Studies H-855, H-856 January 31, 2014

First Supplement to Memorandum 2014-9

Common Interest Development Law (Public Comment)

Memorandum 2014-19 discussed public commentary on two recent Commission-recommended reforms of common interest development ("CID") law.[1] The memorandum included discussion of a Los Angeles Times article critical of the recent recodification of the Davis-Stirling Common Interest Development Act.

We have received four letters reacting to the memorandum's discussion of the Times' article. They are attached in an Exhibit, as follows:

The content of those letters is discussed below.

GENERAL OBJECTIONS TO MEMORANDUM

Pati Tomsit, Karnit R. Mouchly, and George Staropoli all assert that it was inappropriate for the staff to prepare a memorandum discussing the Times' article. They believe it was a misuse of public resources and authority[2] and was motivated by personal animus toward the principal author of the article, Donie Vanitzian.[3]

The staff disagrees. It has long been our practice to inform the Commission of significant public commentary on its work.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Exhibit pp. 1, 7.
3. See Exhibit pp. 1-3, 7.

If public comment comes in the form of a letter directly addressed to the Commission, the letter is always attached to a memorandum for consideration at a meeting. If the commentary is published in a media outlet, the staff makes a judgment call about whether it is significant enough to bring to the Commission's attention.

In this case, the article was published by a long-established and respected newspaper with wide circulation. The staff has received inquiries about the article from legislative staff and a former Commissioner. That level of broad dissemination justified bringing it to the Commission's attention. The staff would have done so regardless of whether the piece praised or criticized the Commission's work, and without any regard for who authored the article.

In this instance, there was another reason to brief the Commission. Because the staff believed the article to be significantly misleading, we took steps to seek a corrective response. It was important that the Commission be aware of those efforts and the reasons for them.

If the Commission would rather that the staff not keep it informed of this kind of commentary in the future, we will note the decision and change our practice.

GENERAL OBJECTIONS TO COMMISSION'S WORK ON CID LAW

George Staropoli believes that the Commission's process is biased and lacking integrity.[4] He suggests that our process "has the smell of corporatism," which "flows from fascism."[5] That is not an accurate depiction of the Commission's process, which is open in every respect, heavily influenced by public input, and produces recommendations that must be separately approved by the elected Legislature and Governor.

Mr. Staropoli also objects to the focus of the Commission's work on CID law, because it has not addressed his concerns about constitutional rights in a CID.[6]

Finally, Mr. Staropoli believes "that there are ample 'facts' easily discoverable by independent truth seekers that will support Ms. [Vanitzian's] opinions."[7] He does not provide any.

4. See Exhibit p. 9.
5. *Id.*
6. See Exhibit pp. 8-10.
7. See Exhibit p. 9.

Attorney G. Randall Garrou writes to support and supplement the criticism of the recodification of the Davis-Stirling Act: "my only criticism of the LA Times comments on the new revisions to Davis Stirling is that they are not sufficiently scathing."[8]

In support of his views, Mr. Garrou offers five specific criticisms of the new law. They are discussed briefly below. Although the staff does not agree that Mr. Garrou's examples support the claims made in the article, the staff greatly appreciates receiving input describing specific concerns. Specific input allows the Commission to evaluate whether the law contains problems that need to be addressed.

Notice of Board Meeting

In support of the article's assertion that the new law creates inconsistencies, Mr. Garrou describes what he believes to be a new inconsistency. He maintains that the provision governing notice of a board meeting is silent on whether such notice must be provided by "individual delivery"[9] or "general delivery"[10] (two methods delineated in the new law).[11] He sees the failure to specify the method of delivery as a "clear inconsistency" created by the new law.[12]

That is not correct. It is true that the provision Mr. Garrou cites, Civil Code Section 4920(a), is silent as to method of delivery. That is because subdivision (a) states a timing rule. The rule on method of delivery is stated in subdivision (c) of the same section:

> 4920. (a) Except as provided in subdivision (b), the association shall give notice of the time and place of a board meeting at least four days before the meeting.
>
> …
>
> *(c) Notice of a board meeting shall be given by general delivery pursuant to Section 4045.*
>
> …

8. See Exhibit p. 6.
9. Civ. Code § 4040.
10. Civ. Code § 4045.
11. See Exhibit p. 4.
12. *Id.*

Notice to Two Addresses

Mr. Garrou also objects that the "new notice provisions of § 4040(b) now require HOA boards to mail notices to two different addresses if a member has requested to receive general notices by individual delivery to a specified 'secondary address.'"

