

Memorandum 2006-12

**Common Interest Development Ombudsperson
Pilot Project: Legislative Update**

In 2005, two bills were introduced to implement the Commission's recommendation on the *Common Interest Development Ombudsperson Pilot Project* (March 2005) — AB 770 (Mullin) and SB 551 (Lowenthal).

Each bill was approved by the Housing and Community Development Committee in its house of origin and was then referred to the Business and Professions Committee.

The Business and Professions Committee in each house indicated that it would not hold a vote on the bills unless they were first reviewed by the Joint Committee on Boards, Commissions & Consumer Protection ("Joint Committee"), as part of that committee's "sunrise review" of new regulatory programs. That decision prevented enactment in 2005, as the Joint Committee's review process runs from November through January.

At that point the bills could still move forward as two-year bills, provided that they were approved by their houses of origin by January 31, 2006.

The Joint Committee issued its recommendation on January 4, 2006. The bills were then heard and approved by the Business and Professions Committees and the Appropriations Committees of their respective houses. Some amendments were made. They are described below. **The Commission will need to decide whether to ratify those changes.**

On January 30, 2006, SB 551 was approved by the Senate, preserving its viability as a two-year bill. AB 770 was approved by the Assembly on January 30, 2006. It too survives as a two-year bill. Each bill now moves on to the second house, for another round of committee hearings.

Significant procedural events and changes to the bills are discussed below.

SUMMARY OF PROPOSED LAW

The proposed law would create a new state office, the Common Interest Development Ombudsperson, in the Department of Consumer Affairs. The office would have the following duties:

- (1) Maintain an informational website.
- (2) Provide training courses and materials for CID homeowners.
- (3) Maintain a toll-free telephone number, to provide information and advice to CID homeowners.
- (4) Assist in resolving CID disputes through informal conference or traditional mediation.
- (5) Collect and analyze empirical data about the nature and incidence of problems arising in CIDs.
- (6) Report its findings to the Legislature annually, along with any recommendations for reforms.
- (7) Make specific recommendations on whether the Ombudsperson should be authorized to enforce CID law administratively or oversee CID elections.

The Ombudsperson program would be funded by a \$10 per unit biennial fee (\$5 per year), collected in conjunction with an existing requirement that CIDs register with the Secretary of State. The proposed law would be repealed by operation of law five years after enactment, unless the sunset date is extended or eliminated by the Legislature before then. Thus, the proposed law would establish a five year statewide pilot project.

SUNRISE REVIEW

The Joint Committee held an informational hearing on November 17, 2005, to consider the need for a state CID ombudsperson. That hearing was described orally at the Commission's November 2005 meeting.

Final Recommendation

The Joint Committee issued a formal written recommendation on January 4, 2006. That recommendation is attached in the Exhibit, at page 1.

In general, the Joint Committee is supportive of some sort of Ombudsperson program (Exhibit p. 1):

There is clearly strong sentiment among some residents who live in Common Interest Developments for a degree of state

involvement to help resolve their problems. There appears to be some sound policy reasons for creation of an Ombudsman.

However, the Joint Committee's recommendation stops short of endorsing the entire proposal. The Joint Committee is unsure about the need for state-run mediation services, and makes no recommendation with respect to funding.

Bear in mind that the Joint Committee's practice is to try to draft consensus recommendations, which are then approved by all members of the committee (as this one was). This means that the Joint Committee's final recommendation represents only those points on which there was common agreement among the committee's members.

Public Opinion Survey

The Joint Committee's recommendation repeatedly cites a recent Zogby-conducted national poll (commissioned by the Community Associations Institute) that found fairly high levels of satisfaction with CID living. The poll results are reproduced at Exhibit p. 10; see <<http://www.cairf.org/research/satisfaction.html>>.

Many of the questions asked in the poll are not squarely on point for our purposes. For example, the survey asked whether a homeowner had ever filed a complaint against another homeowner, but did not ask whether the homeowner had ever filed a complaint against the board. We would be more interested in complaints about boards. The survey also asked whether a homeowner had ever attended an association meeting, but did not ask how frequently the homeowner has attended association meetings. An affirmative response might mean ten times a year or once in ten years.

For our purposes, the most significant point in the poll data is a finding that 71% of those questioned describe their "overall experience living in a community association" as positive. Only 10% report a negative overall experience. *Id.* Such a degree of general satisfaction may call into question the need for state assistance to CIDs. That seems to be how the Joint Committee interpreted the data.

However, even a 10% dissatisfaction rate is significant, involving approximately 430,000 households in California (see "Updated Statistics" below). The approach of the proposed law is to provide a cost spreading mechanism so that low-cost assistance can be provided to whichever associations or homeowners need it at any given time. That would not work if serious problems were universal.

