

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Common Interest Development
Ombudsperson

March 2005

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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March 17, 2005

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

The proposed law would establish an Ombudsperson to assist common interest development homeowners, on a pilot project basis. The Ombudsperson would provide three general services:

- Education of homeowners and association officers, through an Internet Website, toll-free telephone call center, and training classes and materials.
- Dispute resolution, through informal conference or traditional mediation.
- Empirical data collection. This will provide policy makers with reliable information about the nature and incidence of problems occurring within California's common interest developments.

These services would be funded through an annual fee of \$5 per CID unit. Similar programs exist in other jurisdictions, most notably Florida and Nevada.

The programs in Florida and Nevada also provide for administrative enforcement of CID law. The proposed law

does not. Instead, the Ombudsperson would be required to make a recommendation to the Legislature on whether it should be authorized to enforce CID law.

This recommendation was prepared pursuant to Resolution Chapter 192 of the Statutes of 2003.

Respectfully submitted,

Edmund L. Regalia
Chairperson

COMMON INTEREST DEVELOPMENT OMBUDSPERSON

A common interest development (“CID”) is a housing development characterized by (1) separate ownership of dwelling space (or a right of exclusive occupancy) coupled with an undivided interest in common property, (2) covenants, conditions, and restrictions that limit use of both the common area and separate ownership interests, and (3) management of common property and enforcement of restrictions by a community association. CIDs include condominiums, community apartment projects, housing cooperatives, and planned unit developments.¹

There are over 36,000 CIDs in California, ranging in size from three to 27,000 units each.² These developments comprise over three million total housing units — approximately one quarter of the state’s housing stock.³ CIDs accounted for 60% of all residential construction starts during the 1990s. The planned unit development alone represented more than 40% of single family home sales during that period.⁴

CIDs are governed by volunteer directors, elected from among the unit owners. Faced with the complexity of CID law, many of these volunteers make mistakes and violate procedures for conducting hearings, adopting budgets, establishing reserves, enforcing rules and restrictions, and collecting assessments. Many CID homeowners do not understand their rights under CID law and under their

1. See Civ. Code § 1351.

2. Gordon, *Planned Developments in California: Private Communities and Public Life* 21-22 (Cal. Pub. Policy Inst., 2004).

3. *Id.* at 20-21.

4. *Id.* at 3.

association's governing documents. These sorts of mistakes and misunderstandings inevitably lead to conflicts within the development, either between the association and an individual homeowner, or between homeowners.

A homeowner who believes that a community association is violating the law or has otherwise breached its duties has no effective remedy other than civil litigation.⁵ Litigation is not an ideal remedy for many common interest development disputes. Homeowners who sue their associations are suing their neighbors and themselves. The adversarial nature of litigation creates animosity that can degrade the quality of life within the community and make future disputes more likely to arise. Litigation imposes costs on the community as a whole — costs that must be paid by all members through increased assessments.

Many homeowners cannot afford to bring a lawsuit, especially in cases where money damages are not at issue.⁶ A person who cannot afford to sue is effectively denied the benefit of laws designed for that person's protection. The absence of an affordable remedy limits accountability for wrongdoing, creating an atmosphere in which some may choose to cut corners or abuse their power.

Empirical data is not available concerning the incidence of such problems in California. However, there are a number of sources of anecdotal data that suggest that there is a

5. The Attorney General has authority to intervene in cases involving the alleged violation of certain corporate governance statutes. See Corp. Code § 8216. However, the Attorney General's involvement is limited to sending a "notice of complaint" letter. If that does not resolve the problem, the complainant is advised to obtain private counsel. See <www.caag.state.ca.us/consumers/complaints/npmb.htm> (last visited Apr. 6, 2005).

6. Many CID disputes involve laws regulating community association governance (e.g., procedures for elections, meetings, or access to records). In such a case, the relief sought will typically be an injunction or declaratory relief.

significant unsatisfied demand for assistance with CID related problems. These sources include a steady flow of CID homeowner complaints and requests for assistance that are received by the Commission's staff, other state agencies, legislative committee staff, and individual Legislators; testimony from trade groups such as the Community Associations Institute and the Executive Council of Homeowners; and the fact that many CID related bills are introduced each year to address perceived problems.⁷

There is empirical data from other jurisdictions that provide government assistance to CIDs.⁸ For example, in Hawaii, the Real Estate Commission provides educational assistance to condominium homeowners. In 2004 Hawaii responded to approximately 22,000 requests for assistance. Hawaii has approximately 135,000 condominium units.⁹ In California, with its approximately three million CID dwelling units, simple extrapolation suggests that a similar educational

