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supporting principles of democratic government

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Brian Hebert
Assistant Executive Secretary
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

SENT BY EMAIL

Dear Mr. Hebert,

This email letter contains my comments on the proposed bill, AB 1921.

Respectfully submitted,

George K. Staropoli, Pres.
Citizens for Constitutional Local Government, Inc.

Cc: California Legislators

Summary of recommendations for Member Bill of Rights

1. Withdraw AB 1921 until Chapter 2, Member Bill of Rights, has been defined, and condition the approval of any proposed rewrite of the Davis-Stirling Act law on the approval of a homeowners' bill of rights.
2. Explicitly state that the California Constitution is the supreme law of the land and any conflict between the Constitution and the law of servitudes shall be decided in favor of the Constitution.
3. Include a statement that CIDs and all governing documents are subject to Article 1, Declaration of Rights, of the California Constitution, and in particular sections 1, 3(b)(4), 7, 17, 19 and 24.

4. Include a statement that the judicial scrutiny of any covenant, bylaw or rule be the same as would be required according the nature of the constitutional question, and not that blanket rule of reasonableness.
5. Include a statement that, as a matter of good public policy, the state has a compelling legitimate interest in the enforcement of violations by the governing bodies of CIDs, and shall provide appropriate penalties against such violators as both a punishment and a deterrent to future violations.
6. CLRC must include as part of its approach to the revision of Davis-Stirling the non-existent, to date, perspective of protecting the individual liberties of homeowners as it seeks to regulate CIDs in a fair and just manner.
7. CLRC has a duty to examine, under its mission to rewrite Davis-Stirling, the sources given herein, in addition others, to assist its members in understanding the constitutional requirements of due process and the equal protection of the law in order to protect individual homeowner liberties and freedoms.

Discussion of AB 1921

Protecting the individual rights and freedoms of homeonwers

In its July 1, 2005 memorandum (MM05-25) for Study H-885, "Statutory Clarification and Simplification of CID Law", CLRC proposed its first draft of changes to the CID laws. Under the "Scope of reorganization" section, only the Davis-Stirling Act and relevant parts of the Corporation Code and the Department Real Estate regulations would be considered (p.22). However, the proposed Chapter 2, "Rights and Duties of Members", was placed on the backburner for later consideration. It is important to note that this chapter also proposed, among other things, a "Bill of Rights" under the proposed Article 1. The memorandum concluded with a comment on Chapter 2, "That material [Chapter 2] should be substantively and politically more challenging."

In response to my letter of July 6, 2005 commenting on MM05-25, CLRC released its July 16, 2006 First Supplement (MM05-25s1) stating, in part (emphasis added),

> The issue raised by Mr. Staropoli — the extent to which a CID should be subject to the sorts of constraints that apply to a governmental entity — is an important one. However, it is beyond the scope of the current project. The Commission will consider the issue in a later stage of its general study of CID law. (p. 2).

It is also important to note that Chapter 2, now renamed, "Member Bill of Rights [Reserved]", was included in the proposed "reform" legislation of AB 1921, but as an empty placeholder without any substance. I am astonished by this action by CLRC in proposing that affects the governance of CIDs across California, that regulates and controls the property rights, privileges, freedoms and liberties of its citizens living in CIDs as a separate and distinct body of law. Under the proposed AB 1921 legislation, private governments are permitted to operate outside the restraints and prohibitions of the 14th Amendment to the US Constitution; outside Article 1, Declaration of Rights, under the California Constitution, Sections 1 (inalienable rights), §3(b)(4) and §7(a) (due process and equal protection of the laws), §7(b) (revoking any privileges and immunities granted by the legislature), §17, as pertains to CID foreclosures, (cruel and unusual punishment), §19 as pertains to a taking of private property under this ACT, §24 (rights retained by the people); and outside the California laws governing local communities, thereby creating, in reality, independent city-states or principalities under the "charters" granted by the Davis-Stirling Act.

This action by CLRC stands in sharp contrast to the approach taken by our Founding Fathers, although they had their differences, which conditioned the approval of the constitution upon the approval of the Bill of Rights. This Commission has proposed AB 1921 without even considering, under its empty "Member Bill of Rights", the rights and freedoms of California citizens who are subject to the Davis–

Stirling Act. One could well ask, what was the basis for CLRC's decision to proceed in this manner? Surely it could not have felt confident in the fact that the Act is already in existence, and that there is a reasonable legitimate government interest in so regulating CIDs, as evidenced by the Legislature's statement of intent in the bill,

> The Legislature further finds that covenants and restrictions, contained in the declaration, are an appropriate method for protecting the common plan of developments and to provide for a mechanism for financial support for the upkeep of common areas . . . . If declarations terminate prematurely, common interest developments may deteriorate and the supply of affordable housing units could be impacted adversely. The Legislature further finds and declares that it is in the public interest to provide a vehicle for extending the term of the declaration if owners . . . . § 6040(c).

