Study B-502 September 16, 2004

Second Supplement to Memorandum 2004-41

Unincorporated Association Governance (Comments on Tentative Recommendation)

We received an email from R. Bradbury Clark of the Nonprofit Organizations Committee of the Business Law Section of the State Bar. Relevant portions of his comments are excerpted below. We also received a letter from Ms. Donie Vanitzian, an arbitrator from Marina Del Rey. Her letter is attached.

MR. CLARK'S COMMENTS

Mr. Clark addresses two points in Memorandum 2004-41.

(1) He renews the suggestion that the proposed law revise the statutory definition of "other business entity," as it is used within the Corporations Code:

> Respecting your comment on page 2 of the Memorandum about the definition of "other business entity", we believe that the definition in other parts of the Corporations Code of that term should be amended to include unincorporated associations without excluding nonprofit associations. We think that this is the best time, along with enabling unincorporated associations to merge with other entities, to let the other entities merge with them as well. Obviously, other types of organizations do not have to engage in mergers with nonprofit unincorporated associations if they don't want to, but we think they should have the opportunity to do so.

There are around 90 sections of the Corporations Code that reference the term "other business entity." A quick survey of those sections suggests that they relate primarily (and perhaps exclusively) to merger and conversion. To the extent that is correct, then the amendments suggested by Mr. Clark would be harmless. The proposed law already provides for an inter-species merger between an unincorporated association (including a nonprofit association) and another type of entity. A small additional amount of research would be required to confirm that a change to the definition of "other business entity" would not have consequences beyond merger and conversion.

Should the proposed law include amendments to the provisions defining "other business entity" to delete the exclusion of nonprofit associations, contingent on

staff's determination that such a change would have no effect beyond authorization of conversion into a nonprofit association or merger with a nonprofit association?

(2) He also suggests a few minor refinements of the proposed law's default voting procedure:

> We think that the provision on member votes in Section 18730 should be amended so that this stated rule is a default rule for general voting purposes and not just a rule for votes conducted pursuant to the statutory provisions. To make this change, it would be necessary to delete the words "conducted pursuant to this chapter" in line 16 on page 9 of the proposal. We also think that it might be well to revise line 25 on page 9 to read (new material underlined) "describe how, when, and, in the case of a vote at a meeting, where the vote is to be conducted". Otherwise, it is not clear that the notice must state the place where the vote is to be taken if it is to be taken at a meeting.

These are sensible changes. The staff recommends that they be made.

MS. VANITZIAN'S COMMENTS

Ms. Vanitzian's principal concern is based on a misunderstanding. She mistakenly believes that the proposed law would require that an unincorporated association incorporate. There is nothing in the proposed law that would require incorporation of any type of unincorporated association.

As an alternative criticism, Ms. Vanitzian suggests that the proposed law is unnecessary if *existing law* requires the incorporation of an unincorporated homeowners association. There is no existing statute that requires incorporation of an unincorporated homeowners association. To the contrary, many statutes recognize that a homeowners association may be incorporated or unincorporated. See, e.g., Civ. Code § 1351(a). Even if there were such a law, that would not make the proposed law unnecessary. It would still apply to the various unincorporated associations that are not homeowners associations.

Some of Ms. Vanitzian's comments refer to the Commission's work on common interest development law. Those comments are discussed in the Second Supplement to Memorandum 2004-39.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Donie Vanitzian
Arbitrator
Post Office Box 10490
Marina del Rey, California

September 16, 2004

Mr. Brian Hebert
California Law Revision Commission
4000 Middlefield, Room D-1
Sacramento, CA 94353-4739

Re: **Memorandum 2004-41 ~ September 7, 2004**

Dear Mr. Hebert,

The Temple of Blame
and
Creating More Necessary Laws

The aforementioned Memorandum states that:

> *The only public comment we have received regarding the tentative recommendation is from . . . two members of the Nonprofit Organizations Committee of the Business Law Section of the State Bar. It is not too surprising that we received so little comment. The proposed law is fairly technical and probably of little interest to anyone who is not professionally involved in advising unincorporated associations.*

For the record and in my view, that condescending and thoughtless comment is indicative of one of the many problems that is wrong with the California Law Revision Commission in general, and the perception set forth by California's legislature to the extent that deed-restricted property owners must be legislated apart from ***real*** real property owners. The CLRC remains bloated,

remains on the state's payroll, and remains interested only in sustaining itself -- not in assisting deed-restricted owners of "space" dressed up as "property" by the legislature.

