 will need to be amended before its next hearing, we have an opportunity to act on those suggestions. Unless there are objections, the staff will recommend to Assembly Member Harman that the following changes be made:

Section 1363.820. Internal dispute resolution procedure presumed fair

Section 1363.820(b) provides a presumption that an internal dispute resolution process adopted by an association is fair, reasonable, and expeditious. Mr. Baker suggests that the presumption should be conditioned on the procedure satisfying the minimum standards provided in Section 1363.830:

> 1363.820. (a) An association shall provide a fair, reasonable, and expeditious procedure for resolving a dispute within the scope of this article.
>
> (b) A dispute resolution procedure provided by the association is presumed to be fair, reasonable, and expeditious <u>if it satisfies the requirements of Section 1363.830</u>. The presumption created by this subdivision is a presumption affecting the burden of proof.
>
> (c) If an association does not provide a fair, reasonable, and expeditious procedure for resolving a dispute within the scope of this article, the procedure provided in Section 1363.840 applies and satisfies the requirement of subdivision (a).

Section 1363.830. Minimum requirements for internal procedure

Mr. Baker suggests that certain features of the statutory default meet and confer procedure should be included in the minimum standards for a procedure adopted by an association. Specifically, the procedure should require a written request and a prompt response. Mr. Baker also suggests clarification of the rules on when a decision reached through the internal dispute resolution process

would be binding on the association. The staff would make the following changes:

> 1363.830. A fair, reasonable, and expeditious dispute resolution procedure shall at a minimum satisfy all of the following requirements:
>
> (a) The procedure may be invoked by either party to the dispute.
>
> (b) A request invoking the procedure shall be in writing. The association shall act on the request promptly
>
> (c) If the procedure is invoked by a member, the association shall participate in~~, and is bound by any resolution of the dispute pursuant to,~~ the procedure.
>
> (c) If the procedure is invoked by the association, the member may elect not to participate in the procedure. If the member participates but the dispute is resolved other than by agreement of the member, the member shall have a right of appeal to the association's board of directors.
>
> (d) A resolution of a dispute pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the association and is judicially enforceable. An agreement reached pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the parties and is judicially enforceable.
>
> (e) A member of the association shall not be charged a fee to participate in the process.

Section 1363.840. Default meet and confer process

Mr. Baker raises two questions regarding the default meet and confer procedure: (1) What is meant by "good faith implementation"? He suggests it would be clearer if the law simply requires good faith in conferring. (2) Does ratification include implied ratification, or must the ratification be express? In order to reduce potential misunderstandings, it might be best to require express ratification. The staff would make the following changes:

> 1363.840. (a) This section applies in an association that does not otherwise provide a fair, reasonable, and expeditious dispute resolution procedure. The procedure provided in this section is fair, reasonable, and expeditious, within the meaning of this article~~, subject to good faith implementation by an association~~.
>
> (b) Either party to a dispute within the scope of this article may invoke the following procedure:
>
> (1) The party may request the other party to meet and confer in an effort to resolve the dispute. The request shall be in writing.
>
> (2) A member of an association may refuse a request to meet and confer. The association may not refuse a request to meet and confer.

(3) The association's board of directors shall designate a member of the board to meet and confer.

(4) The parties shall meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in good faith in an effort to resolve the dispute.

(5) A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including the board designee on behalf of the association.

(c) An agreement reached under this section binds the parties and is judicially enforceable if both of the following conditions are satisfied:

(1) The agreement is not in conflict with law or the governing documents of the common interest development or association.

(2) The agreement is either consistent with the authority granted by the board of directors to its designee or the agreement is expressly ratified by the board of directors.

Section 1369.510. Definitions

Mr. Baker suggests a change along the following lines, to emphasize the voluntariness in choosing the form of ADR and to parallel language in other ADR bills approved by the Assembly Judiciary Committee:

1369.510. As used in this article:

(a) "Alternative dispute resolution" means mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decisionmaking process. The form of alternative dispute resolution chosen pursuant to this article may be binding or nonbinding ~~at the option~~ , with the voluntary consent of the parties.

(b) "Enforcement action" means a civil action or proceeding, other than a cross-complaint, for any of the following purposes:

(1) Enforcement of this title.

(2) Enforcement of the Nonprofit Mutual Benefit Corporation Law.

