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June 25, 2006

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 2006-25, Member Rights, Homeowners Bill of Rights

Dear Mr. Hebert:

In Memorandum 2006-04, February 28, 2006, CLRC failed to address in its Chapter 2, Member Rights, the question if a Homeowners Bill of Rights that was marked, "Reserved". Yet a number of items were entertained under this Chapter 2: pets, satellite dishes, roofing materials among other things. In the Chapter 3, Community Association Governance, there was the absence of any discussion of a Homeowners Bill of Rights, which would have been appropriate in this area of controversy. How can there be a satisfactory consideration of governance without a consideration of providing a bill of rights for homeowners, as was demanded by the people before our US Constitution could be accepted? Yet, the powers of the board, board meetings and the rights of owners to inspect association records are discussed without first establishing a foundation of homeowner rights. I find this approach very unsatisfactory, ill conceived and not serving the interests of the homeowners, but of the industry special interests. After all, CLRC has labeled this issue as a homeowner's bill of rights and not an association bill of rights.

I had previously written CLRC on this matter of failing to provide a homeowners bill of rights. In my March 14, 2005 letter I wrote[1],

> The tone and questioning of Memorandum 2005-3 gives me some hope of a brighter future, in spite of some last minute awareness of the magnitude of the problems. Unfortunately, the problems will not go away unless squarely confronted. The Commission should consider a second study, in support of the above concerns, conducted by recognized authorities not with an eye to real estate interests, but to the neglected areas of constitutional law, government and political science as they strongly affect those 36,000 private governments already in existence in California as well as those to come. The following issues should be addressed by such a study:

[1] Email letter from George K. Staropoli to B. Hebert, Asst. Exec. Secy, CLRC, CLRC Memorandum 2005-3, Homeowners Bill of Rights, March 14, 2005.

1. Is it proper for the state to create, permit, encourage, support or defend a form of local government of a community of people, whether that form of government is established as a municipal corporation or as a private organization that is not compatible with our American system of government?
2. Is it proper for the state to permit the existence of private quasi-governments with contractual "constitutions" that regulate and control the behavior of citizens
   a. without the same due process and equal protection clauses of the Fourteenth Amendment, and that
   b. do not conform to the state's municipal charter or incorporation requirements, or that
   c. do not provide for the same compliance with the state's constitution, statutes or administrative code as required by public local government entities?

These broad principles provide the tone and "playing field" for exploring and considering the revisions to state laws. Looking solely at the existing same ol', same ol' code with the same ol', same ol' mindset will result in the same ol', same ol' failures to reduce CID problems.

In Memorandum 2006-25, Dispute Resolution has been introduced as a new area of concern, still without first establishing those rights belonging to the homeowners, and those prohibitions on the restriction and denial of those rights by the association board or state laws. In other words, the Homeowners Bill of Rights is still placed on "Reserved" status. What I find alarming in MM06-25 is the determinations by CLRC of the existing methods of justice and due process for homeowners: civil action without any state involvement.[2]

> Civil Action to Enforce Governing Documents
> Section 1354 provides for judicial enforcement of an association's governing documents. That section is continued without substantive change in proposed Section 5125.
>
> Civil Action to Enforce Statutory CID Law
> In order to provide clear guidance on the issue, proposed Section 5130 would authorize a civil action to enforce any provision of the Davis-Stirling Act:

Where is the State of California in this entire affair? It has imposed the Davis-Stirling Act on homeowners that permits the taking of his home for sums that are often a fraction of the value of the home lost in foreclosure. That also sanctions and makes legal actions by associations boards that place restrictions on a citizen's constitutional rights without appropriate due process. What the state offers, instead, is a civil action -- a "leave me out of it, but obey the law" attitude with no bill of rights protections for the homeowner. This can no longer be tolerated if America and California are to continue to lie claim to be democratic, the land of equal laws where fundamental rights and freedoms are guaranteed. Civil action amounts to a bar against justice much as the imposition of poll tax in the South in the 1950s used to prevent blacks from registering to vote. Justice for the average homeowner cannot be had a price which he cannot

2. CLRC Memorandum 2006-25, Statutory Clarification and Simplification of CID Law: Association Governance and Dispute Resolution, p 35.

afford while the association is allowed to use member dues to hire a lawyer. Why not provide a law that the associations must subject themselves not to a general Ombudsman fee, but to fee for a general litigation fund for homeowners to fight association abuse?