That is not a new requirement. It was continued from former Civil Code Sections 1365.1(c) and 1367.1(k). While Mr. Garrou may object to the requirement, this is not evidence of an error or substantive change made in the new law.

To underscore his objection to the two-address requirement, Mr. Garrou provides a specific example, asserting that the new law would: "allow a single dissatisfied owner to harass the Board by requiring it to send out mailings of Board meetings to two different addresses."[13] **That is incorrect.** The two-address requirement is expressly limited to a specified set of notices (relating to annual reports and assessment delinquency). It does not apply to notice of a board meeting.[14]

While the two-address option was not created by the new law, it is worth briefly noting the purpose that it serves. Many CID properties are owned as second homes and are occupied only part of the time. In this situation, it is appropriate for important notices to be delivered to more than one address, to increase the likelihood of receipt. Furthermore, many homes are owned in common by spouses. Both co-owners have the same interest in protecting their investment, even if they live apart. In such a situation, it makes sense to allow owners to receive important notices in two locations.

Personal Delivery of Notice

Mr. Garrou also objects to the fact that the new law does not permit personal delivery of individual notices (a practice his small association followed, leaving notices on owner's exterior door handles).[15] That is a reasonable objection to a substantive change made by the new law. **However, it is not evidence of an error in the law.** The change was intentional. The Commission debated whether to permit personal delivery of individual notices and concluded that it posed too

13. *Id.*
14. Civ. Code § 4040(b). See also Civ. Code § 4920 (board meeting notice).
15. See Exhibit p. 5.

many risks when dealing with important notices. The Legislature unanimously enacted the change.

Paperwork Burden

Mr. Garrou suggests that "the amount of paperwork imposed on very small HOA's by this new law is absolutely overbearing and untenable."[16] As his only example of this new paperwork burden, he points to the "Annual Policy Statement"[17] that associations are required to provide to their members every year.[18]

In fact, the Annual Policy Statement does not add any new burden to an association. **It merely aggregates annual notification requirements that were already scattered throughout former law.** If anything, this aggregation will reduce costs by helping associations coordinate the numerous required disclosures into a single mailing. Furthermore, the proposed law gives associations the option of distributing notice of the *availability* of the Annual Policy Statement, *rather than the statement itself*.[19] As it is likely that many owners will not request a copy of the full statement every year, **this could lead to a significant reduction in the paperwork burden.**

Missed Opportunity

Mr. Garrou regrets that the Commission did not take the opportunity of recodifying the Davis-Stirling Act to also address substantive problems that he sees in the law governing collection liens. **This is not evidence of an error in the new law.** The Commission intentionally decided against including potentially controversial substantive changes in the new law, so as to not jeopardize the benefits of nonsubstantive recodification.

Respectfully submitted,

Brian Hebert
Executive Director

16. *Id.*
17. Civ. Code § 5310.
18. *Id.*
19. See Civ. Code § 5320.

EMAIL FROM PATI TOMSITS
(1/29/14)

I am writing because I read the 12/29/13 L.A. Times Real Estate Column entitled, "Attempt to simplify California condo laws ends in confusion," <http://articles.latimes.com/2013/dec/29/business/la-fi-associations-20131229> by Donie Vanitzian & Zachary Levine, partner at Wolk & Levine, a business & intellectual property law firm.

Using public funds attacking Ms. Vanitzian personally shows your animus against her. Clearly, Mr. Hebert, that is a gross misuse of your paid public position. Using taxpayer funds to divert your personal animosity to satisfy your own perverse need to attack Ms. Vanitzian is unacceptable.

Your mis-dated CLRC Memorandum 2014-9, erroneously dated 1/27/13, should have been 1/27/14, entitled "Common Interest Development Law (Public Comment)," misleads the public as to what this is about. Millions of owners are suffering under a "condo regime," & all you choose to do is degrade an owner advocate who has done nothing but help owners for decades; you should be ashamed of yourself, Mr. Hebert! You do NOT own the California Law Revision Commission, Mr. Hebert; IT BELONGS TO THE TAXPAYER!

There was no reason to change the statute numbers; there was no reason to remove the Davis-Stirling Act from 1350-1378 to another section. You did so to confuse millions of CID owners. The legislature is supposed to make the laws, NOT the California Law Revision Commission. You have usurped your authority of the legislature by aiding & abetting legislators & in creating laws that have been shipped over to the legislature. You think you're clever, Mr. Hebert, but everybody knows what you are doing….