The restatement of equitable servitudes does not protect individual rights

Perhaps, CLRC felt that the doctrine of equitable servitudes prevails, as stated in § 5125(a)

> The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development.

And that, under the Restatement Third, Property (Servitudes), the current expression of servitudes and common interest development common law holding that the common law of servitudes prevails of the constitutional law, see "comment h" below, CLRC need not be concerned (as to relevant parts, emphasis added). The tremendous impact of the Restatement on the denial of homeowner rights and freedoms cannot be overstated.

> **Chapter 3, Validity of Servitude Arrangements**
> **§ 3.1 Validity of Servitudes: General Rule**
> A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy
> Servitudes that are invalid because they violate public policy include, but are not limited to:
> (1) a servitude that is arbitrary, spiteful, or capricious;
> (2) a servitude that unreasonably burdens a fundamental constitutional right;
> (3) a servitude imposes an unreasonable restraint on alienation under § 3.4 or § 3.5;
> (4) a servitude that imposes an unreasonable restraint on trade or competition under §3.6; and
> (5) a servitude that is unconscionable under § 3.7.
>
> **§ 3.7, Unconscionability**
>
> A servitude is invalid if it is unconscionable.
> ....
> [Comment c, p. 485]. Unconscionable transactions contain an element of overreaching, unfairness, surprise, or harshness that leads to the conclusion that the servitude should not be enforced, even though the disadvantaged party could have protected him- or herself through the exercise of proper precautions.

Unfortunately, (2) above is clarified by,

> **[comment h, p.359]. The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law.**

It appears that the property law of servitudes has been rewritten in this third version to supersede the Constitution. A reading from the introduction to the Restatement leaves one with the clear picture that the revisions to equitable servitude laws were designed to accommodate and promote planned communities with their mandatory homeowners associations, as they currently exist and operate under state laws.

> Servitudes are extensively used to provide the underlying structure of real-estate developments that include shared amenities or facilities and services financed by assessments against individual owners. . . . (p.3).
>
> By freeing servitudes law from some of the encrustations accumulated over the centuries, it is designed to retain and enhance their utility to meet the needs of American society in the first part of the 21st Century. (p.4).

I call the commission's attention to the warning offered in the ULI document for the creation, development and mass merchandising of planned communities, its 1964 "bible", *The Homes Association Handbook* (aka TB # 50)[1]. It provides a good understanding as to why equitable servitudes were required to control the laws as applied to planned communities,

> 12.22 FUNCTION OF A RECORDED DECLARATION OF COVENANTS AND RESTRICTIONS.
> The function of a declaration of covenants and restrictions is to subject the land situated within the area described in the declaration to certain obligations which will be legally enforceable against every owner or occupier of the subject land.

This foundation in servitudes law, and especially the "tailoring" of the law to protect planned communities, may have been necessary for private, business organizations to promote the acceptance of homeowners associations, but is entirely short on any protections of individual rights and freedoms. This lack of protection for homeowners has carried across these past 44 years to today, in California and in all other states.

Why didn't CLRC investigate these dramatic legal views expressed by the Restatement that render the US and California constitutions subject to property laws, and no longer the supreme law of the land? These citations, alone, warrant the need to include a homeowners' bill of rights as the law of servitudes does not provide for an effective level of protection of individual rights and liberties, and is more concerned with the establishment and protection of common interest properties.

I am not a lawyer, but I have discovered and questioned these views regarding the sanctity of CIDs, this state protectionism of CIDs, and I wonder why didn't CLRC recognize the impact on the California Constitution, namely its Declaration of Rights to protect the rights, liberties and freedoms of the people of California? The law of servitudes must not be allowed to dominate the California Constitution and deny the people living in CIDs the privileges and immunities granted to all the people of California. This would have been a good start to Chapter 2 for CLRC to have asserted the supremacy of constitutional law over the common law of equitable servitudes. And, furthermore, to require in Chapter 2 a compelling and necessary government interest when asserting the validity of any covenant, servitude or state law that violates the Declaration of Rights under the California Constitution. The simple tests of reasonableness, as contained in the Restatement, or a reasonable government interest is inadequate to deny or to disparage individual rights for those living in a CID.