And I emphatically object to the opinions of the CLRC staff in the last paragraph on p. 35, emphasis added:

> In addition to that change, it is tempting to try to unify all of the existing judicial enforcement provisions into a single generally applicable provision. However, the existing provisions are substantively different in important ways (e.g., **whether they allow for the imposition of civil penalties or an award of attorney fees and costs)**. **Reconciliation of those provisions would result in substantive changes that are probably too controversial to be addressed in the proposed law.** The staff will make a note to study the matter separately.

"Too controversial"? What is the price of justice and fair play for homeowners who have been long subjected to state imposed private constitutional compliance under the name of the Davis-Stirling Act? An Act long without a bill of rights, as we have in the US and California Constitutions! Look at the accomplishments of your neighboring state, Arizona, and see what can be done in the name of guaranteeing the US Constitutional due process to all citizens[3].

Furthermore, with respect to a hesitation to impose penalties on association boards, I thought that the mission of CLRC was to recommend NEW laws to provide for justice and fair play. In Arizona this past session, for example, the mighty pen of the Legislature created just such enabling authority in a single sentence,

> The administrative law judge may order any party to abide by the statute, CONDOMINIUM DOCUMENTS, COMMUNITY DOCUMENTS or contract provision at issue and may levy a civil penalty on the basis of each violation.[4]

That statement by CLRC is inexcusable and reflects a bias toward the fictitious person, the association, against the establishment of justice for real citizens, the people of California. It has been a fundamental basis of the American system of government to provide for checks and balances and a separation of powers to guard against abuse by any government. As James Madison reminded the people, "*If angels were to govern men, neither external nor internal controls on government would be necessary*". Yet, the CLRC staff is hesitant to take a simple, but proven and effective, step to stop 40 years of abuse by association boards and to hold boards accountable to the government, and not just to the individual in a civil action.

Isn't it good public policy to hold lawbreakers accountable? Isn't it good public policy to provide a balance of power to the less powerful homeowner whose funds maintain the survivability of the association? Or does CLRC reflect the class warfare between association management and the owner-members very similar to the attitudes of management vs. labor? I thought the state's interest was in establishing vibrant, healthy, harmonious communities, and not in promulgating continued strife. I am at a loss to understand the delays in making simple legislative changes to the California Code.

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[3] Ariz. Sess. L. Ch 324, (2006) http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/47leg/2R/laws/0324.htm
[4] Id, § 41-2198.02(A).

In my July 6, 2005 letter to CLRC I argued that while state agencies are held accountable under California's APA, there are no equivalent state mechanisms to protect homeowners against CIDs[5].

> 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.

Justice and effective CID dispute resolution can be attained under state imposed adjudication by means of the existing California APA and Office of Administrative Hearings laws, quickly and easily implemented into law as Arizona Legislature has demonstrated. A handful of amendments need only be made following the approach used by Arizona. First, § 10100 of the California Business and Professional code, see Exhibit 1, needs to include wording similar Arizona's HB2824 as included as Exhibit 2. That's about all that is necessary.

There is no need for an Ombudsman to adjudicate disputes, or to mandate alternate dispute resolution methods that promote private third party arbitrators or mediators, allowing them to profit from the injustices by one faction of society on another faction, and which absolve the State of California from any responsibility for the efficient and enforcement of its laws under state oversight, jurisdiction and control.

I strongly urge CLRC to tackle the very important task in defining a Bill of Rights for homeowners and to stop protecting private business interests that deny homeowners their rights and freedoms. I strongly urge CLRC to act with dispatch to support the adoption of APA/OAH as the method of CID adjudication of disputes.

Respectfully,

George K. Staropoli
President

Cc: Assemblyman Mullin
Senator Lowenthal
Committee on Business and Professions
AHRC

[5] email letter of July 6, 2005 to B. Hebert, Asst. Exec. Secy., CLRC, regarding CLRC Memorandum 2005-25, Draft of Civil Code §§ 4000 et seq.

Exhibit 1. California Administrative Procedure Act

Government Code, Title 2, Division 3, Part 1

CHAPTER 4
Office of Administrative Hearings

ARTICLE 1
General Provisions

§ 11370. Citation of Chapters 3.5, 4, and 5
Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act.

§ 11370.2. Office of Administrative Hearings in Department of General Services; Director
(a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.
(b) The director shall have the same qualifications as administrative law judges, and shall be appointed by the Governor subject to the confirmation of the Senate.
(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

§ 11370.3. Appointment and assignment of administrative law judges and other personnel
The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint any other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. Any administrative law judge or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 11370.5.