(3) Enforcement of the governing documents of a common interest development.

The staff has no objection to this change.

Section 1369.520. ADR prerequisite to enforcement action

For the sake of clarity and consistency with existing law, Mr. Baker suggests the following change:

1369.520. (a) An association or an owner or a member of a common interest development may not file an enforcement action unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article.

(b) This section applies only to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of five thousand dollars ($5,000). Except as provided in Section 1366.3, this section does not apply to an action for association assessments. This section does not apply to a small claims action.

Section 1369.560. Certification of efforts to resolve dispute

Section 1369.560 requires a certificate of completion of ADR, or in its absence, either a certificate of refusal or a certificate stating the necessity for preliminary or temporary injunctive relief. Mr. Baker suggests that these related requirements be grouped together, along the following lines:

1369.560. (a) At the time of commencement of an enforcement action, the party commencing the action shall file with the initial pleading a certificate stating that ~~alternative~~ one or more of the following conditions is satisfied:

(1) Alternative dispute resolution has been completed in compliance with this article.

(2) One of the other parties to the dispute refused the offered form of alternative dispute resolution.

(3) Preliminary or temporary injunctive relief is necessary.

(b) Failure to file a certificate pursuant to subdivision (a) is grounds for a demurrer or a motion to strike unless ~~one of the following conditions is satisfied:~~

~~(1) The party commencing the action certifies in writing that one of the other parties to the dispute refused alternative dispute resolution before commencement of the action, or that preliminary or temporary injunctive relief is necessary.~~

~~(2) The~~ the court finds that dismissal of the action for failure to comply with this article would result in substantial prejudice to one of the parties.

Section 1369.570. Stay of litigation for dispute resolution

Mr. Baker suggests that the provisions relating to a stay of an enforcement action during referral to ADR be grouped together and revised slightly, along the following lines:

1369.570. (a) After an enforcement action is commenced, on written stipulation of the parties the matter may be referred to alternative dispute resolution. The referred action is ~~and~~ stayed. During the stay, the action is not subject to the rules implementing subdivision (c) of Section 68603 of the Government Code.

(b) The costs of the alternative dispute resolution shall be borne by the parties.

~~(c) During a referral, the action is not subject to the rules implementing subdivision (c) of Section 68603 of the Government Code~~.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

CONGRESS OF CALIFORNIA SENIORS

April 12, 2004

The Honorable Ellen Corbett, Chair
Assembly Judiciary Committee
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RE: AB 1836: CID Dispute Resolution: SUPPORT IF AMENDED

Dear Ms. Corbett:

The Congress of California Seniors (CCS) remains deeply concerned about AB 1836, whose stated purpose is to develop ways to resolve disputes between homeowners and association boards, because we believe that key provisions of the bill negate this stated purpose. Wilbur Haines, Esq. goes so far as to say in his own memo on AB 1836[1] that, "contrary to the intention of the Law Revision Commission, some of the ADR provisions of the bill as introduced could actually have anti-consumer rather than pro-consumer effects." We have some of the same concerns.

Our qualified SUPPORT IF AMENDED position is contingent on CLRC decisions on proposed amendments to AB 1836 at its meeting this Thursday.

Fairness in Association Rulemaking:

We urged in our April 2 letter to the author of the legislation that, instead of the board having total control over the development of ADR rules, the procedures for dispute resolution be developed jointly by homeowners and boards under the provisions of AB 512, "Fairness in Association Rulemaking." California Law Revision Commission (CLRC) staff[2] now recommends that the commission (the sponsor of the bill) adopt this amendment. If the CLRC votes on Thursday to adopt this amendment, we are prepared to change our position on AB 1836 to SUPPORT IF AMENDED. We thank the CLRC staff for making this recommendation; we believe that joint rulemaking by homeowners and boards is central to dispute resolution, because

- The process has the potential to prevent disputes from occurring in the first place.
- The process itself addresses some of our concerns about disclosure, since homeowners will be active participants in ADR rulemaking, that is: under

[1] Wilbur Haines III, Esq. letter to The Honorable Tom Harman, March 21, 2004, attached.
[2] CLRC staff memo on AB 1836 to the commission, April 8, 2004. Signed by Brian Hebert.

AB 512, boards are required to give notice to each homeowner of an impending rule change; homeowners have the opportunity to comment on proposed rule changes.