7. E.g., CID-related legislation introduced in 2004 included AB 1836 (Harman) (alternative dispute resolution), AB 2376 (Bates) (architectural review), AB 2598 (Steinberg) (assessment collection), AB 2718 (Laird) (reserve funding), SB 1682 (Battin) (election procedures); legislation introduced in 2003 included AB 104 (Lowenthal) (records access), AB 115 (Torlakson) (disclosures), AB 210 (Nation) (smoke exposure), AB 512 (Bates) (rulemaking), AB 1086 (Laird) (transfer fees), AB 1423 (Dutra) (property manager certification), AB 1525 (Longville & Steinberg) (noncommercial signs); legislation introduced in 2002 included AB 555 (Dutra) (property manager certification), AB 643 (Lowenthal) (CID registration), AB 2247 (Salinas) (real estate signs), AB 2289 (Kehoe) (assessment collection), AB 2417 (La Suer) (open meeting requirements), AB 2546 (Nation) (marketability), AB 2776 (Simitian) (disclosures), SB 382 (Haynes) (senior housing), SB 1534 (Bowen) (solar energy systems), SB 1763 (Ortiz) (insurance), SB 2032 (Monteith) (display of flag).

8. See "Experience in Other Jurisdictions" *infra*.

9. 2004 Haw. Real Estate Comm'n Ann. Rep. 33, 36-37.

program would receive approximately 500,000 homeowner requests each year.¹⁰

PROPOSED LAW

Common Interest Development Ombudsperson

A program of state assistance to common interest developments would be helpful in addressing the problems described above. The state could provide training for those charged with difficult responsibilities, provide information and advice to those who do not understand their legal rights and responsibilities, and assist in informally resolving disputes.

Similar assistance programs exist in other jurisdictions. Florida and Nevada have comprehensive programs that include a range of education, mediation, and law enforcement functions.¹¹

The proposed law would create the Common Interest Development Ombudsperson within the Department of Consumer Affairs (“Ombudsperson”). Ombudsperson services would be funded entirely from fees charged to CID homeowners.¹² No general revenue funds would be used. The Ombudsperson would have the following general responsibilities, which are discussed more fully below: (1) education, (2) dispute resolution, and (3) data collection.

10. There are too many potential variations between states to rely on simple population-based extrapolation as a definitive indicator of consumer demand. However, experience in other jurisdictions makes clear that the level of CID homeowners’ need for assistance is significant.

11. See “Experience in Other Jurisdictions” *infra*.

12. See “Funding Issues” *infra*.

Education

The Ombudsperson would maintain an informational website. The website could be used to provide direct access to governing law, distribute plain language explanations of difficult concepts, and answer frequently asked questions. To inform association directors and homeowners of new legal requirements or changes to existing requirements, the website would also provide an annual summary of changes in CID law.

In addition, the Ombudsperson would maintain a toll-free telephone number that could be used to request information or advice.

An authoritative, neutral, and readily available source of information, advice, and training can help association directors and homeowners to understand their legal rights and responsibilities. It would also help to defuse disputes that are based on misunderstanding or mistrust.

Dispute Resolution

On request, the Ombudsperson would assist in trying to resolve a dispute informally. The proposed law does not define what methods would be used. It is expected that the Ombudsperson would adopt procedures based on other successful dispute resolution programs within the Department of Consumer Affairs.

Empirical Data

An important benefit of the proposed law would be the ability of the Ombudsperson to collect a significant body of empirical data on the nature and incidence of CID disputes in California. This would provide policy makers with reliable information about the nature and incidence of problems occurring within California CIDs.

The Ombudsperson would be required to report its findings to the Legislature annually.¹³

FUNDING

Funding Levels

Under current fiscal conditions, it would not be feasible to fund the proposed pilot program from the state's general fund.

Instead, the proposed law would impose a fee on community associations to fund the Ombudsperson's operations.¹⁴ The fee would initially be set at \$5 per unit per year. The amount of the fee would be evaluated periodically and adjusted up or down to reflect the Ombudsperson's actual funding needs. However, there would be a statutory cap on any increase in the fee amount. It could never exceed \$10 per unit per year.

Funding Procedure

The Ombudsperson would be funded through a fee paid by a homeowner association when registering with the Secretary of State every two years.¹⁵ An association would pass the fee along to its members through an increase in annual assessments.

A per-unit fee would spread the cost of agency operations evenly among all CID homeowners. This might seem unfair to a homeowner in a well-run association, where there may be little need for the Ombudsperson's services. However, even a well-run association cannot be sure that it will not face problems in the future. The availability of the

13. See proposed Civ. Code § 1380.120.

14. See proposed Civ. Code § 1380.130.

15. See Civ. Code § 1363.6.

Ombudsperson's mediation service provides an inexpensive alternative to litigation if problems do arise.

A per-unit fee has been used successfully in other jurisdictions that provide education and dispute resolution services to common interest communities.¹⁶

Filing Fee

The Ombudsperson would also be authorized to charge a filing fee of up to \$25 for formal mediation of a dispute. This would help to defray the cost of mediation services.