Lest that quotation (above) remain on the record, so too must the reality that most owners have all but given up writing to the CLRC because they do not believe it is useful to do so. Their letters and recommendations end up bastardized and taken out of context to the extent they are left with a law or laws that legislators can brag about, but the homeowners are left to ***live by and deal with.***

It should not be lost on the public that the *Nonprofit Organizations Committee of the Business Law Section of the State Bar,* is either funded in whole or in part by the state - funds which also emanate from deed-restricted homeowners living in common interest developments. The State Bar! Imagine that! The *same state bar that continues to receive letters of complaint from hundreds of homeowners against association attorneys, only to receive the Bar's response that "this is a civil matter."* This is the *same state bar that polices its own.* To insinuate that the State Bar is in a better position to discuss this matter than those who are ***statutorily forced to live by its Rule,*** is irresponsible.

While homeowners are not sustained on a perpetual payroll in order to be able to respond at will to every problem that the CLRC creates for us, ***it does not mean we are less "technical" or that the propositions set forth by the CLRC are "probably of little interest" to us.*** We read ***every*** Memorandum that the CLRC produces. We analyze them. We meet on those issues. We decide how to proceed. That we do not respond to the CLRC directly should not be misinterpreted that it is a subject matter we know nothing about, or that we did not respond because it is a subject matter that is of little interest to us.

Having said that, I believe that the tentative recommendations set forth in the referenced Memorandum 2004-41 are unnecessary. First, no mandatory homeowner association should be forced to incorporate. Second, if laws already exist making mandatory homeowner associations responsible for incorporating by a certain date, then the CLRC's referenced recommendation is a waste of time. What has happened between the CLRC's ***so-called*** "recommendations" and our legislature, is that a massive maze of cross-over laws has been created. This

causes even more confusion than what presently exists. AND, there IS confusion. I know. I am barraged now, not only with letters from homeowners, but from Real Estate Brokers begging for assistance.

Somewhat off topic, but relevant to this discussion, is the fact that the CLRC appears to be of the mind set that *if we can only create a place to send these common interest development problems everything will be resolved.* ***Ha!*** Not only will such problems ***not*** be resolved, it will create problems that are presently lying in wait. No department will be able to address these problems because the concept of residential homeowner associations adjudged under corporate law is a failed housing concept. Prediction: The proposed entity or department will be the undoing of California common interest developments as we know it.

If the CLRC is pursuing the avenue of incorporation for all homeowner associations, or recommending same, then ***place the complaint department where it rightfully belongs: The Department of Corporations.*** Let the Dept. of Corporations treat homeowner associations equally, just like they would ENRON. Because, that is the ***scope*** of the problem the state is presently faced with. Until that is realized by those who drive the laws, nothing will change.

When I purchased my expensive outhouse dressed up as a townhouse, and that is just what my home has turned into thanks to California's legislators and the laws they create, we were not incorporated. We do not want to be incorporated and there is no useful reason for our association to be incorporated. Yet, it appears that non-profit homeowner associations will be ***dictated*** to by our lawmakers regarding our corporate status.

Then there is the *"Tort Liability"* and *"No Liability Based Solely on Membership or Agency."* ***Please get rid of indemnification for homeowner association boards of directors, it is nothing less than a license to lie and commit crimes against titleholders with impunity.*** While in the REAL corporate world, perhaps indemnification of officers is helpful when dealing with hundreds of thousands of shareholders, in a homeowner association environment it is used to wholesale disenfranchise titleholders. I do not make ***this statement or any other statement lightly in this correspondence, I have the documentation to back***

this up.

The CLRC owes it to the public to add **DISCLOSURE** to their Uniform Unincorporated Nonprofit Association Act, tort liability and otherwise.

That disclosure should ***warn residential deed-restricted purchasers that they are BUYING A CORPORATION - NOT A HOME. That they alone, jointly - severally, legally responsible for funding of all corporate operating bank accounts. That they will be governed by corporate laws but that the Dept. of Corporations does not and will not recognize them as either.***

Thank you for your time.

Very truly yours,

Donie Vanitzian