Note too that many CID problems may exist “beneath the surface,” without most members being aware of them. For example, a failure to adequately fund reserves may continue for several years without creating an immediate problem that would be noticed by the membership. The likelihood of “hidden” problems is heightened by the prevalence of homeowner apathy about association governance (a recent survey of association boards in Virginia found that 62 percent of respondents indicated that “the most important problem facing their association was either the lack of participation by members in their community meetings/events or the lack of volunteers to serve on their boards and committees.”). Virginia Real Estate Board, Draft Report of the Adequacy of Training of, and Disclosure of Financial Information to Consumers by, Financially Compensated Professional Managers of Condominium Associations, Property Owners’ Associations and Other Similar Common Interest Communities 9 (October 17, 2005) (on file with Commission).

In any event, despite the fairly high level of general satisfaction found in the survey, which was national in its scope, there still seems to be significant demand for CID Ombudsperson services in those states that provide them.

For example, in 2003, the Hawaii Condominium education program received 26,000 requests for information or advice; one for every six condominium units. If that rate were to hold true in California, the Ombudsperson office would receive over 700,000 inquiries per year. In 2004, the Florida condominium law enforcement program processed 2,000 statutory violation complaints; one for every 600 units. In California that would extrapolate to more than 7,100 alleged statutory violations per year.

The staff has also learned that a bill has been introduced this year to create a CID ombudsperson in Arizona. See Ariz. SB 1100 (Waring). According to Senator Waring’s staff, part of the impetus for the bill was experience at the Legislature’s constituent services office. It received 3,000 calls for assistance last year, of which 1,000 were related to CIDs.

NEW STATISTICAL DATA

Each year a private accounting firm, Levy & Company, produces statistics on California CIDs. The data is derived from government records and appears to be reliable. The 2005 release of the report indicates that there are now more than 41,000 associations in California, comprising approximately 4.3 million units. See

Levy and Company, 2005 California Community Association Statistics 1 (2005). That is a significant increase over the numbers that we cited previously (36,000 associations and three million units). The staff has no reason to doubt the accuracy of these new figures.

The report also includes interesting data about association size. Most are quite small, with very large associations being rare:

Number of Units	Percent of Total
2-25	52%
26-50	15%
51-100	14%
101-150	7%
151-325	8%
326-500	2%
501-1,000	1%
1,000+	1%

Significantly, two-thirds of associations have 50 units or fewer. Many of these associations will not be able to afford extensive professional assistance and would benefit from a neutral and reliable source of information, training, and advice.

MEDIATION ISSUES

Temporary Deletion for Procedural Reasons

Because SB 551 includes mediation, it was scheduled to be heard by the Senate Committee on the Judiciary after approval by the Business and Professions Committee. Given the shortness of the time available, a referral to Judiciary would have made it effectively impossible to meet the deadlines for approval of a two-year bill. To avoid that, SB 551 was amended to delete the mediation provisions, without prejudice.

It is expected that the mediation provisions will be revised to address concerns raised by the Senate Judiciary Committee and then reinserted into the bill at a later date.

Committee Concerns

The Senate Judiciary Committee staff has several concerns about the mediation provisions. They are summarized below:

- (1) The proposed law should expressly state that the mediation process is voluntary for all parties.
- (2) The proposed law should include standards for the conduct of mediation by the Ombudsperson's office. Existing standards for court-ordered mediation could perhaps serve as a model. See Rule of Court 1620 *et seq.*
- (3) Last year's assessment foreclosure bill (2005 Cal. Stat. ch. 452; SB 137 (Ducheny)) incorporates existing pre-litigation ADR requirements. ADR under those provisions could include Ombudsperson-conducted mediation. The appropriateness of the use of the Ombudsperson's process in that context needs to be analyzed in light of the policy goals served by SB 137. One refinement might be to provide homeowners the choice of whether to use the Ombudsperson process in this context.
- (4) The proposed law would authorize the Ombudsperson to contract out for mediation services. That approach needs to be analyzed to determine whether it might create a repeat player bias in favor of boards. One refinement might be to provide homeowners the choice of whether to use a local contract mediator or a mediator employed directly by the Ombudsperson. The Committee staff also suggested that it might be appropriate to cap the contract price paid by the state for mediation services, in order to control costs.
- (5) Under the proposed law, the Ombudsperson would be authorized to assist in resolving disputes involving CID law or a CID's governing documents. That could include a dispute between two homeowners that does not involve the association board. Resolution of a dispute between members may not be the best use of scarce resources.
- (6) Should the proposed law require that the Ombudsperson be a civil service employee, in order to reduce political influence on the position?

As is our usual practice, the staff will discuss any specific amendments with the Chair before they are implemented. **However, it would be helpful to have the sense of the Commission on whether any of the issues noted above raise significant policy concerns.**

California Dispute Resolution Council

The California Dispute Resolution Council (CDRC) also has some concerns about the mediation provisions, which are discussed below.

As noted above, the proposed law would authorize the Ombudsperson to contract with private parties to perform mediation. CDRC has asked for two clarifications regarding that authority: (1) make clear that Dispute Resolution

Program Act community mediation centers can serve as contract mediators, and (2) make clear that the mediation fee specified in the proposed law is a cap on what the homeowner pays to the Ombudsperson for mediation, and not a cap on what the Ombudsperson can pay to a contract mediator.