However, our other concerns about the bill still remain and have not been addressed in CLRC staff memos.

Affordability of ADR: the Role of Community Mediation Programs and Small Claims Court

One crucial issue underlying AB 1836 is the affordability of ADR, because of its impact on seniors with fixed incomes.

The author and sponsor have apparently closed off both community mediation programs and small claims court as venues for low-cost dispute resolution, even though both could be tools affordable to the homeowner-consumer.

As we have stated many times in letters to the CLRC: the core problem with dispute resolution between homeowner and the association board is that a chasm exists between their power positions. This is especially true for the senior homeowner living in a CID.

When the two disputants sit at the table to "negotiate," one of them – the association – brings financial and legal resources to the table that the other disputant – the homeowner -- doesn't have. The association has insurance policies protecting board actions, legal advice, and access to both operating and reserve funds. The board has access to legal information about its rights and powers under California law, whether or not the board attorney is present at the negotiating table.

The homeowner, on the other hand -- unless independently wealthy -- has no such resources. In fact, his assessments are being used to pay the association lawyers to mount a case against him.

According to the dispute cases that have come to the Congress of California Seniors, the homeowner's choice of ADR is driven largely by economics. He makes a financial decision, not a legal one, when choosing ADR. He will be asking himself "How much money do I have? How much can I afford to spend on resolving this dispute?"

Neither the legislation nor the CLRC memo mention this crucial issue of affordability, even though the legislation Section **1369.540** (c) states that "the costs of the ADR shall be borne by the parties." Therefore we further urge that the operating rules lay out *affordable* ADR options.

Since owners and boards will each have to foot the bill for ADR, it is in the *economic interests* of both that they choose the most *affordable* form of ADR that will resolve the dispute quickly. In fact, the board has a ***fiduciary*** obligation to the rest of the homeowners not to saddle them with special assessments or increased insurance premiums arising from choosing an *expensive* form of dispute resolution.

The executive director of the Berkeley Dispute Resolution Center wrote the CLRC more than a year ago[3] to support the Commission's recommendation that "every homeowner's association must make available a fair, reasonable and expeditious internal dispute resolution mechanism at no cost to its members."

We urge, therefore, that two amendments be made

- AB 1836 be amended to include specific reference to the California Dispute Resolution Programs Act (DRPA)[4] and its statewide network of dispute resolution centers; and
- AB 1836 be amended to reference the statewide network of dispute resolution centers in California funded by the federal department of Housing and Urban Development.

These are not simply "lists"; they are ***community dispute resolution programs funded by both public and private monies***. Given California's budget crisis, ***we think it makes good fiscal sense to make maximum use of an ADR infrastructure already in place.*** We have made this recommendation in earlier memos to both the author and to the sponsor of AB 1836.

The CLRC's April 8 memo states that there is nothing prohibiting associations from referencing Consumer Affairs and HUD programs in the ADR rules they devise. As we see it, the only obstacle is ignorance of the programs. Again, as Ms. Calderone says:

"There is a need to improve public awareness of local mediation programs. If homeowner's were aware of the already existing network of mediation centers, then many could take advantage of the low-cost (in some cases, no cost) services available to them that could address many of the types of disputes in question."[5]

AB 1836 presents an opportunity to dispel some of the public lack of awareness of existing ADR programs and to connect CIDs with these already-existing resources.

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[3] See March 28, 2003 memo from Sarah Calderone, Executive Director of the Berkeley Dispute Resolution Service, a community-based mediation program funded in part by the Dispute Resolution Programs Act overseen by the California Department of Consumer Affairs.
[4] Ms. Calderone also made this recommendation in her March 2003 letter to the CLRC.
[5] ibid

Amendment

Again, our specific amendment is: *1363.810(d) The operating rules shall make maximum use of community-based mediation programs available through or noticed by the Department of Consumer Affairs[www.dca.ca.gov] and programs available through the federal Department of Housing and Urban Development and other public agencies [www.hudcc.org/agencies/California]*

Referencing community ADR programs increases the likelihood of having a neutral third party at the meet-and-confer table: someone who can negotiate a resolution at the early stages of a dispute. Community mediation programs are the low-cost, consumer-friendly ADR methods that would carry out the CLRC's recommendation that no-cost, low-cost ADR be available to all homeowners.