-Pati Tomsits

FOR PUBLICATION

January 29, 2014

Mr. Brian Hebert
California Law Revision Commission
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Re: memorandum 2014-9

Dear Mr. Hebert:

As a homeowner who lives under a Homeowners Association rule, I was greatly disappointed reading the profoundly disgraceful Staff Memorandum 2014-9 of the California Law Revision Commission (CLRC).

This memorandum cannot be read in any other way than a childish self grandiose statement, while at the same time, it seems, its purpose was to viciously attack the highly reputable and respected Ms. Donie Vanitzian, JD, and Mr. Levin of Wolk & Levine law firm, for their rightly critical opinion published on December 29, 2013 by the Los Angeles Times.

Starting with the mundane, as was quoted (of others) by Ms Vanitzian and Mr. Levine, the revision of the Davis-Stirling Act was "(pedestrian) sloppy". Dating the subject Memorandum "January 27, 2013" is sloppy.

Continuing with the disgraceful self congratulatory opening of the Memorandum, it quotes a thank you letter addressed to the Governor, the writer of which requested the Governor to "make some sort of public comment to recognize…." Firstly, attaching the letter (as it was) and referring to it should have been more than sufficient. Secondly, without trying to second-guess the motives of the letter's writer, nor playing a psychologist, one must stop and think - how insecure in their revised Davis-Stirling Act was the Staff and its Executive Director Mr. Hebert, publishing this Memorandum. It starts by self-congratulating themselves, and continues with an attack of an opposing legal opinion, without stating why the claims published in the article were erroneous or confusing. The article provided clear examples of "*confusion to expect*".

Thirdly, it looks pretty bad for a state agency whose mission is to "assist the Legislature and Governor by examining California law and recommending needed reform" to aggressively attack the writers of a newspaper column publishing a critical opinion of work done by this agency. The attack seems personally vindictive and calculated by Staff and Mr. Hebert. Last we checked, the First Amendment affords publication of critical opinions.

However, if the quality of work of the CLRC (its staff and Mr. Hebert, its Executive Director) is to be characterized by memorandums such as the 2014-9, it solidly supports Ms. Vanitzian and Mr. Levine's argument that "*the money allocated to the commission would be better directed to compensate titleholders in homeowner associations and be placed in a type of victim's fund to assist owners who are adversely affected by such statutory incompetence*."

Sincerely,

Karnit R. Mouchly

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January 29, 2014

Sent today by US Mail, by email to
bhebert@clrc.ca.gov, and by fax to
650-494-1827

Brian Herbert
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: Comment to Commission Memorandum 2014-9

Dear Mr. Herbert

I have read your Memorandum 2014-9 discussing, among other things, the recent rewrite of the Davis-Sterling Common Interest Development Act. In it, under a section entitled Criticism Of The Recodified Residential CID Statute, you list as an "erroneous factual claim," a statement in an LA Times article which said that the rewrite of this law created "inconsistencies" in the law. This assertion of the creation of inconsistencies in the Davis Stirling act by this new rewrite is by no means an erroneous factual statement.

I would direct you to the newly created provisions establishing two different forms of notice that should be utilized by HOA's; one (found in Civil Code § 4040) is called "individual notice." The other (found in Civil Code § 4045) is called "general notice." These two categories did not exist in the prior law. The only problem is that the new law is inconsistent in its use of these terms. For example, whenever an HOA Board intends to schedule a Board meeting, new Civil Code § 4920 (a) says that "the association shall give notice of the time and place of a Board meeting at least four days before the meeting." However, even though the statute was just amended to create and distinguish between two different types of notice, general notice and individual notice, this requirement for notice of Board meetings does not explain which type of notice is required. That is a clear inconsistency created by the new law.

Apart from the law's inconsistencies, as an HOA Board member, I wish to register significant criticisms of the new law, as well as its perpetuation of bad provisions in the old law.

Specifically, the new notice provisions of § 4040 (b) now require HOA boards to mail notices to two different addresses if a member has requested to receive general notices by individual delivery to a specified "secondary address." While I can understand why a Board can be required to mail even a general notice to an individual requesting a personal mailing, I cannot understand why the Board must be forced to now mail that notice to *two* different addresses. That is absurd.