Language along the following lines has been proposed:

1380.300(d). The ombudsperson may contract with ~~private parties~~ a private party or organization, including a dispute resolution program organized pursuant to Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code, to provide mediation services pursuant to this section. An individual or organization that provides mediation services pursuant to this section would be compensated through the Ombudsperson fund created in Section 1380.140, at a rate to be determined by the Ombudsperson and the service provider.

The Commission chair agreed with the staff that these changes would be consistent with the intent of the proposed law. **If the Commission agrees, it should ratify the proposed amendments.**

CDRC also suggested that the provision authorizing the Ombudsperson to convene an advisory committee should specifically authorize the committee to advise on what constitutes good mediation practice. Thus:

1380.110. ...

(e) The ombudsperson may convene an advisory committee to make recommendations on matters within the ombudsperson's jurisdiction, including the development of standards for mediation services provided under this chapter to ensure the quality and integrity of the mediation process. A member of an advisory committee shall receive per diem and expenses pursuant to Section 103 of the Business and Professions Code. In selecting the members of an advisory committee, the ombudsperson shall ensure a fair representation of the interests involved.

The Commission chair agreed with the staff that this change would be consistent with the general policy of the proposed law. **If the Commission agrees, it should ratify the proposed amendment.**

Note that the proposed amendments described above may need to be adjusted to account for the concerns raised by the Senate Judiciary Committee. However, the staff expects that agreement can be reached on the issues.

FISCAL ISSUES

Tax v. Fee

The proposed law is opposed by the California Taxpayers' Association ("Cal-Tax"). Cal-Tax maintains that the proposed law would:

impose a \$10 biennial association tax (labeled a fee in the bill) on common interest development [associations.] Taxes called fees are an end run around the Constitution. First, this bill would impose a tax that should require a two-thirds vote for passage. This new tax should not be classified as a fee to circumvent tax approval procedures specified in the Constitution.

Assembly Committee on Business and Professions Analysis of AB 770 (January 12, 2006), p. 9.

In the staff's opinion, Cal-Tax is incorrect to characterize the per unit fee as a tax. The question of whether a fee is actually a tax requiring two-thirds legislative approval has been addressed in several published court decisions. The governing principles are relatively clear.

In *Sinclair Paint v. State Board of Equalization*, 15 Cal. 4th 866 (1997), the court considered a state program to evaluate, screen, and provide follow-up services to children who had been exposed to lead. The program was funded through a fee charged to lead "manufacturers and other persons formerly and/or presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead, which have significantly contributed and/or currently contribute to environmental lead contamination." *Id.* at 872.

The fee was challenged as an unlawfully enacted tax. Section 3 of Article XIII of the State Constitution requires that state taxes "enacted for the purpose of increasing revenues" be approved by at least two-thirds of the Legislature. The challenged fee had not been approved by that supermajority.

Because there were no cases interpreting Section 3, the court looked to cases interpreting Section 4, which requires a two-thirds vote of the citizens for approval of a local "special tax." The court noted three circumstances in which courts have held that a fee charged to a group is not a special tax: (1) where the fee is reasonably related to the value of the benefit conferred on those paying the fee, (2) where the fee is paid in return for a governmental privilege, or (3) where a fee is charged in order to regulate the group paying the fee. *Sinclair Paint*, 15 Cal. 4th at 875-76.

Looking to the special tax cases as persuasive authority, the court held that the state lead abatement fee was a regulatory fee and not a tax. *Id.* at 881.

Another relevant example is provided in *Pennell v. City of San Jose*, 42 Cal. 3d 365 (1986). In that case, the City of San Jose had created a program for adjudicating complaints made under the City's rent control ordinance. It was funded by a \$3.75 annual fee charged for each rental unit. The court held that the fee was not a tax.

Under the proposed law, the per unit fee would be used exclusively to provide services conferring a benefit on the group paying the fee. If the Ombudsperson program is later expanded to include enforcement powers, the fee would also be used for regulation of the group paying the fee. Both uses are clearly consistent with what the courts have held is a fee, rather than a tax.

Funding Source

The California Alliance for Retired Americans ("CARA") objects to the fact that the proposed Ombudsperson program would be funded by fees paid exclusively by CID homeowners:

CARA contends that instead of taxing the consumer, other sources of financing could be found. Possible revenue sources include: (1) a portion of the revenue generated by the \$30 fee that HOAs pay when registering with the California Secretary of State; (2) a tax on private firms (property managers, for example) that use the Office; (3) a per unit fee assessed on developers for each parcel or unsold unit to which the developer holds title; and, (4) local governments which approve CID subdivisions and benefit from the expanded tax base CIDs create.

