

## Second Supplement to Memorandum 2009-33

### Statutory Clarification and Simplification of CID Law (Staff Draft)

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Memorandum 2009-33 presents a staff draft of a proposed recodification of the Davis-Stirling Common Interest Development Act (“Davis-Stirling Act”).

The Commission has received two more comment letters, which are attached in the Exhibit as follows:

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|--|-------------------|
|  | <i>Exhibit p.</i> |
| • Oliver Burford, Executive Council of Homeowners (8/24/09) .....  | 1                 |
| • Marjorie Murray, California Alliance for Retired Americans &<br>Center for California Homeowner Association Law (8/26/09)..... | 2                 |

The staff appreciates the assistance provided by these commenters. Their comments are discussed below.

#### GENERAL SUPPORT

Oliver Burford writes for the Executive Council of Homeowners (“ECHO”). ECHO is generally supportive of the proposed law, which it believes will lead to less confusion and greater compliance with statutory requirements. See Exhibit p. 1. ECHO is currently conducting a thorough review of the staff draft and intends to provide timely feedback. *Id.* The staff appreciates ECHO’s commitment to serve as a resource in the development of the proposed law.

Marjorie Murray writes for the California Alliance for Retired Americans and the Center for California Homeowner Association Law (“CARA/CCHAL”). See Exhibit pp. 2-3. Ms. Murray expresses support for the Commission’s decision to abandon any effort to integrate Corporations Code provisions into the Davis-Stirling Act, but expresses some other concerns about the approach taken in drafting the revised version of the proposed law. Those concerns are discussed below.

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Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

## CONCERNS

### Changes in Wording

CARA/CCHAL is unsure how to reconcile two of the Commission's decisions on how to approach revising the proposed law:

However, we remain baffled by two of the "guiding principles" on page one of the memo. Item (5) says that "the general attempt to make the language of existing law simpler and easier to understand will be abandoned." However, this statement follows Item (2) which states that "Changes in wording that are necessary to clarify unclear language in existing law will be retained."

Does this mean that words will be changed - or not? Changing words in order to "clarify" their meaning may in fact result in substantive changes to the law. Furthermore, changing words to "clarify" is a subjective decision. Words that are "clarifying" to one reader may be "confusing" to another. More important, changing the words may in fact create substantive changes, whether intended or not.

See Exhibit p. 2.

The intention is to stick to existing language verbatim in most cases, in order to avoid any concerns about inadvertent substantive changes that might result from recasting existing language in clearer terms. Sections without *any* change in wording (beyond routine technical changes, which are noted in the Comments following the sections) are flagged as "unchanged" in the section heading.

However, there are a number of provisions in existing law where the language is confusing or otherwise problematic. Where those clear problems exist, the draft would correct them. Those sections are marked as "revised" in their section headings.

The Comments to those sections specifically describe the proposed changes. Staff notes following those sections discuss the purpose or effect of the proposed changes. To further simplify review, Memorandum 2009-33 lists every section that would make wording changes that are intended to be nonsubstantive improvements. See Memorandum 2009-33, p. 8.

This is a compromise approach, that would allow the proposed law to address apparent drafting problems in existing law, while simplifying the task of reviewing the proposed law by clearly flagging and describing all proposed changes.

## **Noncontroversial Substantive Improvements**

CARA/CCHAL is also concerned about the inclusion of “noncontroversial substantive improvements” in the revised draft of the proposed law:

The memo states, as a first principle that “noncontroversial substantive improvements will be retained.” Previous staff memos have made similar assertions: that only noncontroversial changes will be proposed. However, as we learned when AB 1921 was going through policy committees: this turned out not to be true. In fact, AB 1921 made substantial changes to critical consumer protections in Davis-Stirling. Civil Code sections governing association records, meeting notices, elections, and operating rules were weakened and/or deleted altogether. We want to ensure that similar changes are not made during this second iteration of the “clarification and simplification” process.

See Exhibit p. 2.

Unfortunately, the only way to know whether a proposed change is noncontroversial is to present it for public review and see whether it prompts any serious policy objections. That was the approach the Commission followed in the lengthy public process of developing the original version of the proposed law. The Commission was scrupulous in removing any substantive change that prompted serious policy objections (including objections raised by CARA/CCHAL). The policy objections raised by various groups *after* introduction of AB 1921 (Saldaña) were all new objections that had not been raised during the Commission’s process.

**We respectfully ask that all interested persons and groups carefully review the sections of the revised draft that contain substantive reform proposals.** These sections are marked as either “new” or “revised” in their headings, and the Comments and staff notes that follow the section specifically identify and explain the proposed changes. To further simplify review, Memorandum 2009-33 lists every section that would make a substantive change in the law. See Memorandum 2009-33, pp. 9-10.

## **Drafting Style**

CARA/CCHAL suggests that the draft of the proposed law be repackaged to show any changes from existing law in strikeout and underscore. See Exhibit p. 3.

The Commission’s longstanding practice has been to draft proposed laws using the stylistic conventions used in bills. In bills, when a single code section is

revised it is marked up to show the changes from existing law. When a new section is added, there is no mark-up. Similarly, when a group of sections (i.e., an article, chapter, division, etc.) is repealed and replaced with a new group, the new group is treated as a new enactment and is not marked up to show how it differs from existing law.

