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The Hon. David Chiu
Chairman
Assembly Housing & Community Development Committee
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P.O. Box 942849
Sacramento, CA 942249-0017

Ms. Lisa Engel
Chief Consultant
Assembly Housing & Community Development Committee
California State Legislative Office Building
1020 "N" Street, Room 162
Sacramento, CA

Re: Statement in opposition to Senate Bill 1265

Dear Assemblyman Chiu and Ms. Engel:

I am writing to urge the Assembly Housing & Community Development Committee to come out in opposition to SB 1265 (Bob Wieckoski – Fremont) which, if approved will make a number of changes to the current rules of the Davis-Stirling Common Interest Development act (Civil Code section 4000 et seq) relating to the conduct of director elections and member inspection rights which make absolutely no sense in terms of sound public policy. It is my understanding that this Bill will be coming before your Committee on Wednesday, June 13, 2018.

By way of my own background, along with Professor Katharine Rosenberry and attorney Mary Howell, I am one of the three co-authors of the CEB book, *Advising California Common Interest Communities* and I took the lead with attorney Sandra Bonato in representing the State Bar Real Property Law Section task force that worked with the staff at the Law Revision Commission when the CLRC was drafting the restatement of the Davis-Stirling Act

which became law in 2014. I also served on Select Committees appointed by the Legislature to assist in drafting the 1980 Nonprofit Corporation Law and the original 1985 Davis-Stirling Act.

Currently the Davis-Stirling Act contains requirements found in Civil Code section 5105 that common interest owner associations adopt rules that will help ensure the fair conduct of association elections. Among other requirements those rules currently require associations to "specify the qualifications for candidate for the board and any other elected position and procedures for the nomination of candidates" (including a right of a member to "self-nominate" himself or herself as a candidate).

If signed into law, SB 1265 would result in the following ill-advised changes in existing laws relating to the election of owner association directors and member inspection rights:

- The Bill's proposed amendments to Civil Code section 5105 begin by creating an interpretative ambiguity that currently does not exist. Specifically, section 5105 currently opens, in subparagraph (a), with the directive that associations adopt election rules "at least 90 days before any election, in accordance with the procedures prescribed by Article 5 (commencing with Section 4340) of Chapter 3". The referenced procedures are those that pertain to the adoption of "Operating Rules". However the proposed amendments to Civil Code section 5105 say that certain requirements or disqualifications for a member's candidacy are only valid if those requirements or disqualification criteria are stated in the association Bylaws.

- In place of the current directive that election rules "specify the qualifications for candidates to the board and any other elected position", revised Civil Code section 5105(b) states that a person can only be disqualified for election to the board:

(i) if the person is not a member of the association;

(ii) if, within the past 20 years, the member has been convicted of a felony involving accepting, giving, or offering to give, a bribe, the embezzlement of money, the extortion or theft of money, perjury, or conspiracy to commit any of those crimes – but only if the Bylaws specifically state these disqualification criteria. It is important to note that the listed felonies are all related to financial crimes. So, for example, the East Area Rapist could run for the Board if he had lived in a common interest development, and so could Maricopa County Sheriff Joe Arpaio or Don Blankenship (the West Virginia coal mine owner whose unsafe operations resulted in the deaths of a number of mining employees) had they been residents of a California common interest development; or

(iii) if the member is delinquent in the payment of regular assessments – again, only if the Bylaws expressly state that being delinquent in the payment of regular assessments is a disqualification criteria. NOTE that being late in the payment of a duly levied special assessment or a penalty assessment or fine are not listed in SB 1265 as a basis for being disqualified for service on an association board.

Currently, many owner association governing documents also list as ineligible candidates members who are delinquent in the payment of any duly levied assessments, members who have filed litigation against their association, and co-owners if they will be serving as directors at the same time. These are sensible disqualification criteria given the fiduciary obligations imposed on directors pursuant to the Davis-Stirling Act and Corporations Code section 7231to always act and make decisions they believe to be in the best interests of the association and the almost unlimited inspection rights that are conferred on directors under Corporations Code section 8334. Should this bill pass, all those sensible limitations on eligibility will be illegal.

- Although proposed new subparagraph (b)(2) of section 5105 permits association Bylaws to include a provision that authorizes the disqualification of a member if the member has been convicted in the past twenty years of certain financial types of felonies, Corporations Code section 7221(a) permits the board of a nonprofit mutual benefit corporation to declare vacant the office of any director who is convicted of a felony. So apparently a member could be nominated and elected even if he or she had been convicted of some category of felony that is not on the 5105(b)(2) list and then be removed by his or her fellow directors under Corporations Code section 7221(a).