Assembly Committee on Business and Professions Analysis of AB 770 (January 12, 2006), p. 9. Those suggestions are discussed below:

(1) Civil Code Section 1363.6 requires that the Secretary of State maintain a registry of CIDs. It authorizes the Secretary of State to charge a fee of up to \$30 per registering association for that purpose. At present, the fee is set at \$15. Theoretically, the law could be amended to require that the fee be increased to the statutory maximum, with the additional \$15 directed to the Ombudsperson program fund. However, the staff sees no benefit in doing so. The cost of the fee would still be borne by the association's membership. It would simply be packaged differently.

(2) CARA suggests that private firms that use the services of the Ombudsperson be charged a tax to defray part of the cost of the office. However, any third party using Ombudsperson services would do so as an agent of a homeowner association. Any fee for service charged to the agent would probably be passed directly through to the association on whose behalf the agent is acting. That would tend to concentrate the costs of the Ombudsperson program in those associations that make greatest use of its services, but would do little to spread the cost beyond CID homeowners.

(3) CARA suggests that developers who hold title to units within a CID be required to pay the per unit fee. However, that would already be the result under the proposed law. The fee would be paid by the association, which would then recoup the cost through the collection of assessments. With a few exceptions that are not relevant here, a developer who owns separate interests in a CID is obliged to pay assessments for those separate interests. See 10 Cal. Code Regs. § 2792.16.

It may be that CARA intends that developers pay an additional fee, beyond that paid by the association under the proposed biennial fee provision. That would be possible, but it seems extremely likely that a developer would simply pass the cost along to the home's purchaser. This would create a two-tiered funding system, with new buyers paying more than those who stay in established homes. It would probably not have the effect of spreading the cost beyond the CID homeowner population.

(4) CARA's final suggestion is that part of the cost of the Ombudsperson program be borne by local government. Because local government can require that a CID maintain infrastructure that would otherwise have been the responsibility of the local government, there is a fiscal benefit to the local government when housing is built as a CID. Arguably, the local government should therefore pay part of the cost to support CID communities.

That is an understandable policy position. However, it seems politically impossible to implement. Cities and counties are cash-strapped and in all likelihood would be unable to provide any funding for a new state program.

Furthermore, it seems likely that any attempt to shift the cost of the program to third parties who are not directly benefited would strengthen the argument that the funding mechanism is a tax rather than a fee. See "Tax v. Fee" above.

The staff is confident that the proposed law could not be enacted at this time if a two-thirds supermajority were required.

Assembly Member Mullin has committed to working with CARA on the issue of alternative funding sources. But in the staff's view, all of the alternatives proposed so far are either politically unrealistic or would not actually accomplish the policy goal of shifting costs away from CID homeowners.

Cost Controls

The Appropriations Committee of each house suggested that specific amendments be made to the bill under its consideration. The proposed amendments were mostly technical or aimed at limiting program costs. The authors accepted the amendments described below. The staff assumes that the bills will eventually be reconciled to bring them back into conformity with one another.

(1) AB 770 was amended to change its sunset date from January 1, 2011, to January 1, 2012. That is an appropriate adjustment to the fact that the bill is now a two-year bill and will be enacted (if at all) one year later than was originally expected.

(2) AB 770 was amended to increase the homeowner fee for participation in mediation from \$25 to \$50. The Appropriations Committee staff was concerned that the share of the mediation cost being subsidized by the Ombudsperson would be too great and that it would be appropriate for those participating in mediation to bear more of the cost. There is a \$50 filing fee for similar services in Florida, Hawaii, and Montgomery County, Maryland; so that figure was seen as reasonable.

(3) Both AB 770 and SB 551 were amended to change language in the bills that provides for a "continuous appropriation." Apparently, that language would exempt the Ombudsperson program from annual budget review by the Legislature. Both committees insisted on changing the language to provide for an annual appropriation, which would be conducted as part of the annual budget process. That is understandable, as the budget process provides an important mechanism for legislative oversight.

(4) The fee provision refers to "separate interests" but does not define the term. It is not strictly necessary to define the term, because there is an existing

definition that would apply. See Civ. Code § 1351. However, the Senate Appropriations staff was concerned about potential confusion on the point. Accordingly, SB 551 was amended to include a cross-reference to the definition of “separate interest” provided in Section 1351.

(5) SB 551 was amended to make the authority of the Ombudsperson to pay per diem to members of an advisory committee discretionary.

(6) Both committees suggested that it might be appropriate to lower the initial per unit fee amount. Both authors declined to do so.

A budget projection prepared by the Department of Consumer Affairs for the Assembly Appropriations Committee estimates that initial revenues would be approximately \$12 million, with initial costs at approximately \$11.25 million. Assembly Committee on Appropriations Analysis of AB 770 (January 18, 2006), p. 2. That rough equivalence between projected revenue and costs suggests that the initial fee amount of \$5 per unit is in the correct vicinity.

Note too that the proposed law would require that the Ombudsperson examine its actual costs and revenues every two years and adjust its fees accordingly, by regulation. That would allow the Ombudsperson to correct any initial mismatch between revenue and expenses.