PILOT PROJECT

The proposed law would be subject to a five year sunset provision. At the end of that period, the pilot project would be subject to review by the Joint Committee on Boards, Commissions, and Consumer Protection.¹⁷ In connection with that review, the Ombudsperson would provide the Joint Committee with a detailed report analyzing its activities, funding, and expenditures.¹⁸ The Joint Committee would then hold a public hearing to receive testimony regarding the continued need for the Ombudsperson program.

EXPERIENCE IN OTHER JURISDICTIONS

Florida and Nevada provide a broad range of services to CID associations and homeowners. Other jurisdictions provide narrower assistance. Experience in these jurisdictions demonstrates that there is significant public demand for such services. It also demonstrates that the services can be funded

16. See "Experience in Other Jurisdictions" *infra*.

17. Bus. & Prof. Code § 473.4 (sunset review).

18. Bus. & Prof. Code § 473.2.

with a small annual fee paid by homeowners. A brief survey of CID programs in other jurisdictions is provided below.

Florida

In Florida, the state provides three general types of assistance: education, informal dispute resolution, and law enforcement. These services are funded by an annual fee of \$4 per unit.

Education

The Division of Florida Land Sales, Condominiums and Mobile Homes (“Division”) provides a range of educational resources, including training classes, a toll-free telephone number, and an Internet website. The website includes information on condominium law and provides answers to over 100 frequently asked questions.¹⁹

Dispute Resolution

Before a lawsuit can be filed in a case involving any of the following issues, the dispute must be submitted to mandatory nonbinding arbitration or mediation:

(a) The authority of the board of directors, under this chapter or association document to:

1. Require any owner to take any action, or not to take any action, involving that owner’s unit or the appurtenances thereto.

2. Alter or add to a common area or element.

(b) The failure of a governing body, when required by this chapter or an association document, to:

1. Properly conduct elections.

2. Give adequate notice of meetings or other actions.

3. Properly conduct meetings.

19. See <www.myflorida.com/dbpr/lsc/condominiums/information/faq.shtml> (last visited Apr. 6, 2005).

4. Allow inspection of books and records.²⁰

This is similar to California law requiring an offer of alternative dispute resolution before filing a lawsuit to enforce an association's governing documents or common interest development law.²¹

In addition, the Division now includes the Office of the Condominium Ombudsman.²² The Ombudsman is authorized to provide a range of informal dispute resolution services, including the monitoring of association elections.

Law Enforcement

Any person may file a complaint with the Division alleging a violation of condominium statutory law. The Division will review the complaint to determine whether it states facts establishing a violation within the Division's enforcement jurisdiction. The Division does not enforce governing documents.²³

If the Division finds a violation of statutory law, it can attempt to resolve the complaint informally, through a warning, education, or a negotiated agreement. If that is not effective, the Division can issue a corrective order, requiring that the offender cease and desist and take affirmative action to remedy the violation. A corrective order can include a civil penalty of as much as \$5,000 per violation. A penalty can be imposed against an association director for a knowing and willful violation.²⁴

20. See Fla. Stat. Ann. § 718.1255.

21. See Civ. Code § 1369.520.

22. See Fla. Stat. Ann. §§ 718.5011-718.5012.

23. See Fla. Stat. Ann. §§ 718.501.

24. *Id.*

A Division enforcement decision is subject to administrative and judicial review.²⁵

Nevada

Nevada provides education, dispute resolution, and law enforcement assistance to common interest communities. Responsibility is divided between two entities: the Ombudsman for Owners in Common Interest Communities and the Commission for Common Interest Communities.

Ombudsman

The Ombudsman has the following responsibilities:²⁶

- (1) To assist in processing claims submitted for mediation or arbitration pursuant to Nevada's mandatory ADR statute (as in Florida, mediation or arbitration is required before certain specified types of CID lawsuits can be filed).
- (2) To assist owners to understand their rights and responsibilities, including publishing materials relating to rights and responsibilities of homeowners.
- (3) To assist board members to carry out their duties.
- (4) To investigate disputes involving community association law or the governing documents of an association and assist in resolving such disputes.
- (5) To compile a registry of CID associations.

The Ombudsman's office is funded by a fee of about \$3 per unit per year.²⁷

25. See Fla. Stat. Ann. §§ 120.569 (administrative hearing); 120.68 (judicial review).

26. See Nev. Rev. Stat. Ann. § 116.625.

27. The fee is expected to increase to \$4 per unit per year to reflect the actual expenses of the services provided. Telephone interview with Gail J. Anderson, Administrator of the Nevada Real Estate Division (Feb. 24, 2005).

The Nevada program receives approximately 300 formal requests for intervention each year. These requests are handled first by the Ombudsman. If they involve an apparent violation of law they are referred for further investigation and possible adjudication.

