Study H-855 October 22, 2009

First Supplement to Memorandum 2009-44

Statutory Clarification and Simplification of CID Law (Discussion of Issues)

The Commission has received another letter from Elaine Roberts Musser, commenting on the points discussed in Memorandum 2009-44.

The staff has received comment letters from other persons as well. For the most part, those letters raise new issues, rather than commenting on issues that have already been raised for discussion in Memorandum 2009-44. Those letters will be presented to the Commission at the December 2009 meeting.

One issue discussed in Memorandum 2009-44 (at pages 23-24) and revisited in the attached letter from Ms. Musser, is whether board meetings should be subject to the same standards that govern an association's internal dispute resolution procedure ("IDR"), which must be "fair, reasonable, and expeditious." See Civ. Code § 1363.820. Those standards are expressed in Civil Code Section 1363.830.

In order to facilitate discussion of that issue, Section 1363.830 is set out below:

> 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. A request invoking the procedure shall be in writing.
>
> (b) The procedure shall provide for prompt deadlines. The procedure shall state the maximum time for the association to act on a request invoking the procedure.
>
> (c) If the procedure is invoked by a member, the association shall participate in the procedure.
>
> (d) 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.
>
> (e) 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.

(f) The procedure shall provide a means by which the member and the association may explain their positions.

(g) A member of the association shall not be charged a fee to participate in the process.

Respectfully submitted,

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Executive Secretary

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October 18, 2009

California Law Revision Commission
Attn: Brian Hebert (via email)

Dear Mr. Hebert and Commissioners,

In regard to the October 7, 2009 **Memorandum 2009-44 Statutory Clarification and Simplification of CID Law (Staff Draft)**, I would like to offer further comment as an individual and volunteer attorney experienced in elder law issues, especially financial elder abuse matters.

Again I applaud the massive effort undertaken to reorganize existing CID law, in a way that is more user friendly, **so long as it does not erode any consumer protections provided therein**. I want to reiterate it is the "simplification" or "clarification" in some areas that is of serious concern to me.

1. Page 3 - I agree with the assessment that the use of **parentheticals** could lead to inadvertent changes in the meaning of the law. Thus I am opposed to their use.

2. Page 4 - I agree with the assessment that to **convert the first part of the first sentence of each section into an unnumbered paragraph,** designating the remainder a new subdivision, would complicate cross referencing. It could lead to a substantive change in interpretation, with the numbered sections seen as secondary to the unnumbered paragraph. Therefore I am against any such conversion.

3. Page 5 - I am satisfied with the position that **annotations** to the current Davis Stirling Act in the proposed simplified/clarified version would be available from a publisher intending to provide a good product. Since there is no precedent for including them in the law itself, I withdraw the suggestion, assuming an annotated version will be available.

4. Page 5 - I agree with the **proposed reorganization** of Davis-Stirling Act as envisioned by the CLRC as an excellent methodology. I would not tinker with it significantly to separate matters based on whether they are "foundational" versus "operational".

5. Page 8 - **Individual Delivery Opt-In** - I agree with the suggested change to proposed Section 4045(b) "*…if a member requests to receive general notices by individual delivery, all general notices to that member shall be delivered pursuant to Section 4040…*" One request for individual delivery would be sufficient to cover all future general delivery notices.

6. Page 8 - **Personal Delivery** - I strongly urge the DELETION of the "*personal delivery"* option because:

- Under existing law, some types of notices must be delivered by mail - permitting personal delivery of such a notice would remove an important consumer protection, e.g. notice of an assessment increase under Sect 1366(d).
- Personal delivery creates the problem of no proof of delivery.
- If used casually, personal delivery could produce actual errors/misunderstandings, e.g. a document could be left in a location where it could blow away in the wind.
- Eliminating personal delivery would create procedural regularity, reducing misunderstandings/mistakes.

7. Page 10 - **Accessibility of Posted Notice -** I agree with the changes recommended for Section 4045(a)(3):

- Providing posting of notice in a location that is accessible to all members, with the added clarifying language: "*A location that is inaccessible to a member due to the member's physical disability would not satisfy that requirement*."
- The DELETION of *Internet posting* is imperative because it is not an adequate form of delivery of general notices. Too many seniors and low income folks do not own a computer.

8. Page 11 - **Font Size** - I firmly support new proposed Section 4060, requiring minimum "*12 point font or larger"* for ALL member notices, a basic consumer protection for the sight impaired. It is a perfect solution, that goes even further than the current Davis-Stirling Act.

9. Page 12 - **Delivery of Notice to the Association** - I am extremely supportive of the suggested revision of proposed Section 4035 to include *certified mail* as an *acceptable method of delivery to the association*, with the addition that *proof of mailing is deemed proof of delivery*. This will remove the current bad faith practice of some management companies in refusing to accept certified mail. The result of such questionable procedures has been: to deem timely payments of assessments as late, sending artificially created "delinquent accounts" to collections; the denial of access to dispute resolution, among other dire consequences. This small and logical change will have a profound effect on debt collection practices, and represent much needed consumer protection.

10. Page 16 - **Inconsistent terminology** - It would be very helpful to the lay person if the problem of inconsistent terminology in the Davis Stirling Act were rectified.

11. Page 17 - **Amendment of the Declaration** - I strongly agree with the suggested

approach to add subsection (e) to Section 5115 as follows: "*In an election to approve an amendment of the governing documents, the ballot shall include the text of the proposed amendment*." To have this protection encompass all governing documents is an excellent additional consumer safeguard.