If the Commission feels that these amendments are consistent with the general policy of its recommendation, it should ratify them.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

**FINAL RECOMMENDATIONS FOR
THE PROPOSAL TO CREATE AN
OMBUDSMAN'S OFFICE FOR COMMON INTEREST
DEVELOPMENTS
January 4, 2006**

RECOMMENDATION OF THE JOINT COMMITTEE ON BOARDS,
COMMISSIONS, AND CONSUMER PROTECTION (JOINT COMMITTEE)

**ISSUE #1. Should the State create an Ombudsman's
Office for Common Interest Developments?**

Recommendation #1: There is clearly strong sentiment among some residents who live in Common Interest Developments for a degree of state involvement to help resolve their problems. There appears to be some sound policy reasons for creation of an Ombudsman.

Comments: Currently, the state of California does not have an office devoted to Common Interest Developments, or CIDs. The Department of Real Estate has some minimal oversight responsibility when these developments are in their initial stages. But once a development is fully occupied by private citizens, the Home Owners Association (HOA) elected by the residents, has full authority to act on behalf of those residents. The HOA is subject to procedural rules about decision making and the conduct of elections, and has an obligation to act in ways that are open and comport with general notions of fairness and due process. Violations of those rules, or disputes that are not satisfactorily resolved, can only be resolved by some process outside the CID, either mediation, arbitration, or in the most extreme cases, filing of a judicial action.

There is little doubt that the number of CIDs in California is growing, and there is little reason to believe the increase will slow in the near future. However, it is not clear whether an adequate number of CID residents want the state involved. A recent poll by the Zogby polling firm, released after the November hearing, showed considerable satisfaction among CID residents with the communities they live in and the dispute resolution systems that exist.

This poll was not California-specific, and did not deal with the specific question before this Committee. It was sponsored by the Foundation for Community Association Research, a non-profit organization created in 1975 by Community Associations Institute (CAI), which provides education and resources to community associations nationally, and has been active during the pendency of the current legislation. This funding could be considered to undermine the credibility of the results. Nevertheless, Zogby is a reputable polling organization, and the poll seems to have some indicia of reliability. In any event, the results in this poll contain some important information far exceeding the poll's margin of error of 3.5 percent.

Nationwide, there is significant participation in and satisfaction with some relevant aspects of CIDs. While Committee staff had initial concerns about participation in HOA activities, the Zogby poll showed only 28% of residents said they had never been to an association meeting. A 72% participation rate is certainly respectable, and shows a common sense level of attention to the concerns of the community. In addition, 90% said they were on friendly terms with their association board's members. If even remotely similar percentages held true in California CIDs, this would argue against too great a state intervention in the process, since both lack of participation and significant levels of dissatisfaction are key aspects of the argument that existing CID procedures fall short of what is necessary to keep these organizations running smoothly. Significantly, only 15% in the survey said they wanted to see more government control of their associations.

Eighty percent of Zogby's respondents said they had a positive assessment of how their dues are being used by the association. Similarly, 78% believe the association rules enhance the value of their property.

Moreover, 77% said they had never filed a complaint with their association about another member, and of the 23% who had, 72% said the complaint had been resolved to their satisfaction. And

76% of those who had been the subject of a complaint reported that it had been resolved to their satisfaction. These numbers, of course, still leave a significant, though not large percentage of residents who were not satisfied. Nor is it clear from this survey how California-specific numbers might look. However, the survey does help to put the testimony before this committee into some perspective.

Given the present record, there appears to be room for some state involvement in CIDs that would fall short of actual involvement in CID disputes.

A. Informational Website

At the very minimum, the Ombudsman could take over the operation of a CID informational website that is now being developed, in a more limited form, by the Dept. of Consumer Affairs and the Dept. of Real Estate. As noted in the Background Paper, a centralized source of the laws and rules applicable to CIDs would be valuable, both for board members who may not be fully conversant with the procedures and laws that govern their actions, and for residents who should be fully aware of how HOAs operate, and what limits they will be subject to as a member of a specific CID. There is no doubt that most ordinary citizens have a difficult time finding relevant laws and regulations applicable to them within the thousands of volumes of legal authority that govern a modern state like California. Since HOAs do have an obligation to operate within the law, a readily available resource compiling what laws, exactly, provide that framework, would be extremely valuable for homeowners who are, in the main, not trained as lawyers or legal researchers.

While the website cannot include the most relevant document to any CID resident – the CCRs applicable to that particular community – the site can make clear that the CCRs are, in fact, the most important governing document in the CID, and urge that all residents know its contents, and review it closely when problems develop.

Secondly, the site could have a useful section specifically dealing with board meeting procedures, elections and rule changes. Many problems may arise because fundamental procedures have been neglected. For example, board meetings must be conducted openly, and residents must be properly notified of relevant board actions. Board members – and CID residents – should all be fully aware that violations of such fundamental rules of fairness are, in fact,

violations of the compact that boards make with the residents they represent.