There is no data on the number of informal requests for assistance received by the Ombudsman.²⁸

Commission for Common Interest Communities

The Commission for Common Interest Communities (“CCIC”) is charged with collecting specified types of information about common interest communities, developing and promoting various educational programs, developing standards for mandatory mediation and arbitration of CID disputes, and developing a program to certify and discipline community managers.²⁹

In addition, the CCIC has authority to adjudicate an alleged violation of the common interest community statutes and regulations.³⁰ It may not adjudicate disputes involving an association’s governing documents.

A person who believes that there has been a violation of law must first provide notice to the alleged violator. The notice requirements are designed to provide an opportunity to correct the problem informally. If the problem is not corrected, the aggrieved person may file an affidavit with the Real Estate Division. The affidavit is referred to the Ombudsman who will attempt to resolve the problem by informal means. If the problem cannot be resolved with the Ombudsman’s assistance, the Real Estate Division conducts an investigation to determine whether there is good cause to proceed with a hearing. If there is good cause to proceed, the

28. *Id.*

29. See Nev. Rev. Stat. §§ 116.745-116.750.

30. *Id.*

complaint is heard by the CCIC or by a hearing panel appointed by the CCIC. The CCIC has authority to issue subpoenas, which are enforceable by court order.

The CCIC has a number of remedies at its disposal. It may issue an order requiring that the violator cease and desist from unlawful conduct or take affirmative action to correct conditions resulting from a violation. It can impose an administrative fine of up to \$1,000 per violation. The CCIC may also order an audit of an association or require that a board hire a certified community manager. A board member or other officer who has knowingly or willfully violated the law can be ordered removed from office.

In general, a board member or other officer is not personally liable for a fine. However, if a board member or other officer is found to have knowingly and willfully violated the law, that officer may be held personally liable.

The CCIC is composed of five gubernatorial appointees, with the following qualifications: one homeowner who has served on an association board, one developer, one member who holds a permit or certificate (i.e., a property manager), one certified public accountant, and one attorney.

Maryland

Montgomery County, Maryland, has by ordinance adopted a complete scheme for nonjudicial resolution of CID disputes. The scheme was established in 1991, following a task force study that identified a number of major concerns and issues, including inequality of bargaining power and the need to provide for due process in fundamental association activities. The law creates a county Commission on Common Interest Communities that, among other activities, seeks to reduce the number and divisiveness of disputes, provide and encourage

informal resolution of disputes, or (if necessary) conduct formal hearings.³¹

The Commission is composed of 15 voting members appointed by the County Executive, consisting of six CID residents, six CID professionals, and three real estate professionals. It also has non-voting designees of heads of major county departments (including planning, environment, public works, transportation, housing, and community affairs).

A dispute may not be filed with the Commission until the parties have made a good faith attempt to exhaust all procedures provided in the association documents, and at least 60 days have elapsed since those procedures were initiated.

The Commission will provide mediation services to the parties on request. If mediation fails, or is rejected by a party, the dispute goes to a hearing. The hearing is conducted pursuant to standard county administrative hearing procedures. The Commission may compel production of books and records and attendance of witnesses, and may invoke the court's contempt power. The hearing panel may resolve the dispute, award damages, and award costs and attorney's fees in appropriate situations. Its decision is binding on the parties.

The hearing panel's decision is subject to judicial review on three grounds only: (1) the decision does not comply with law, (2) it is not supported by substantial evidence, or (3) it is arbitrary and capricious. The court may award costs and fees. A failure to comply with the decision is a civil offense, and the decision is enforceable by the full enforcement mechanisms of the county, including the County Attorney.

31. See Chapter 10B of the Montgomery County Code.

In recent years, an average of 40 to 64 cases have been filed each year (about one dispute for every 2,200 registered units). About half of all complaints filed are resolved without a formal hearing. An average of about three cases per year are appealed to the courts.

The Montgomery County program is funded by a \$2.25 annual per-unit fee. There is also a \$50 fee to file a dispute.

Hawaii

In Hawaii, the Real Estate Commission maintains a list of local mediation centers that are under contract to the state to mediate condominium governance disputes. The state subsidizes the mediation of specified types of disputes. The parties to a subsidized mediation pay only a filing fee.

The Real Estate Commission also offers information and advice to condominium homeowners and their boards. It publishes information on the Internet and in print, and responds to specific inquiries. Hawaii has 135,000 condominium units.³² In 2004, the Real Estate Commission answered nearly 22,000 requests for information or advice.³³ Hawaii subsidized the mediation of 26 disputes.³⁴ If the Hawaii data is extrapolated to California based on the difference in the number of units, it would predict an annual California workload of 488,000 requests for assistance and 578 mediations.