§ 11370.4. Determination and collection of costs
The total cost to the state of maintaining and operating the Office of Administrative Hearings shall be determined by, and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

§ 11370.5. Recommendations on administrative adjudication
(a) The office is authorized and directed to study the subject of administrative adjudication in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature. All departments, agencies, officers, and employees of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. Nothing in this section authorizes an agency to provide access to records required by statute to be kept confidential.
(b) The office may adopt rules and regulations to carry out the functions and duties of the office under the Administrative Procedure Act. The regulations are subject to Chapter 3.5 (commencing with Section 11340).

ARTICLE 3
State Agency Reports and Forms Appeals

§ 11380. Appeal filed by Business and Professions Code
(a) (1) The office shall hear and render a decision on any appeal filed by a business, pursuant to subdivision (c) of Section 14775, in the event the business contests the certification by a state agency head that reporting requirements meet established criteria and shall not be eliminated.
(2) Before a business may file an appeal with the office pursuant to subdivision (c) of Section 14775, the business shall file a challenge to a form or report required by a state agency with that state agency. Within 60 days of filing the challenge with a state agency, the state agency shall either eliminate the form or report or provide written justification for its continued use.
(3) A business may appeal a state agency's written justification for the continued use of a form or report with the office.
(4) If a state agency fails to respond within 60 days of the filing of a challenge pursuant to paragraph (2), the business shall have an immediate right to file an appeal with the office.
(b) No later than January 1, 1996, the office shall adopt procedures governing the filing, hearing, and disposition of appeals.

The procedures shall include, but shall not be limited to, provisions that assure that appeals are heard and decisions rendered by the office in a fair, impartial, and timely fashion.
(c) The office may charge appellants a reasonable fee to pay for costs it incurs in complying with this section.

CHAPTER 4.5
ADMINISTRATIVE ADJUDICATION: GENERAL PROVISIONS

ARTICLE 1
Preliminary Provisions

§ 11400. Administrative Procedure Act; References to superceded provisions.
(a) This chapter and Chapter 5 (commencing with Section 11500) constitute the administrative adjudication provisions of the Administrative Procedure Act.
(b) A reference in any other statute or in a rule of court, executive order, or regulation, to a provision formerly found in Chapter 5 (commencing with Section 11500) that is superseded by a provision of this chapter, means the applicable provision of this chapter.

§ 11400.10. Operative date of chapter
(a) This chapter is operative on July 1, 1997.
(b) This chapter is applicable to an adjudicative proceeding commenced on or after July 1, 1997.
(c) This chapter is not applicable to an adjudicative proceeding commenced before July 1, 1997, except an adjudicative proceeding conducted on a remand from a court or another agency on or after July 1, 1997.

§ 11400.20. Adoption of interim or permanent regulations
(a) Before, on, or after July 1, 1997, an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this chapter or Chapter 5 (commencing with Section 11500). Nothing in this section authorizes an agency to adopt regulations to govern an adjudicative proceeding required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, except to the extent the regulations are otherwise authorized by statute.

(b) Except as provided in Section 11351:
(1) Interim regulations need not comply with Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5, but are governed by Chapter 3.5 (commencing with Section 11340) in all other respects.
(2) Interim regulations expire on December 31, 1998, unless earlier terminated or replaced by or readopted as permanent regulations under paragraph (3). If on December 31, 1998, an agency has completed proceedings to replace or readopt interim regulations and has submitted permanent regulations for review by the Office of Administrative Law, but permanent regulations have not yet been filed with the Secretary of State, the interim regulations are extended until the date permanent regulations are filed with the Secretary of State or March 31, 1999, whichever is earlier.
(3) Permanent regulations are subject to all the provisions of Chapter 3.5 (commencing with Section 11340), except that if by December 31, 1998, an agency has submitted the regulations for review by the Office of Administrative Law, the regulations are not subject to review for necessity under Section 11349.1 or 11350.

ARTICLE 3
Application of Chapter

§ 11410.10. Decision of requiring evidentiary hearing
This chapter applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

§ 11410.20. Applicability to agencies
Except as otherwise expressly provided by statute:
(a) This chapter applies to all agencies of the state.
(b) This chapter does not apply to the Legislature, the courts or judicial branch, or the Governor or office of the Governor.

ARTICLE 5
Alternative Dispute Resolution
§ 11425.10. Required procedures
(a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements:
(1) The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.
(2) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (commencing with Section 11500) is applicable to the proceeding.
(3) The hearing shall be open to public observation as provided in Section 11425.20.