<u>The restatement of equitable servitudes justification for CC&Rs: the freedom to contract</u>

The Restatement, under § 3.1, Validity of Servitudes: General Rule, Comment a, adopts the presumption of constitutionality doctrine with respect to claims of invalidity. *"The party claiming invalidity of a servitude [has] the burden to establish that it is illegal or unconstitutional, or violates public policy."* It refers to *"the <u>modern</u> [emphasis added] principle of freedom to contract to creation of servitudes"*, and quotes, not contract law, but the Restatement of Contracts as a defense,

> In general, parties may contract as they wish, and the courts will enforce their agreements without passing on the substance…. The principle of freedom of contract is rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own lives.

We hear this mantra almost everyday form CAI, and other supporters and protectors of CIDs – no interference with the freedom of contract. Yet, has anyone considered the fact that Davis-Stirling is itself an interference with CID "contracts" by means of California's right to regulate for the health, safety and general welfare under its police powers? But, when it comes to holding CIDs accountable to the state, or placing restrictions on the acts and actions of CIDs and their boards, or granting the homeowner certain rights and freedoms we hear the cry of "contract interference". This biased use of contract interference by the special interests must be put to an end, as Clint Bolick[2], Director of the Goldwater Institute's Sharf-Norton Center for Constitutional Litigation, and co-Founder of the Institute for Justice, notes,

> Special-interest groups across the political spectrum engage in vicious battle with the sole operational principle that the ends justify the means (p. 19). . . . "the families realize how few rights they have and how easily those rights can be taken away by voracious governments acting on behalf of favored special interests. . . . the government is not taking their house, it's taking their home (p. 157) [comments on a movie to illustrate his point].

Another important question that should have been addressed by CLRC is that of a claim of a freely given and fully informed contractual agreement, repeatedly heard by the CID protectors. This weak argument is susceptible to attack under numerous alternatives, including the sufficiency of constructive notice for the surrender of fundamental rights and freedoms. A "secondary" argument advanced by CID protectors, that should have also been addressed by CLRC, is that the homeowner has consented to be governed under the CID regime by the fact that he freely chose to live in a CID and has remained under CID jurisdiction. This consent to be governed is challenged by several scholars below.

The regulation of CIDs under AB 1921 and Davis-Stirling

With the prerequisite restoration of a concern for the protection of individual rights and freedoms, CLRC can now proceed with an analysis of the proposed AB 1921 impact on homeowner rights, and act in accordance with the principles of American government. To fail to so act would only affirm the societal and political changes that support a New America and a New California, no longer concerned with preservation and protection of individual rights and freedoms as did the Founding Fathers.

I believe constitutional scholar Randy Barnett[3] makes the argument for protecting individual rights, in general, even under majority rule:

> For a law is just and binding in conscience, if its restrictions are (1) necessary to protect the rights of others, and (2) proper insofar as they do not violate the preexisting rights of the persons on whom they are imposed.
>
> Every freedom restricting law must be scrutinized to see if it is necessary to protect the rights of others without improperly violating the rights of those whose freedom is being restricted. In the absence of actual consent, a legitimate lawmaking process is one that provides adequate assurances that the laws it validates are just in this respect.

It is not my intent to detail my views of questionable constitutional statutes or those that affect the individual rights of homeowners. My intent is to have CLRC approach the revision of Davis-Stirling from the non-existent, to date, perspective of protecting the individual liberties of homeowners as it seeks to regulate CIDs under the proper exercise of California's police powers. In addition to the Declaration of Rights, and issues raise as a result of the Restatement of servitudes law, there are other works by constitutional scholars and political scientists well versed in common interest community issues. CLRC can utilize, and should have utilized, these resources as a guide to its efforts to regulate CIDs and the people living within who are the member-owners of CIDs. They are given below.

AARP Homeowners Bill of Rights

A very good first source and one directly on point with the development of a homeowner's bill of rights is the 2006 David Kahne study for the AARP Research Policy Institute[4]. Kahne proposes a 10-point Homeowner's Bill of Rights and offers a model statute for consideration by others, such as CLRC. There is a "need to protect rights of homeowners as individuals, and the governmental aspects of associations, suggest consideration of a bill of rights." And, to the very heart of the CID legal model,

> Associations differ significantly from other nonprofit corporations. Homeowners cannot quit the association without moving, a choice often precluded by practicalities. Moreover, members typically make small economic commitments to nonprofits, whereas the commitment to an association can be substantial, even without considering home equity. (p. 10).
>
> From a consumer protection standpoint, the core issues revolve around the fact that the governing documents of an association are generally non-negotiable, were originally drafted by the developer's attorney, and can be lengthy (sometimes hundreds of pages) and frequently incomprehensible to a nonprofessional. (p.1)

Trust and Community

Political scientists Steven Siegel and Paula Franzese also address the need to protect the rights of homeowners in their 2007 article in the Missouri Law Review[5]. Concerned with healthy marketplace forces, the authors write,

> A well-functioning marketplace usually requires some rough equality of bargaining power between the market players, or, in the alternative, a strong governmental role in protecting the consumer. (p. 1113).
>
> A healthy marketplace depends on some modicum of equal bargaining power between its players, or, in the alternative, a meaningful governmental role in protecting the consumer. A well-functioning marketplace finds its players sufficiently armed to make informed decisions. (p. 1124).