The Real Estate Commission's educational function and its mediation subsidy are funded by a \$4 per unit biennial fee on registered condominium associations.

The Real Estate Commission also has authority to investigate violations of specific statutes under its

32. 2004 Haw. Real Estate Comm'n Ann. Rep. 33.

33. *Id.* at 36.

34. *Id.* at 37.

jurisdiction. If it finds a violation, it can issue a cease and desist order or seek a court injunction. A violation may also be referred for prosecution as a crime.³⁵ For the most part this authority is limited to laws governing the development and sale of condominiums. However, one of the provisions that can be enforced administratively is a requirement that members have access to association records.³⁶

Virginia

Virginia maintains a Common Interest Community Association Liaison in its Department of Professional and Occupational Regulation. The Liaison has the following duties:

[Serve] as an information resource on issues relating to the governance, administration and operation of common interest communities, including the laws and regulations relating thereto. Such information may include nonbinding interpretations of laws or regulations governing common interest communities and referrals to public and private agencies offering alternative dispute resolution services, with a goal of reducing and resolving conflicts among associations and their members.³⁷

The liaison maintains an informational website³⁸ and funds various educational events and publications. The liaison maintains a telephone number for homeowner inquiries, receiving about 1,200 inquiries per year. The liaison provides information and advice, but does not intervene in disputes.

Liaison operations are funded by an annual fee of \$25 per association.

35. See Haw. Rev. Stat. §§ 514A-46 to 514A-49.

36. See Haw. Rev. Stat. § 514A-83.5.

37. See Va. Code Ann. § 55-530.

38. See <www.dpor.virginia.gov/dporweb/cic_lias.cfm>.

Australia

Australia has state-run dispute resolution programs for “strata schemes” (including condominiums) in three states: New South Wales, Queensland, and Western Australia.

New South Wales has the most fully-developed program. The agency (Strata Schemes & Mediation Services) includes a commissioner, full-time mediators, adjudicators, and an appeals board. The agency provides governmental oversight and public information, as well as dispute resolution services, and employs customer service officers who provide free information to the public on the governing laws. The agency is funded by the state, but a person submitting a dispute for resolution must pay a filing fee of \$58 AUS (approximately \$45 US).

A dispute is first submitted to mediation with a government-provided mediator. If mediation fails or is deemed inappropriate, the case proceeds to adjudication. There is a written adjudication system, which is based on the documentary record. A decision reached through written adjudication may be appealed to an administrative “tribunal” which holds a formal hearing to decide the matter. Cases may also be appealed to the courts, though that rarely occurs.

In 2003, there were 918 applications submitted for adjudication in New South Wales (out of approximately 750,000 “strata scheme” housing units).

The programs in Queensland and Western Australia are less fully developed, but include some combination of mediation or conciliation, paper-based adjudication, and appeal to a specialist tribunal.

CONCLUSION

A Common Interest Development Ombudsperson would provide a number of important services:

- Authoritative advice and education would help an association director or homeowner to understand the requirements of CID law. This would help to avoid problems that result from ignorance or misunderstanding. This is especially important because CID law is complex and most homeowners are not attorneys.
- Informal dispute resolution would help to defuse problems that are based on miscommunication or mistrust. The involvement of a neutral third party can often serve as a catalyst to bring about a mutually acceptable solution to what might otherwise be an intractable problem.
- A statewide advice and dispute resolution service could gather reliable information about the frequency and nature of problems within CIDs. This would provide an empirical basis for determining the need for future reforms of CID law.

The proposed law would create a pilot project to provide all of the services described above, at a cost to each CID home of \$5 per year.

Experience in other jurisdictions demonstrates that there is a significant demand for state assistance of the type proposed and that it is feasible to provide such assistance. The Commission recommends that California provide similar assistance to its CID homeowners, on a pilot project basis.

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PROPOSED LEGISLATION

Civ. Code §§ 1380.010-1380.300 (added). Common Interest Development Ombudsperson Pilot Project

SEC. ____ Chapter 11 (commencing with Section 1380.010) is added to Title 6 of Part 4 of Division 2 of the Civil Code, to read:

CHAPTER 11. COMMON INTEREST DEVELOPMENT OMBUDSPERSON PILOT PROJECT

Article 1. Definitions

§ 1380.010. Application of definitions

1380.010. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this chapter.

Comment. Section 1380.010 is new.

§ 1380.020. “Owner” defined

1380.020. “Owner” means the owner of a separate interest.

Comment. Section 1380.020 is new. See also Section 1351(*l*) (“separate interest” defined).

§ 1380.030. “Person” defined

1380.030. “Person” includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.

Comment. Section 1380.030 defines “person” broadly to include various forms of legal entity. *Cf.* Evid. Code § 175; Fam. Code § 105.