Similarly, residents must both know and fully *appreciate* that they have an obligation to pay attention to what is going on in their community, and have a right both to participate in board meetings, and to run for the board if they are not satisfied with particular votes. Because the value of their own home is ultimately at stake, CID residents may be paying a very real price if they fail to know what is going on, or make their opinions known. This is important, both in the resolution of individual disputes between neighbors, and in the limitations embodied in particular CCRs. Those rules are enforceable as written, but they are not carved in stone. They may be changed using proper procedures.

The Ombudsman's web site can be a helpful starting place for all this information.

B. Toll-Free Number

Depending on funding (discussed in more detail below), the Ombudsman could also staff a toll-free number to provide information that would supplement that on the website. While the staff could not give legal advice, factual information about what the law is could help to resolve a significant number of emerging disputes before they develop into confrontations.

The toll-free number could also provide other services, depending on the Ombudsman's budget. This function would necessarily be more staff-intensive – and thus more expensive to operate – than establishing and maintaining a website. However, its value would also be greater.

C. Information Gathering

In addition to the web site, the Ombudsman can be a clearing house for information about CIDs. The Secretary of State's registration process now gathers certain information about CIDs. However, that office has many concerns besides CIDs. An Ombudsman would have CIDs as its sole priority, and can guarantee that CID laws related to (for example) registration of all CIDs are fully complied with. The fact that we know a significant number of CIDs are not even registered with the Secretary of State right now, something required by law, suggests that more focused attention may need to be paid to CIDs than a large state bureaucracy can provide.

The Ombudsman could also collect additional information, or conduct surveys similar to the recent study done by the Zogby polling organization to better understand CIDs within California.

ISSUE #2. Should the Ombudsman's Office provide mediation services?

Recommendation #2: *A considerable amount of testimony from residents showed an acute desire for the state to offer a mediation program to CID residents. However, the Committee should only authorize this after determining (1) whether a majority of CID residents in California want such a program, and (2) what effect, if any, a state mediation program would have on the general market for mediation services.*

Comments: Testimony from residents showed that some boards of directors do act in violation of the law, perhaps knowing that the cost of enforcing existing rules in the courts is prohibitive to many, if not most people who live in CIDs. This is as serious a problem as flaunting of the law would be by any other elected body. Punishment for such violations should be a high priority for both local and state law enforcement agencies, particularly in light of the continually growing number of CIDs in California. While the current proposal does not include enforcement authority in the Ombudsman's Office, it may be useful to consider whether it should have the authority to review the most severe complaints about legal violations, and make priority recommendations to law enforcement.

Similarly, testimony and letters submitted by boards of directors and others showed that some residents fail to pay legitimate assessments, or abide by other rules established in the CCRs applicable to all residents. These people can create disruptions within the CID, and force boards to make hard decisions about how best to address the problem. Again, court action is a divisive and expensive last resort. However, boards do have a duty to enforce the rules of the CID, and an obligation to those who abide by the rules to assure that transgressions are properly and reasonably dealt with.

In light of the fact that disputes will always be inevitable, mediation programs, both private and public, have become prominent. Mediation can help resolve problems while minimizing potential acrimony. Such programs also have a cost, though it is seldom as expensive as even the most minor court action.

The survey responses to the Zogby poll show that – at least nationally – only a small number of CID residents are unsatisfied in CID disputes. At the national level, 23% of CID residents said they had filed a complaint with their association against another resident, and of those, 72% said the complaint had been resolved to their satisfaction. Thus, in that survey, only about 6% of those who filed complaints were unsatisfied with the resolution. Moreover, 76% of those who had been the *subject* of a complaint – the ones who could be expected to be the least happy about the process -- reported that it had been resolved to their satisfaction.

In this context, it would be important for the Legislature to determine if the number and percentages of California CID residents have similar levels of satisfaction with the existing process. The more individual CID residents who are dissatisfied with existing processes, the greater the need for state intervention to help them. Conversely, if general satisfaction levels are high, this would be evidence that existing private procedures are working for most people.

It is not clear whether the Zogby results deal only with the existing internal CID processes for dispute resolution, or whether satisfaction levels were gauged after some participation in outside mediation programs. Outside mediation programs provide an extra buffer to resolve disputes; if the Zogby numbers on satisfaction include outside processes which helped to resolve disputes that could not be resolved within the CID, then a higher level of dissatisfaction could be expected within CIDs, a level that was being addressed by other means. On the other hand, if the Zogby poll is confined to processes within CIDs, then it is reasonable to conclude that a higher level of satisfaction may exist than reported by Zogby, since some of those dissatisfied with CID processes would achieve resolution through means not reflected in the poll question.

Whatever those numbers would be in California, the proposed mediation function of the Ombudsman's Office is envisioned as a supplement, not just to internal CID processes, but to outside mediation programs, and that fact must be taken into account. As noted by the California Dispute Resolution Council, mediation in the

Ombudsman's Office should not be viewed as a replacement for existing private mediation. There are always difficult market balances to be struck when a state office competes with the private sector in offering services.