Referencing these programs is vital, because at the moment, the CLRC sees no way to expand the jurisdiction of small claims court – the people's court – to deal with CID disputes.[6]

What Constitutes "Refusal of ADR" by Homeowner or the Association?

The definition of "refusal of ADR" has emerged as a crucial issue in AB 1836.

Under existing law, a plaintiff – either homeowner or association board in this case -- who wants to file a civil suit to enforce the association's governing documents must first try to submit the dispute to some form of ADR. The "non-filing party" is not required to participate in ADR. However, refusal to participating has legal consequences. So, what exactly constitutes "refusal"?

The CLRC's April 8 memo says "refusal" is important in two contexts: (1) the awarding of attorney's fees and (2) demurrer. However, the memo defines "refusal" only in the second context. It says that "refusal" in context (1) can be decided fairly by the judge looking at the entire case "and reaching its own conclusions on the equities of the situation." Not defining "refusal" in this context creates yet another financial risk for the homeowner, who is already gambling against a well-financed opponent that, if he sues – and wins – that his attorney's fees will be reimbursed.

We are looking to the CLRC to revisit this subject on Thursday.

[6] See CLRC memo of May 4, 2001.

ADR and Assessment Disputes

We wish to comment again on the provision of AB 1836 that ADR does not apply to subdivision (c) of 1367.1, i.e. to assessment disputes. We are also looking to the author and the sponsor to revisit the subject of ADR as it applies to assessments disputes, because assessment disputes are precisely the kind of disputes, which are in desperate need of resolution.

We think that some of the confusion here has arisen because of the terminology of the legislation. The CLRC states that Civil Code Section 1367.1 (c) "provides an informal procedure for disputing an assessment or requesting a payment plan for an overdue assessment." The code section allows a homeowner to request a meeting with the board at which he can dispute the assessment or work out a payment plan.

Civil Code section 1367.1 is actually a variation on the meet-and-confer provisions of AB 1836.

However, what is not in place is the ADR, which is to follow the "pay-under-protest" provisions. We have collected countless examples of such disputes in which the homeowner – often after meeting with the board -- paid the full amount under protest, requested ADR, and only after making full payment was told by the other disputant – the association -- that no ADR mechanisms exist for resolving the counter-claims. More often, the association (or the debt collector acting as the association's agent) simply ignores the homeowner's request for ADR.

If the association has no ADR mechanism for assessment disputes, then the homeowner becomes subject solely to the business practices of the debt collector/trustee. AB 1836 presents an opportunity to resolve assessment disputes through ADR in order to head off foreclosure abuses. If it not resolved here at this time, then AB 1836 may have to be amended at a later date to conform with the legislation being developed on the Senate that deals with foreclosure abuse.

Assumption that ADR Rules are Fair, Reasonable, and Expeditious

The CLRC has already flagged this as an assumption, which will probably not bear close examination, i.e. that rules are assumed to be fair, reasonable, and expeditious, e.g. the governing documents of some associations require that all disputes be submitted to arbitration. AB 1836 puts the burden on the homeowner to prove that arbitration – for example -- is, by definition, unfair, unreasonable, and not expeditious.

Dispute Resolution Terminology of AB 1836 and Neutral Third Parties

We believe that unintentional confusion has been created by the language of the legislation, i.e. by calling the "meet-and-confer" procedures "alternative dispute resolution" in some sections of the bill while in another section (1369.510) defining ADR as a "procedure that involves a neutral party in the decision-making process." However, the meet-and-confer procedure – though called ADR – does not involve a neutral third party. This was one of the comments we offered originally on the legislation: that the meet-and-confer procedures – if ADR in fact as well as in name – should involve a neutral third party.

We look forward to continued discussions with both the sponsor and the author of the legislation to find ways to strengthen it in ways that benefit both consumers and the homeowner associations to which they belong.

Very truly yours,

Gary Passmore
Legislative Coordinator

cc: The Honorable Tom Harman
ATTN: Tiffany Conklin
Brian Hebert, CLRC
Kevin Baker, Assembly Judiciary Committee
Marjorie Murray, Congress of California Seniors
Wilbur Haines, Attorney at Law
Karen Raasch, CCS
Joan Lee, Gray Panthers
Betty Perry, Older Women's League (OWL)