Article 2. Administration

§ 1380.100. Legislative findings and declarations

1380.100. The Legislature finds and declares all of the following:

(a) There are more than 36,000 residential common interest developments in California, comprising more than 3,000,000 dwellings. Common interest developments comprise approximately one quarter of the state's housing stock.

(b) Managing a common interest development is a complex responsibility. Community associations are run by volunteer directors who may have little or no prior experience in managing real property, operating a nonprofit association or corporation, complying with the law governing common interest developments, and interpreting and enforcing restrictions and rules imposed by the governing documents of the common interest development. Homeowners may not fully understand their rights and obligations under the law and the governing documents. Mistakes and misunderstandings are inevitable and may lead to serious, costly, and divisive problems. The Common Interest Development Ombudsperson seeks to educate community association officers and homeowners as to their legal rights and obligations. Effective education can prevent or reduce the severity of problems within a common interest development.

(c) The principal remedy for a violation of common interest development law is private litigation. Litigation is not an ideal remedy for many common interest development disputes, where the disputants are neighbors who must maintain ongoing relationships. The adversarial nature of litigation can disrupt these relationships, creating animosity that degrades the quality of life within the community and makes future disputes more likely to arise. Litigation imposes costs on a common interest development community as a

whole — costs that must be paid by all members through increased assessments. Many homeowners cannot afford to bring a lawsuit and are effectively denied the benefit of laws designed for their protection. The Common Interest Development Ombudsperson provides a neutral, nonjudicial forum for resolution of common interest development disputes. Many disputes can be resolved inexpensively, informally, and amicably through Ombudsperson-facilitated mediation.

(d) Anecdotal accounts of abuses within common interest developments create continuing public demand for reform of common interest development law. This results in frequent changes to the law, making it more difficult to understand and apply and imposing significant transitional costs on common interest developments statewide. By collecting empirical data on the nature and incidence of problems within common interest developments, the Common Interest Development Ombudsperson provides a sound basis for prioritizing reform efforts, thereby increasing the stability of common interest development law.

(e) The costs of the Common Interest Development Ombudsperson Pilot Project shall be borne entirely by common interest development homeowners, through imposition of a biennial fee.

Comment. Section 1380.100 is new. See also Sections 1351(a) (“association” defined), 1351(c) (“common interest development” defined), 1351(j) (“governing documents” defined).

§ 1380.110. Common Interest Development Ombudsperson

1380.110. (a) There is in the Department of Consumer Affairs the Office of the Common Interest Development Ombudsperson, under the supervision and control of the director of the Department of Consumer Affairs.

(b) The director of the Department of Consumer Affairs shall employ a Common Interest Development

Ombudsperson and other officers and employees as necessary to discharge the requirements of this chapter. The Common Interest Development Ombudsperson shall have the powers delegated by the director.

(c) The Ombudsperson shall adopt rules governing practices and procedures under this chapter. A rule adopted under this subdivision is subject to the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(d) Information and advice provided by the Ombudsperson has no binding legal effect and is not subject to the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(e) There shall be no liability on the part of, and no cause of action of any nature shall arise against, the State of California or any of its employees, agents, or representatives for providing or failing to provide information or advice pursuant to this chapter.

(f) The Ombudsperson may convene an advisory committee to make recommendations on matters within the Ombudsperson's jurisdiction. 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.

Comment. Section 1380.110 is new. Subdivision (c) authorizes the Ombudsperson to adopt rules governing its practices and procedures. Such rules are subject to the rulemaking requirements of the Administrative Procedure Act.

Subdivision (d) provides that information or advice provided by the Ombudsperson has no binding effect and is not a regulation under the rulemaking provisions of the Administrative Procedure Act.

Subdivision (e) immunizes the Ombudsperson from liability for any information or advice that the Ombudsperson provides or fails to provide. Provisions immunizing state agencies from liability for information disclosure are common. See, e.g., Bus. & Prof. Code § 10176.1 (Department of Real Estate); Health & Safety Code § 1799.105 (poison control center).

See also Bus. & Prof. Code §§ 10 (delegation of powers or duties), 310 (powers and duties of director).

§ 1380.120. Annual report

1380.120. The Common Interest Development Ombudsperson shall report annually to the Legislature, no later than October 1 of each year. The report shall include all of the following information:

(a) Annual workload and performance data, including the number of requests for assistance received, the manner in which a request was or was not resolved, and the staff time required to resolve the inquiry. For each category of data, the Ombudsperson shall provide subtotals based on the type of question or dispute involved in the request.

(b) Analysis of the most common and serious types of disputes within common interest developments, along with any recommendations for statutory reform to reduce the frequency or severity of those disputes.

(c) On or before January 1, 2009, the Ombudsperson shall submit recommendations to the Legislature on the following topics:

(1) Whether the Ombudsperson should be authorized to enforce common interest development law.