The most minimal view of the Ombudsman's mediation program would make it available to those who cannot afford private sector mediation. This would make sure that even those without adequate financial means are not confined to having their problems addressed by the very board that may, in fact, be causing the problem. A lack of resources should not equate to a lack of options. A mediation program for those who cannot afford the cost of private mediation assures that cost will not be a barrier for low-income CID residents.

The California Law Revision Commission and the authors, however, seem to have a broader view of the program, in which it would be available to all CID residents in California, irrespective of income. The current proposal does not include a minimum income requirement, or any other criteria for participation in the mediation program, except payment of the fee, which cannot exceed \$25.00. Because the cost of private mediation is generally much higher than \$25.00, this would seem to suggest that the costs would somehow be subsidized.

The Ombudsman's Office, itself, will be paid for by CID owners, and therefore they can legitimately provide themselves a subsidized mediation service if they choose, since their money – rather than taxpayer money from the General Fund -- will pay for it. However, funding of this part of the Ombudsman's Office is still the least developed part of the current proposal. If mediation in this program is to be subsidized through the Ombudsman's budget, this should be explicit, so an appropriate budget can be devised.

Moreover, if the cost of mediation will be below-market, the Committee may wish to consider how this would affect the general market among both private and other publicly-funded mediation services. Any program given the imprimatur of the state can become a formidable force in the market and can drive legitimate competitors out of business, or diminish their competitiveness. While the market for mediation exists beyond just disputes within CIDs, there are clearly some private businesses in existence that would be affected by this proposal. Those businesses already "compete" against other kinds of local government supported mediation, however, and that fact must also be considered.

In addition, concerns have been expressed by staff of the Senate Judiciary Committee concerning the scope of any mediation program that could be developed by the Ombudsman. This issue does not appear to be irresolvable, and is currently under discussion between the authors offices and staff of the relevant committees.

ISSUE #3. How should the Ombudsman's Office be funded?

Recommendation #3: *No recommendation.*

Comments: While there is some potential value in the Ombudsman's Office, the question of funding will be critical to this proposal. If California's numbers are even remotely similar to the national satisfaction results reported by Zogby, CID residents may not see the value of having the funding for the Ombudsman's Office come out of their pockets. The national levels of satisfaction, participation and lack of interest in state involvement show that most problems in CIDs (again, at the national level) are being resolved as they should be – privately.

This is appropriate for communities that are not, in fact, "governments." In fact, it could be argued that if any individual HOA wanted to fund its own mediation program by imposing an assessment on its residents, it could do so now. This might seem to be an unreasonable choice for all but the largest CIDs, but there is nothing that would prevent smaller CIDs from banding together to create the same sort of program for themselves if they wanted to do so.

The state, of course, is in the best position to do this at the highest level, but the illustration raises the fundamental question here. If CIDs could already assess themselves to create such a program and have not, would the state be imposing something on CID residents that a majority of them do not want?

The answer is unclear. The five dollar a year proposed fee is certainly minimal, as is the proposed maximum fee for mediation services of \$25. And those who understand the advantages of cost-sharing across the largest base could see that, while all residents would not use the system in any given year, the \$5 a year fee would provide a very inexpensive form of insurance for when such services are needed.

However, if the desire for such services is as low in California as the Zogby figures suggest, many residents may make a rational decision that they would rather pay for whatever mediation services they may need individually, if they need them and as they arise. Since (in this analysis), most people would not perceive that they would need such services, the calculation is a rational balancing of perceived individual need against perceived individual cost.

If CID residents are not willing to pay for the Ombudsman's Office, other funding options exist. The state, of course, could pay for such an office out of the General Fund. However, such a proposal is unlikely in the current budgetary environment. Moreover, Californians who do not live in CIDs (still a majority in this state) may not wish to have their tax dollars fund something that is only applicable to a minority of state residents.

Other, more creative solutions may be available, such as a fee on property developers, or dedication of interest earned on HOA bank accounts. There is no question, however, that funding will be a critical question for creation of the Ombudsman's Office.

CID HOMEOWNER SATISFACTION SURVEY

Zogby International 2005 National Research Findings

Zogby International conducted telephone interviews in August 2005 of 801 randomly selected adults residing in homeowners associations, condominiums, cooperatives and other planned communities—collectively called "community associations" in this summary. The margin of error is +/- 3.5 percentage points.

The survey was sponsored by the Foundation for Community Association Research, a non-profit organization created in 1975 by Community Associations Institute (CAI). The Foundation strives to keep CAI at the forefront of scholarship, knowledge and insight pertaining to community association management and governance. Funding for the project was provided by CAI's President's Club.

General Satisfaction

Which of the following best represents the type of home you currently occupy?

Single family	65%
Condominium	17
Townhouse	14
Apartment (cooperative)	2
Other (mobile home, duplex)	2

On a scale of one to five, with one being very bad and five being very good, how would you rate your overall experience living in a community association?