12. Page 18 - **Emergency meetings** - I agree with the proposed addition of separating out the emergency meeting subsection and making it its own section, for easier search accessibility. It makes no substantive change, yet makes it much easier to hunt for the term "*emergency meet*ing".

13. Page 23 - **Exemption of Board Hearings from Subsequent Meet and Confer Procedure** -
The heart of my concern about Sections 5665 and 5855, as was surmised, is the fairness and reasonable of the board hearings on member discipline and partial payment plans. These two proceedings need to be fair, reasonable, and provide the affected member with a reasonable opportunity to be heard. In the case of IDR, a fair and reasonable STANDARD is very carefully laid out by statute (Section 1363.830). Those exact same standards should apply to member discipline and partial payment hearings.

To merely add a subsection (c) to Section 4925 that states "*The board of directors shall follow fair and reasonable procedures when making any decision*" does not lay out precisely what "*fair and reasonable*" means. "*Fair and reasonable*" should denote the exact same thing as the protections listed for IDR under the current Davis-Stirling Act Section 1363.830 - "*A fair, reasonable, and expeditious dispute resolution procedure shall at a minimum satisfy all of the following requirements -*"

- *The procedure may be invoked by either party, and shall be in writing.*
- *The procedure shall provide for prompt deadlines.*
- *If the procedure is invoked by a member, the association shall participate.*
- *If the procedure is invoked by the association, the member may elect not to attend.*
- *Right of appeal.*
- *Resolution binds the association and is judicially enforceable.*
- *Procedure provides means by which member/association may explain their positions.*
- *A member may not be charged a fee to participate.*

14. Page 29 - **Report Summaries** -
A *financial review should be distributed in unvarnished form, and not as a summary*.

I also strongly support the revision of proposed Section 5320, that retains the important consumer protection "*Instructions on how to request a complete copy of the report at no cost to the member shall be printed in bold face on the first page of the summary*."

15. Page 30 - **Report Delivery Deadlines** -
Section 5320 (a) does not give any specific deadline for a prepared report to be delivered. It has been suggested to insert the word "*promptly*", but I would contend that is far too vague a term. One man's promptly is another man's laggardly. I see no reason why an

association cannot deliver a copy of any required report within 30 days of its preparation, or some such specific deadline.

Proposed Section 5615 allows the association to use individual notice to alert homeowners to an increase in regular or special assessments. Individual notice as currently proposed can actually include personal notice, as in leaving notice on someone's porch for the wind to blow away. Yet current Section 1365(d) specifically provides that notice shall be "***by first class mail***" of any increase in regular or special assessments. (If personal notice is eliminated from individual notice as suggested in item 6 above, then I believe the problem with Section 5615 would be resolved.)

16. Page 31 - **Assessment Collection** -
CLRC Memorandum 2009-44 memo states "…it might be the case that some foreclosures are being initiated prior to the statutory limit, but are not completed until after the statutory limitation period, with the intent being to time completion to occur as soon after the statutory limitation period as possible. It is not clear that this would be improper or contrary to legislative intent."

According to an article entitled "*Homeowners Charge That Foreclosure Industry Torpedoes SB 137*", Sept 3, 2006, by AHRC News Services, the Legislative Council's prelude to the chaptered bill said "*The bill would provide that when an association of a CID seeks to collect delinquent assessments of less than $1800, not including accelerated assessments and specified late charges and fees, the association must either file a civil action in small claims court or record a lien* ***upon which it would be prohibited from foreclosing UNTIL the amount equals or exceeds $1,800 or the assessments are more than 12 months delinquent***." But homeowners charge… SB 137 had a loophole that does not prevent foreclosures for amounts less than $1,800. (**http://www.ahrc.se/new/index.php/src/news/sub/article/action/ShowMedia/id/3081**)

According to a Consumers Union fact sheet "*SB 137 establishes two thresholds, only one of which must be met, for an association to use foreclosure as a collection tool: either the assessment debt is $1800 or more, exclusive of assessment charges or the debt is more than 12 months delinquent… When a homeowner association seeks to collect delinquent assessments* ***that do not meet either of these thresholds for INITIATING foreclosure****, the association may either file a civil action in small claims court or record a lien upon which* ***it is prohibited from foreclosing until the amount equals or exceeds $1800 or the assessments are more than 12 months delinquent***."
(**http://www.consumersunion.org/pub/officesf/002792.html**)

SB 137 Senate Bill - Bill Analysis from the Senate Rules Committee states **"*This bill prohibits associations from USING A FORECLOSURE ACTION to collect delinquent assessments of less than $1,800 or any assessments that are more than 12 months delinquent.…In cases where foreclosure is permitted under the bill, i.e. where the assessments owed are $1,800 or higher, or any assessments that [are] more than 12 months delinquent, this bill requires a majority of the board to vote for foreclosure BEFORE THE ASSOCIATION COULD USE THAT FORM OF RELIEF.*"**

(http://www.leginfo.ca.gov/pub/bill/sen/sb_0101-0150/sb_137_cfa_20050907_214817_sen_floor.htmlYtext/html)

With all due respect, it could not be clearer that the legislative intent was that an action for foreclosure cannot BEGIN until the thresholds are met, and not before. Some debt collectors are trying to argue otherwise, for their own personal gain, but to the detriment of the millions of homeowners in this state.

Respectfully,
Elaine Roberts Musser
Member Board of Directors, CA Center for Homeowners Association Law (CCHAL)
Vice Chair, Yolo County Commission on Aging & Adult Services
Chair, Davis Senior Citizens Commission
Volunteer Attorney, Legal Clinic of Yolo County
Attorney Member, Yolo County Multi-Disciplinary Team

cc file