(4) The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30.
(5) The presiding officer is subject to disqualification for bias, prejudice, or interest as provided in Section 11425.40.
(6) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision as provided in Section 11425.50.
(7) A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent as provided in Section 11425.60.
(8) Ex parte communications shall be restricted as provided in Article 7 (commencing with Section 11430.10).
(9) Language assistance shall be made available as provided in Article 8 (commencing with Section 11435.05) by an agency described in Section 11018 or 11435.15.
(b) The requirements of this section apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the governing procedure, subject to Section 11415.20. The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to, or more protective of the rights of the person to which the agency action is directed than, the requirements of this section.

§ 11425.50. Decision to be in writing; Statement of factual and legal basis
(a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision.
(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.
(c) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence.
(d) Nothing in this section limits the information that may be contained in the decision, including a summary of evidence relied on.
(e) A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 10100-10103

Real Estate, Hearings.

10100. Before denying, suspending or revoking any license issuable or issued under the provisions of this part, the department shall proceed as prescribed by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted therein.

Exhibit 2. Arizona HB2824, Sess. L. Ch. 324. (2006).

41-2198. Administrative adjudication of complaints

PURSUANT TO CHAPTER 6, ARTICLE 10 OF THIS TITLE, an administrative law judge shall adjudicate complaints regarding and ensure compliance with:

1. The Arizona mobile home parks residential landlord and tenant act ~~pursuant to title 41, chapter 6, article 10~~.

2. TITLE 33, CHAPTER 9 AND CONDOMINIUM DOCUMENTS.

3. TITLE 33, CHAPTER 16 AND PLANNED COMMUNITY DOCUMENTS.

41-2198.01. Hearing; rights and procedures

A. A person who is subject to title 33, chapter 11 or a party to a rental agreement entered into pursuant to title 33, chapter 11 may petition the department for a hearing concerning violations of the Arizona mobile home parks residential landlord and tenant act by filing a petition with the department and paying a ~~fifty dollar~~ NONREFUNDABLE filing fee IN AN AMOUNT TO BE ESTABLISHED BY THE DIRECTOR. All monies collected shall be deposited in the state general fund and are not refundable.

B. FOR A DISPUTE BETWEEN AN OWNER AND A CONDOMINIUM ASSOCIATION OR PLANNED COMMUNITY ASSOCIATION THAT IS REGULATED PURSUANT TO TITLE 33, CHAPTER 9 OR 16, THE OWNER OR ASSOCIATION MAY PETITION THE DEPARTMENT FOR A HEARING CONCERNING VIOLATIONS OF CONDOMINIUM DOCUMENTS OR PLANNED COMMUNITY DOCUMENTS OR VIOLATIONS OF THE STATUTES THAT REGULATE CONDOMINIUMS OR PLANNED COMMUNITIES. THE PETITIONER SHALL FILE A PETITION WITH THE DEPARTMENT AND PAY A NONREFUNDABLE FILING FEE IN AN AMOUNT TO BE ESTABLISHED BY THE DIRECTOR. THE FILING FEE SHALL BE DEPOSITED IN THE CONDOMINIUM AND PLANNED COMMUNITY HEARING OFFICE FUND ESTABLISHED BY SECTION 41-2198.05. THE DEPARTMENT DOES NOT HAVE JURISDICTION TO HEAR:

1. ANY DISPUTE AMONG OR BETWEEN OWNERS TO WHICH THE ASSOCIATION IS NOT A PARTY.

2. ANY DISPUTE BETWEEN AN OWNER AND ANY PERSON, FIRM, PARTNERSHIP, CORPORATION, ASSOCIATION OR OTHER ORGANIZATION THAT IS ENGAGED IN THE BUSINESS OF DESIGNING, CONSTRUCTING OR SELLING A CONDOMINIUM AS DEFINED IN SECTION 33-1202 OR ANY PROPERTY OR IMPROVEMENTS WITHIN A PLANNED COMMUNITY AS DEFINED IN SECTION 33-1802, INCLUDING ANY PERSON, FIRM, PARTNERSHIP, CORPORATION, ASSOCIATION OR OTHER ORGANIZATION LICENSED PURSUANT TO TITLE 32, CHAPTER 20, ARISING OUT OF OR RELATED TO THE DESIGN, CONSTRUCTION, CONDITION OR SALE OF THE CONDOMINIUM OR ANY PROPERTY OR IMPROVEMENTS WITHIN A PLANNED COMMUNITY.