Also, the new notice provisions just wiped out a CC&R provision we had which was custom-made for our small HOA and which allowed us to provide notice of Board meetings by hand delivery to the front door handle of each of our nine condo units. This system worked very well for us. Now, however, the new changes in this law forbid us from providing notice of Board meetings in this simple and direct manner and, instead, allow a single dissatisfied owner to harass the Board by requiring it to send out mailings of Board meetings to two different addresses.

Lastly, the amount of paperwork imposed on very small HOA's by this new law is absolutely overbearing and untenable. What the law fails to recognize is the near-impossibility, in very small HOA's, of finding persons willing to take the time to be Board members because the law now imposes such an unbelievably daunting number of requirements on boards, including the new Annual Policy Statement, etc.

Now, in terms of the perpetuation of existing bad provisions, the system for imposing liens needs much work. While the law allows an HOA Board to collect late fees on delinquent assessment payments, and allows an HOA, after going through endless time-consuming hoops, to impose a lien if those assessment payments remain delinquent months later after all the hoops have been jumped through, it does not allow imposition of a lien if the delinquent owner, at the 11th hour, pays off only the delinquent assessments, but not the late fees. This is absurd. There should be an enforcement mechanism to ensure the late fees are paid. The rewrite of the statute would've been an excellent time to fix this problem.

In short, my only criticism of the LA Times comments on the new revisions to Davis Stirling is that they are not sufficiently scathing.

Very truly yours,
G. Randall Garrou, Esq.
A professional corporation

By _____
G. RANDALL GARROU

GRG:
LRG8137.DOC
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January 30, 2014

Brian Hebert
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EMAIL LETTER

RE: CLRC Memorandum 2014-09, Common Interest Development Law (Public Comment)
Donie Vanitzian; LA Times

Dear Mr. Hebert:

I read Ms. Vanitzian's LA Times column of December 29, 2013, *Attempt to Simplify California Condo Laws Ends in Confusion* and your response contained in MM14-09. As you may be aware I commented on her article in two parts. I must admit that I was quite shocked to see your personal reaction against Ms. Vanitzian as if she had a personal vendetta against CLRC. This is no way for a government official to react to criticism from a member of the public and suggests that she hit a sore point with you and CLRC. As President Truman said, "*If you can't stand the heat get out of kitchen.*"

I believe you forgot that the media is there to serve as the voice of the people - a vehicle of transparency - and transparency is a requirement of CLRC. I am disturbed about "the staff's concern" regarding "erroneous factual claims" when no materials of fact are provided to the LA Times for correction, except for opinion taken from part of a letter written on behalf of the stakeholders.

Your complaint against MS. Vanitzian is in my opinion out of order, irrational, and not conducive of a commission that is supposed to serve the public and not an industry. The appropriate reply, something of the order, "We are not aware of any such criticism indicated by the author" seems to be a logical reply. But then again, your numerous memoranda from 2000 to present contain criticisms

of CLRC by the public, including some of my own, refuting your denial of "facts." I suggest your staff look there.

The praise you quote as making the staff happy is not from "property owners" per se, as you write, but from a person speaking "on behalf of" the stakeholder group (CAI and CACM among others), the vendors who make money off the HOAs who are consumers of these stakeholder services. I am puzzled by the enumeration of "The Stakeholders Group" in the quote and the "*thousands of . . . condominium owners we represent.*" Yet, he writes under a real estate brokerage firm letterhead. I think he is not being candid with CLRC and the Governor using the brokerage firm letterhead.

Even the die-hard stakeholder supporter posing as just an HOA president, who wrote in the CAI-CLAC blog of January 28, agrees that "*Substantive improvements were made, but are primarily considered minor and non-controversial.*" He provides a reason for the rewrite, "*However, we could not alter the primary governing document for community associations – the Davis-Stirling Act*." So, the need to rewrite D-S through CLRC.

If you are looking for facts, allow me to introduce a few. I recall Susan French's study in 2000 (H-850), at the request of CLRC, that started the ball rolling "*to clarify the law [and] establish a clear, consistent, and unified policy with regard to formation and management of these developments.*" Now, with all due respect to Ms. French, I do not agree with her views on UCIOA and on private government as contained in the Foreword to *The Restatement of Property* (emphasis added),

> Professor Susan French [Reporter (chief editor/contributor) for this Restatement] begins with the assumption . . . that **we are willing to pay for private government because we believe it is more efficient than [public] government** . . . . **Therefore this Restatement is enabling toward private government,** so long as there is full disclosure . . . .

