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July 6, 2005

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

SENT BY EMAIL

RE: CLRC Memorandum 2005-25, Draft of Civil Code §§ 4000 et seq.

Dear Mr. Hebert:

Previously, in my March 14, 2005 email letter to CLRC relating to CLRC memorandum 2005-3, the Homeowners Bill of Rights, I voiced my concerns for the continued focus on CIDs as a property interest issue and the lack of protections of homeowners with respect to de facto municipal governance by these CIDs. I feel I must repeat my concerns with respect to the proposed draft of the Common Interest Development legislation.

I will address my concerns just to two sections in the proposed Civil Code. First, the definition of "Association", § 4048, is a simple statement that speaks only of managing rather than of governing the subdivision as if its functions, duties and responsibilities are simple those of any other nonprofit corporation. I ask, "What other nonprofit organization mandates membership in a specific territory, with compulsory assessments – taxes, since the CID does not provide a service or produce akin to a business -- subjecting the organization's members to statutory requirements relating to the loss of the member's private property, their homes, and to other penalties and fines affecting their property -- CID police powers -- also enforced by statute?" A reasonable person would have to agree that such conditions and restrictions define a civil government more so than an everyday nonprofit organization.

Our system of government with its checks and balances, separation of powers, "clean elections" procedures, due process protections in terms of sufficient notice of violations and hearings in which the homeowner can confront the allegations, examine the witnesses, and present evidence must be applied to CIDs. The corporate form of governance is not democratic, nor was it intended to be, and to assume that homebuyers openly and with full knowledge surrendered their rights to these protections cannot be argued with any substance. The arguments fall on constructive notice of equitable servitudes is sufficient notice, but that is where the application of equitable servitudes vs. explicit waiver of civil rights fails to provide a just remedy.

Should public policy uphold the current doctrine that equitable servitudes are binding contracts that are agreed to by a purchaser when title to his home is accepted? Shouldn't there be legislation to protect average citizens, home buyers and not experienced real estate investors, from this constructive notice binding of a waiver and surrender of rights enjoyed by other home buyers? Shouldn't there be legislation that calls for an explicit waiver of such rights after being fully informed of the consequences and impact of buying in a CID? Current disclosure laws fall far short of a comprehensive "red herring" warning to perspective buyers.

> A waiver of constitutional rights must be voluntary and intelligent, it must have been made knowingly, and with sufficient awareness of the relevant circumstances and likely consequences. Stated otherwise, a valid waiver connotes an intentional relinquishment or abandonment of a known right or privilege. Certainly, a waiver may not rest on mistake or ignorance.
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> 16 C.J.S. *Constitutional Law* § 82.

Second, I ask, "Why is it necessary to define a CID, if it were only a property interest alone, in terms of mandatory membership with the right to lien homeowner private properties?" Draft § 4095(2)(b).

> In a development where there is no common area other than that established by mutual or reciprocal easement rights appurtenant to the separate interests, "common interest development" means a development in which a separate interest is coupled with membership in an association with the power to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of common area by means of an assessment that may become a lien upon the separate interest.

Is the state of California, by virtue of this definition of a common interest development, conferring governmental status on CIDs by including only those CIDs that levy assessments and lien homeowner properties? Since the existence of a CID depends upon its right to assess its members, then the wording of this section can only be construed as a requirement to lien a homeowner's property in order to qualify as a CID. However, there are no protections, as stated in my email letter of March 14th, against the excessive punishment of homeowners resulting from the foreclosures of these liens for amounts far in excess of any compensatory damages to the CID. The draft of Civil Code § 400 et seq. is without sufficient due process protections to avoid state actions resulting from the acts of private parties and to avoid a violation of 42 U.S.C. § 1983, "color of law" violation of rights." This amounts to a taking of property by private organizations under state action. (See references in my March 14th letter).

Finally, I am very much concerned with the continued deference given to CIDs by the proposed § 6175(a), Liberal Construction of Instruments, unchanged from former § 1371, which says,

> Any deed, declaration, or condominium plan for a common interest development shall be liberally construed to facilitate the operation of the common interest

development, and its provisions shall be presumed to be independent and severable.

Here, the CID is indeed being treated and held to the level of a state agency, a municipal entity, where it is well established that deference to government agencies is given by the courts. This provision invalidates the equal protection clause since, as stated above, there are no protections in place in similar, at least, to those available to any citizen with respect to agency adjudication under California's Administrative Procedures Act. This provision gives unrestrained powers to the CID without the prerequisite balance of homeowner protections as required under the law. It is tantamount to saying that CIDs, being private contractual arrangements, are outside the 14th Amendment protections. This cannot be allowed. If upheld, the state is saying that private organizations can bypass the laws of the land by creating privately contracted governments.

I well understand that the focus of your current endeavors may not be in alignment with my views, but if the principles of the California and US Constitutions are to be upheld, CLRC must begin to take serious consideration of these views. Planned communities, CIDs, territories privately governed, cannot be treated solely as a property interest and the laws must reflect this concern. CIDs are governments and the laws must reflect their civil government functions. The special interests have argued, following Marsh v. Alabama, that CIDs possess functions found in many other non-governmental entities and, therefore, they are not governments. Yet, the laws commonly refer to local governments as being incorporated as **municipal corporations.** Distinctions are even made with respect to governmental immunities on the basis of governmental and proprietary functions, "proprietary" meaning a function that can be performed by a private corporation, such as trash removal. Cf. Prosser & Keeton, Prosser and Keeton On Torts, *Government Immunities*, § 131 (1984). CID legislation has failed to recognize this dual nature of local government and proposed legislation must place proper emphasis on the neglected civil government aspects of CIDs.

> "[A]nd upon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal."
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> . . .
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> With power, of course, comes the potential for abuse. Therefore, the Association must be held to a high standard of responsibility: "The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing." (Id at p. 921.) (See Raven's Cove Townhomes, Inc. v. Knuppe Development Co.,supra, 114 Cal.App.3d 783, 792-799.) **[142 Cal.App.3d 652]**
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> Cohen v. Kite Hill Community Assn. 142 Cal.App.3d 642 , 191 Cal.Rptr. 209 (1983) (citing Hyatt and Rhodes, *Concepts of Liability in the Development and*

> *Administration of Condominium and Home Owners Associations* 12 Wake Forest Law Review at page 915 (1976)).

What is the legitimate purpose of the state to justify the taking from homeowners and the giving to CIDs?

> Equal protection principles require that distinctions drawn by a statute granting an economic benefit to one class while denying it to another must at least bear some rational relationship to a conceivable legitimate state purpose.
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> 16B Am. Jur. 2d *Constitutional Law* § 873.

California Constitution,

> Article1, Sec. 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . .
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> Article 4, Sec. 16. (a) All laws of a general nature have uniform operation. (b) A local or special statute is invalid in any case if a general statute can be made applicable.

Respectfully,

George K. Staropoli
President