1 Very bad	5%		
2	5	Negative	(1 + 2) 10%
3	19		
4	32	Positive	(4 + 5) 71%
5 Very good	39		

Have you ever brought a complaint about another member to the association board or the manager?

Yes	23%
No	77

Asked of those who brought a complaint to the association: How was it resolved on your behalf?

Very satisfactorily	42%
Somewhat satisfactorily	30
Somewhat unsatisfactorily	8

Very unsatisfactorily	16
Not sure	4

Have you ever been the subject of a complaint by another member?

Yes	14%
No	85
Not sure	1

Asked of those who had been a subject of complaint: How was it resolved on your behalf?

Very satisfactorily	49%
Somewhat satisfactorily	27
Somewhat unsatisfactorily	5
Very unsatisfactorily	11
Not sure	8

Personal Involvement

Have you ever attended any community association board meetings?

Yes	72%
No	28

How many times a year, on average, would you say you have contact with your community association board (in person, by letter or phone or in meetings)?

One	17%
Two	14
Three	9
Four	10
Five or more	41
Not sure	9

Community Association Volunteer Leaders

Do you think the members of your elected governing board strive to serve the best interests of the community as a whole?

Absolutely	54%
For the most part	35
Not at all	9
Not sure	2

Overall, would you say you are on friendly terms with your current community association board, or would you say you are on unfriendly terms

with them?

Friendly terms	90%
Unfriendly terms	4
Not sure	6

Community Association Managers

Does your association employ a community manager?

Yes	52%
No	40
Not sure	8

Asked of those who said their communities employ a manager: In your view, does the manager provide value and support to residents and the community as a whole?

Yes	78%
No	13
Not sure	9

Have you had any direct interaction with your community manager?

Yes	49%
No	48
Not sure	2

Ask of those who said yes above: Was it generally a positive experience?

Yes	88%
No	10
Not sure	2

Assessments, Value and Enforcement

Which of the following best describes the amount of assessments you currently pay to your community association per month?

Less than \$25	20%
\$25-\$50	19
\$51-\$100	14
\$101-\$300	29
\$301-\$500	7
More than \$500	4
Do not pay dues	4
Not sure	3

Considering your overall assessments and the services provided by your association, how would you describe the return for what you pay in assessments?

1 Great	25%		
2 Good	55	Positive	(1+ 2) 80%
3 Not so good	13		
4 Bad	6	Negative	(3 + 4) 19%
5 Not sure	2		

What do you think your community should do when residents neglect to pay their assessments?

Insist that every homeowner pay the assessments, involving attorneys only if delinquent accounts are not brought up to date after sufficient notification	77%
Make up the loss by increasing assessments for paying homeowners	5
Curtail services and amenities such as reducing pool hours, delaying improvements and spending less on landscaping	5
Not sure	13

Rules, Pros and Cons

Do the rules in your community protect and enhance property values, harm them or make no difference?

Protect and enhance	78%
Harm	1
No difference	19
Not sure	2

What is the single *best* thing about living in a community association?

Maintenance-free	23%
Clean/attractive neighborhood	15
Safe neighborhood	13
Everybody knows the rules	7
Responsible neighbors	6
Property Values	4
Quiet neighborhood	4
Amenities like swimming pools and tennis courts	4
You have a say in the rules	2
Nothing good	8
Other/not sure	14

What is the single *worst* thing about living in a community association?

Restrictions on exterior home improvements	15%
Paying dues	15
The rules	11
Restrictions on parking	4
Dissatisfaction with board	4
Restrictions on landscaping	2
Meetings	2
Dealing with neighbors/members	2
Nothing bad	25
Other/not sure	20

Government Regulation

The governance of community associations is subject to differing state laws and regulations. Would you like to see more government control of these associations?

Yes	15%
No	78
Not sure	7

Pre-Purchase Awareness

When you were considering the purchase or rental of your current home, were you told that it was in a community association?

Yes	89%
No	10
Not sure	1

Asked of those answering "yes" above: Did the fact that your current home is in a community association make you more likely to purchase or rent your home, make you hesitant about purchasing or renting your home, or have no impact?

More likely	28%
Hesitant	9
No impact	63
Not sure	1

Relations and Conflict

On a scale of 1 to 5, with 1 being not at all and 5 being very well, how well would you say you get along with your immediate neighbors? *

1 Not at all	3%
--------------	----

2	2	Not well	(1 + 2) 5%
3	8		
4	22	Well	(4 + 5) 86%
5 Very well	64		
Not sure	1		

** This question also was asked of a national representative sample of **all** homeowners. The results are strikingly similar, with 85 percent saying they get along well with the neighbors and 4 percent saying they don't.*

Asked of those who responded 1 or 2 above: What would you say creates most of the conflict?

Pets	28%
General lifestyle	11
Noise	9
Parking	8
Personal habits	6
Landscaping/yard issues	4
Appearance of a home	3
Other	27
Not sure	5

© Copyright 2005 Foundation for Community Association Research