With respect to a consent to be governed under the CID regime, the authors are quite clear that,

> This voluntary consent theory holds that residents consent to the rules and restrictions when purchasing, and that those who do not wish to subject themselves to CIC rules are free to buy elsewhere. . . . The complex CIC servitude regime that buyers 'assent' to is more akin to an adhesion contract than the product of informed, meaningful choice. (p. 1125).
>
> Traditional contract theory assumes not only the ability of both parties to engage in effective bargaining, but also presupposes that both parties have reasonable access to the information that becomes the basis of the bargain. . . . empirical research suggests that even rudimentary informed consent is lacking. (p. 1126).

"Consent to be governed" based on remaining under the CID jurisdiction

Another pro-CID argument for homeowner consent, when the contractual argument is not accepted, is the consent to be governed theory as used with respect to political jurisdiction. This theory rests on the decision to live and remain in the jurisdiction in which the homeowner resides, thereby giving tacit acceptance to be governed under the laws of the town or city. CID supporters apply the same reasoning to a homeowner's decision to buy and remain in his CID, making the CID equivalent to public governance

while ignoring the legal reality of the private, contractual CC&R arrangement to be governed (Which is it? Is the CID equivalent to a public government or is it a private business arrangement under the CC&Rs?)

This "consent to be governed" theory is criticized with respect to public governance by constitutional scholar Randy Barnett, and applies equally well under the CID regime. Does this argument rise to the level of judicial scrutiny to permit the loss of rights and freedoms? Barnett points out that this "love it or leave it" argument is ambiguous,

> Simply remaining in this country, however, is highly ambiguous. It might mean that you consent to be bound by the laws . . . or it might mean that you have a good job and could not find a better one [elsewhere] . . . or that you do not want to leave your loved ones behind. It is simply unwarranted that to conclude from the mere act of remaining . . . that one has consented to all and any of the laws thereof.[6]

California Common Interest Development – Homeowner's Guide

This Thomson-West treatise[7] on California CID law is a first, because *"the majority of common interest development publications appear to be geared to represent 'associations'"*, and the author, Donie Vanitzian, JD, was determined *"to protect homeowner rights in any way I could*." While Ms. Vanitzian is an outspoken critic of the Davis-Stirling Act, her 1055-page plus treatise is another direct source of information and experience to warrant study by CLRC in its efforts to rewrite the Act, and in preparing the missing Member Bill of Rights.

Earlier homeowner rights material

Additionally, there are several earlier, but well-known sources of CID problems concerning homeowner rights. These include:

1. Barton and Silverman, *Common Interest Communities: Private Governments and the Public Interest*, Institute of Governmental Studies Press, Univ. of California, Berkeley, 1994.

2. Evan McKenzie, *Privatopia: Homeowners Associations and the Rise of Residential Private Government*, Yale University Press, 1994.

3. Robert J. Dilger, *Neighborhood Politics: Residential Community Associations in American Governance*, New York University Press, 1992.

4. Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama,* p. 461-563, William & Mary Bill of Rights Journal, 461 (1998) Volume 6, Issue 2, Spring 1998.

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[1] *The Homes Association Handbook*, Technical Bulletin 50, The Urban Land Institute, 1964. (Available from the research division of ULI).
[2] Clint Bolick, *David's Hammer: the case for an activist judiciary*, Cato Institute, 2007.
[3] Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton University Press, 2004, p. 19.
[4] David A. Kahne, *A BILL of RIGHTS for HOMEOWNERS in ASSOCIATIONS: Basic Principles of Consumer Protection and Sample Model Statute,* AARP Public Policy Institute, #2006-15, July 2006. (The efforts of this writer is acknowledged, and his book, *The Case Against State Protection of Homeowners Associations* is cited in footnote 104).
[5] Paula A Franzese and Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, p. 1111-1157,The Missouri Law Review, vol. 72, 2007.
[6] Supra, note 3, p. 44-45.
[7] Donie Vanitzian, *California Common Interest Development – Homeowner's Guide*, The Expert Series (Thomson-West 2006). (This writer's efforts are acknowledged in the Preface).