(2) Whether the Ombudsperson should be authorized to oversee association elections.

(3) Whether the scope of application of Section 1380.230 should be narrowed or broadened.

Comment. Section 1380.120 is new. See also Section 1351(c) (“common interest development” defined).

§ 1380.130. Fee

1380.130. (a) On filing information with the Secretary of State every two years, pursuant to subdivision (a) of Section 1363.6, an association shall submit a Common Interest Development Ombudsperson Fee. This fee is in addition to the fee submitted pursuant to Section 1363.6. Failure to submit the Common Interest Development Ombudsperson Fee is deemed noncompliance with Section 1363.6.

(b) The Common Interest Development Ombudsperson Fee shall equal the number of separate interests within the association multiplied by the biennial fee amount. The initial biennial fee amount is ten dollars (\$10).

(c) An association is excused from paying the fee for a separate interest if another association has paid the fee for that separate interest. An association that is excused from paying the fee for a separate interest shall certify, on a form developed by the Secretary of State for that purpose, that another association has paid the fee for that separate interest. The Ombudsperson may adopt, by regulation, a rule governing which association is required to pay the fee for a separate interest that is part of more than one association.

(d) The Common Interest Development Ombudsperson shall increase or decrease the biennial fee amount every two years to provide only the revenue that it estimates will be necessary for its operation during the next two year period. The biennial fee amount shall not exceed twenty dollars (\$20).

(e) An assessment increase necessary to recover the fee imposed by this section shall not be included in any calculation for purposes of subdivision (b) of Section 1366.

Comment. Section 1380.130 is new. Subdivision (b) provides that the Common Interest Development Ombudsperson fee equals the number of separate interests within an association multiplied by the biennial fee amount. The biennial fee amount is initially set at \$10. Because the fee is paid every two years, the total annual cost to a homeowner would be \$5.

Subdivision (c) excuses an association from paying a fee for a separate interest, if the fee for that separate interest is paid by another association. This allows overlapping associations to avoid double payment, pursuant to whatever arrangement for paying fees suits their circumstances. For example, the separate interests in a 200 unit planned development and a 200 unit condominium project are also included in a master association. The master association pays the fee for all 400 units. The planned unit development association and condominium association are then excused from paying the fee for their separate interests, provided that they document payment by the master association. The Ombudsperson is authorized to adopt a regulation specifying which association is responsible for payment of the fee for a separate interest that is part of more than one association. This could provide a default rule applicable when associations cannot agree among themselves as to which association will pay the fee.

See also Sections 1351(a) (“association” defined), 1351(*l*) (“separate interest” defined).

§ 1380.140. Deposit and use of funds

1380.140. Common Interest Development Ombudsperson fee revenue received by the Secretary of State and fee revenue received by the Common Interest Development Ombudsperson shall be transferred to the State Treasurer and placed in the Fee Account of the Common Interest Development Ombudsperson Fund, which is hereby created. All funds in the Fee Account are continuously appropriated to the Ombudsperson, to be used exclusively for expenditures necessary for the proper administration of this chapter.

Comment. Section 1380.140 is new. See also Section 1380.130 (Common Interest Development Ombudsperson fee).

§ 1380.150. Application of chapter

1380.150. (a) This chapter is repealed by operation of law on January 1, 2011, unless a subsequent statute repealing this section or extending the date of repeal of this chapter is enacted and takes effect on or before January 1, 2011.

(b) The Common Interest Development Ombudsperson Pilot Project is subject to review by the Joint Committee on

Boards, Commissions, and Consumer Protection pursuant to Chapter 1 (commencing with Section 473) of Division 1.2 of the Business and Professions Code.

Comment. Section 1380.150 is new. See also Sections 1351(c) (“common interest development” defined), 1373 (this chapter not applicable to nonresidential CID).

Article 3. Education

§ 1380.200. Association training

1380.200. (a) The Common Interest Development Ombudsperson shall offer training materials and courses to common interest development directors, officers, and owners, in subjects relevant to the operation of a common interest development and the rights and duties of an association or owner.

(b) The Ombudsperson may charge a fee for training materials or courses, not to exceed their actual cost.

Comment. Section 1380.200 is new. See also Sections 1351(a) (“association” defined), 1351(c) (“common interest development” defined).

§ 1380.210. Toll free telephone number

1380.210. The Common Interest Development Ombudsperson shall maintain a toll free telephone number to provide information or assistance on matters relating to common interest developments.

Comment. Section 1380.210 is new.

§ 1380.220. Internet website

1380.220. (a) The Common Interest Development Ombudsperson shall maintain an Internet website, which shall provide all of the following information:

(1) The text of (i) this title, (ii) the Nonprofit Mutual Benefit Corporation Law, and (iii) any other statute or

regulation that the Ombudsperson determines would be relevant to the operation of a common interest development or the rights and duties of an association or owner.