Here we have the CLRC selected lawyer conduct a study on HOAs expressing a clear bias for HOA governance in a legal authority that is used by judges throughout the country. Any dissent, any opposition as to the constitutionality and legality of the HOA legal concept has been dismissed a priori -- discounted -- with prejudice. Still, much of her report aside from the need for clarity, Part II, sections C and D, called for protections of homeowner rights and a bill of rights statute in the rewrite of Davis-Stirling. She even recommended the application of Section 6.13, "Duties of a Common Interest Community to Its Members," of the Restatement. And, her report contained criticisms of D-S.

It appears that she was aware that the HOA concept is treading on constitutional law, but her failure is in not saying so. And it is also the failure of CLRC. Homeowners living in HOAs are being denied the equal protection of the laws and, as such, are second-class citizens with fewer rights than those not living in HOAs.

Whatever happened to the proposed "Chapter 2, Members Rights, Article 1, Bill of Rights," (MM06-25)? While you spoke of addressing Member Rights in your introduction, the proposed

Bill of Rights, buried within the proposed Table of Contents (EX 17), showed "Reserved." And there was my letter (MM05-25s1) arguing for the need for this equal rights chapter, to which you answered with, "*Beyond the scope of this project*" even though French had recommended protecting homeowner rights. Not only did I write and criticize, so did others including Ms. Vanitzian as is her right to speak up. See also the comments to CLRC (MM01-19), where Ms. Vanitzian spoke not for the stakeholders but for the homeowners.

It is obvious that this rework by stakeholders without meaningful homeowner input easily leads to clarifications and simplifications as interpreted solely by this group, from its perspective, which would not protect the homeowner. The new D-S cannot be seen as the result of an unbiased effort and with integrity. As any good lawyer and legislator will tell you that just changing a comma no less revising a phrase or clause can create new law, which lies in the domain of the legislature and not advisors acting on their own agenda. Passing it on to the legislature to rubber stamp law-making by CLRC is a mockery of the law.

The approach to t by CLRC has the smell of corporatism, the rule by a handful of corporations. It is a form of government that flows from fascism as defined by its founder, Italy's Benito Mussolini, Il Duce. Mussolini proclaimed:

> Fascism combats the whole complex system of democratic ideology, and repudiates it, whether in its theoretical premises or in its practical application. Fascism denies that the majority, by the simple fact that it is a majority, can direct human society; it denies that numbers alone can govern by means of a periodical consultation . . . which can never be . . . universal suffrage…. (Benito Mussolini: *What is Fascism*, 1932).
>
> Thus understood, Fascism is totalitarian, and the Fascist State . . . interprets, develops, and potentiates the whole life of a people. (Benito Mussolini, 1935**,** *The Doctrine of Fascism***,** Firenze: Vallecchi Editore**,** p.14, http://www.publiceye.org/fascist/corporatism.html).

A reading of any declaration of CC&Rs reveals conformity to fascism and the absence of those objectives as set forth in the Preamble to the Constitution. The Preamble reads:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

I believe that there are ample "facts" easily discoverable by independent truth seekers that will support Ms. Vanizian's opinions. The failure of CLRC and all those legal academics who hide behind lesser laws and ignore the supreme law of the land must be made public and debated.

(See Ms. French's version, as the Reporter, of the Restatement, Sec. 3.1, comment h, arguing that servitudes law should prevail over constitutional law). CLRC failed to tackle this very important and far reaching question affecting our society. Instead, CLRC dismissed the application of the US Bill of Rights, and did not address the California Constitution's Declaration of Rights. "*However, a bill of rights would probably go beyond the substantive rights that are currently provided in the law*" (MM05-03), but in the next sentence dismissed the US Bill of Rights as existing substantive law. CLRC simply stated that HOAs were private entities, and did not address HOAs as state actors.

But, CLRC did ask, *"How would these rights apply in a CID context, where the governing body is a private association rather than the state?"* The obvious answer - as there were a number of published books, papers and journals from nationally recognized researchers and political scientists relating to this issue - was to recognize that indeed HOAs were de facto governments and to subject them to the Constitution. A call for a study regarding HOAs as de facto governments was long overdue and should have been recommended by CLRC.

Ms. Vanitzian and the LA Times have provided an important public service in publishing her column. I hope the LA Times editor will continue to explore this failure to address the loss of constitutional rights in HOA-Land.

Respectfully,

George K. Staropoli

George K. Staropoli
President

PS. It is my belief that all correspondence with CLRC is published by and made part of CLRC's records.

Cc: Nancy Rizera-Brooks, LA Times Editor
Donie Vanitzian