The draft of the proposed law follows that drafting convention. Because the entire Davis-Stirling Act would be repealed and replaced with an entirely new act, the proposed law is shown as a new enactment, without any mark-up.

**The staff recommends against deviating from that drafting practice in setting out the proposed law.** However, it might be possible to include marked up versions of proposed changes in the notes that follow revised sections. That might facilitate public review of the changes proposed in the tentative recommendation. As is customary, any such notes included in a tentative recommendation would be deleted in the final report to the Legislature and the Governor. The staff will experiment to see whether that approach is workable.

Respectfully submitted,

Brian Hebert  
Executive Secretary



Law Revision Commission  
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AUG 26 2009

August 24, 2009

File: \_\_\_\_\_

Commissioner Pamela Hemminger  
Chair, California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739

ATTN: Brian Hebert, Executive Secretary

Dear Mr. Hebert:

The Legislative Committee of the Executive Council of Homeowners (ECHO), on behalf of the more than 1,550 community associations that comprise its membership and the over 250,000 homeowners who live in ECHO member associations, has followed the work of the California Law Revision Commission (CLRC) as it has attempted to simplify and organize the Davis-Stirling Act governing common interest developments.

The Legislative Committee has recently done an initial, cursory review of the *Statutory Clarification and Simplification of CID Law (Staff Draft), Memorandum 2009-33 (BH) (8/10/09)* and has embarked on a thorough analysis of the document in order to provide the CLRC timely and appropriate feedback over the course of the CLRC's deliberations. Please be assured that input from ECHO will be of a timely nature and will seek to support the work of the CLRC.

ECHO applauds the CLRC's efforts to simplify and clarify the Davis-Stirling Act. Once revisions are completed and recommendations finalized, we anticipate less confusion and greater compliance to statute by the growing number of associations and residents of common interest developments. We fully concur with the comment in the draft memorandum that any revised law should be as usable by association directors as possible.

ECHO has and will continue to stand as a resource to the CLRC as it develops its final proposal. Please feel free to contact the ECHO office if you should have any questions or concerns during this process.

Yours very truly,

Oliver Burford  
Executive Director

*Executive Council of Homeowners*

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EX 1

August 26, 2009

Brian Hebert, Executive Secretary  
California Law Revision Commission  
Via email: [bhebert@clrc.ca.gov](mailto:bhebert@clrc.ca.gov)

Dear Mr. Hebert and Members of the Commission:

I am writing on behalf of the California Alliance for Retired Americans (CARA) and the Center for California Homeowner Association Law (CCHAL) to comment on Memorandum 2009-33. As you know, we have been commenting for some time on the CLRC project to “clarify and simplify” CID law.

We want first to comment on the “guiding principles” listed on page one of the memo.

1. We applaud the commission’s decision to abandon the effort to integrate elements of the Corporations Code into Davis-Stirling. Attempting to meld the two codes created more confusion than clarification.
2. However, we remain baffled by two of the “guiding principles” on page one of the memo. Item (5) says that “the general attempt to make the language of existing law simpler and easier to understand will be abandoned.” However, this statement follows Item (2) which states that “Changes in wording that are necessary to clarify unclear language in existing law will be retained.”

Does this mean that words will be changed – or not? Changing words in order to “clarify” their meaning may in fact result in substantive changes to the law. Furthermore, changing words to “clarify” is a subjective decision. Words that are “clarifying” to one reader may be “confusing” to another. More important, changing the words may in fact create substantive changes, whether intended or not.

3. The memo states, as a first principle that “noncontroversial substantive improvements will be retained.” Previous staff memos have made similar assertions: that only noncontroversial changes will be proposed. However, as we learned when AB 1921 was going through policy committees: this turned out not to be true. In fact, AB 1921 made substantial changes to critical consumer protections in Davis-Stirling. Civil Code sections governing association records, meeting notices, elections, and operating rules were weakened and/or deleted altogether. We want to ensure that similar changes are not made during this second iteration of the “clarification and simplification” process.

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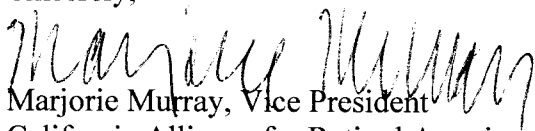
Brian Hebert, Executive Secretary  
California Law Revision Commission  
RE: Memo 2009-33  
August 26, 2009

We have come to no conclusions, at this point, about whether “substantive changes” have been made. We ask only that, to facilitate our study of the memo, that a side-by-side presentation of the changes be presented. We need to know exactly which words are being changed. Do the changed words truly “clarify” or do the changed words in fact modify either the legislative intent or the spirit of the law? Again: we are most concerned about the sections of Davis-Stirling providing consumer protections to homeowners.

When legislation is amended, the practice of the Legislature is for the old language of the bill to be lined out and the new language substituted. This process makes clear which sections are being changed. We ask that the commission us this process and prepare a new draft of the memo and the proposed legislation that shows visually what changes are being offered. Only then can we truly evaluate if the law truly remains unchanged if the new words are in fact making substantive changes to existing law.

Please do distribute our comments to the commission and please incorporate this memo into the minutes of Friday’s meeting.

Sincerely,



Marjorie Murray, Vice President  
California Alliance for Retired Americans (CARA)  
President, Center for California Homeowner Association Law (CCHAL)

Members of the Commission