(2) Information concerning nonjudicial resolution of disputes that may arise within a common interest development, including contacts for locally available dispute resolution programs organized pursuant to Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code.

(3) A description of the services provided by the Ombudsperson and information on how to contact the Ombudsperson for assistance.

(4) An analysis, prepared each year, of legislative changes to common interest development law.

(5) Any other information that the Ombudsperson determines would be useful to an association or owner.

(b) Information provided on the Ombudsperson's Internet website shall also be made available in printed form. The Ombudsperson may charge a fee for the purchase of printed material, not to exceed the actual cost of printing and delivery.

Comment. Section 1380.220 is new. See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development" defined).

§ 1380.230. Director and managing agent certification

1380.230. (a) Within 60 days of assuming office as an association director or providing services as a managing agent, an association director or managing agent shall certify that the director or managing agent has read each of the following:

(1) The declaration, articles of incorporation or association, and by-laws of the association that the director or managing agent serves.

(2) This title or, if the Common Interest Development Ombudsperson prepares a detailed summary of the requirements of this title, that summary.

(b) A director shall file the certification required by this section with the Ombudsperson. A managing agent shall file the certification required by this section with the association served by that managing agent.

(c) For the purposes of this section, “managing agent” means a person or entity that, for compensation or in expectation of compensation, exercises control over the assets of a common interest development. “Managing agent” does not include a regulated financial institution operating within the normal course of its regulated business practice.

Comment. Section 1380.230 is new. See also Section 1351(a) (“association” defined).

Article 4. Informal Dispute Resolution

§ 1380.300. Dispute resolution assistance

1380.300. (a) Any interested person may request that the office of the Common Interest Development Ombudsperson provide assistance in resolving a dispute involving the law governing common interest developments or the governing documents of a common interest development.

(b) On receipt of a request for assistance the Ombudsperson shall, within the limits of the available resources, confer with the interested parties and assist in efforts to resolve the dispute by mutual agreement of the parties. If a dispute cannot be resolved through informal conference, the Ombudsperson may offer to mediate the dispute.

(c) The Ombudsperson may, by regulation, adopt a fee for mediation services of not more than twenty-five dollars (\$25) per mediation.

(d) The Ombudsperson may contract with private parties to provide mediation services pursuant to this section.

(e) Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code applies to mediation initiated under this section.

Comment. Section 1380.300 is new. Subdivision (b) makes clear that a statement made during mediation is subject to existing mediation confidentiality rules.

See also Sections 1351(c) (“common interest development” defined), 1351(j) (“governing documents” defined), 1380.020 (“person” defined).

RELATED CHANGES

Civ. Code § 1363.7 (added). Information on Common Interest Development Ombudsperson

SEC. _____. Section 1363.7 is added to the Civil Code, to read:

1363.7. An association shall provide its members with annual written notice of the Internet website address and toll-free telephone number of the Common Interest Development Ombudsperson established pursuant to Chapter 11 (commencing with Section 1380.010).

Comment. Section 1363.7 is added to require that an association provide its members with contact information for the Common Interest Development Ombudsperson.

Civ. Code § 1369.510 (amended). Definitions

SEC. _____. Section 1369.510 of the Civil Code is amended to read:

1369.510. As used in this article:

(a) “Alternative dispute resolution” means mediation, arbitration, conciliation, or other nonjudicial procedure, including mediation pursuant to Section 1380.300, 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, 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 (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code).

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

Comment. Section 1369.510 is amended to make clear that “alternative dispute resolution” includes an attempt to mediate a dispute under procedures established by the Common Interest Development Ombudsperson.

Civ. Code § 1373 (amended). Nonresidential associations

SEC. _____. Section 1373 of the Civil Code is amended to read:

1373. (a) The following provisions do not apply to a common interest development that is limited to industrial or commercial uses by zoning or by a declaration of covenants, conditions, and restrictions that has been recorded in the official records of each county in which the common interest development is located:

(1) Section 1356.

(2) Article 4 (commencing with Section 1357.100) of Chapter 2 of Title 6 of Part 4 of Division 2.

(3) Subdivision (b) of Section 1363.

(4) Section 1365.

(5) Section 1365.5.

(6) Subdivision (b) of Section 1366.

(7) Section 1366.1.

(8) Section 1368.

(9) Section 1378.

(10) Chapter 11 (commencing with Section 1380.010).

(b) The Legislature finds that the provisions listed in subdivision (a) are appropriate to protect purchasers in residential common interest developments, however, the provisions may not be necessary to protect purchasers in commercial or industrial developments since the application of those provisions could result in unnecessary burdens and costs for these types of developments.

Comment. Section 1373 is amended to exempt a nonresidential CID from the jurisdiction of the Common Interest Development Bureau and to delete unnecessary language.