- Subparagraph (b) of Civil Code section 5105 goes on to say that if the reason for disqualification is the nonpayment of regular assessments the association must first validate that the regular assessment obligation is, in fact, delinquent "using the internal dispute resolution process set forth in Article 2 (commencing with Section 5900) of Chapter 10". That new hurdle for disqualifying a candidate conflicts with other provisions of the Davis-Stirling Act (specifically Civil Code sections 5660, 5665, 5670 and 5706). Civil Code section 5670 does provide that prior to recording a lien for delinquent assessments an association must offer the delinquent owner the opportunity to participate in a meet and confer process (IDR), but that is only one of several options available to the owner and the other dispute resolution alternatives must be identified by an association during the collection process.

- Under proposed new subparagraph (b) of section 5105, "[t]he association's validation of the debt [meaning, apparently a delinquent regular assessment obligation] shall be completed before the association's deadline for submitting a nomination". So, if a member defaults in the payment of regular assessments at any time after throwing his or her hat in the ring for nomination or the association is unsuccessful in completing the debt validation process prior to the deadline for submitting an application, or the nominee is delinquent in the payment of a special assessment or fines, that person is still eligible for election. If the association correctly adheres to the assessment collection rules as stated in the Civil Code sections listed in the preceding bullet point, the assessment collection process could take 90 days or even longer.

- Subparagraph (d)(1) of revised Civil Code 5105 prohibits association election rules from "prohibiting the denial of a ballot to a member for any reason other than not being a member at the time when ballots are distributed." So apparently even if a member is disqualified from being a candidate for election under the revised qualification rules in 5015, that ineligible member still has the right to vote in the election. There are sound reasons for having a rule that makes a member ineligible to vote if the member is, for example, delinquent in the payment of

assessments. Why should members who are not supporting their association have a say in who is elected to manage the association in a responsible fashion?

- Under proposed subparagraphs (d)(2) and (d)(3) of Civil Code 5105 election rules cannot prohibit issuance of a ballot to someone holding a power of attorney from a member and that power of attorney holder's ballot must be counted. First, the Corporations Code rules regarding member voting rights do not speak of powers of attorney. Instead a member either votes in person or by a designated proxy, if proxy voting is permitted under Corporations Code section 7613. Many owner association Bylaws prohibit the use of proxies in the voting process, particularly in Bylaws prepared after the Davis-Stirling Act was amended to require practically all member votes to be conducted by the use of secret ballots that are mailed directly to each member. Why should the designated inspector of election be put in the position of determining whether a proffered power of attorney form is legally valid? The proposed new Civil Code rules under SB 1265 contain no statement or direction regarding what constitutes a valid power of attorney.

- Currently Civil Code section 5110, which requires owner associations to appoint one or three "inspectors of election" to fairly administer the election process and the tabulation of ballots. As presently written, subparagraph (b) of section 5110 states that persons appointed as inspectors of election must be independent third parties (which could be a member of the association who is not a candidate or related to a director or candidate) or a person who is employed or under contract with the association *if expressly authorized by the rules of the association*". That last category (persons employed or under contract with the association) would be eliminated if SB 1265 is adopted. The secret ballot, double envelope, voting rules that owner associations must follow under the Davis-Stirling Act are already very costly and burdensome large and small associations alike and many associations enlist the services of the association's outside auditor or legal counsel to serve as the inspector of elections. Accountants and lawyers are obligated by both their respective rules of professional conduct and by Civil Code 5110(d) to "perform all duties impartially, in good faith, and to the best of the inspector of election's ability".

- Currently Civil Code section 5120 provides that "all votes shall be counted and tabulated by the inspector or inspectors of election, or the designee of the inspector of elections, in public at a properly noticed open meeting of the board or members. Any candidate or other member of the association may witness the counting and tabulation of the votes. . . " If Civil Code section 5105(b)(7) is amended in accordance with the present text of SB 1265, the provision will require association election rules to "ensure that the meeting at which ballots are counted is held on association property and accessible to all members or their representatives who want to witness the tabulation." While, on its face, this may seem like an innocuous change (to require the vote count to be conducted at the site of the common interest development) in many contexts --- particularly predominantly second home resort CIDs – the requirement may make little sense because the bulk of the members have a principal domicile in some other location.

For example, many of the Lake Tahoe associations this Firm represents conduct their annual meetings (when the votes are tabulated) at locations in the Bay Area or Sacramento. Other Associations may utilize a meeting site that is near, but not part of the development because the site is better suited for large meetings. The version of SB 1265 that was reviewed for this letter also appears to make no revisions to the current text of Civil Code section 5120 which, while requiring the tabulation of ballots to occur at a meeting that is open to the members, does not require the tabulation to be conducted at the development.

- SB 1265 also dramatically increases the technical requirements that must be followed during the election process and would change Civil 5145(a) to require courts to overturn an election if they are shown to be in error. Currently Civil Code section 5145(a) gives the court the discretion to void the results of an improperly conducted election, but not the obligation to do so. That discretion permits a judge to disregard a technical violation that did not, in the court's judgment, compromise the fairness or integrity of the election or the results of the election.

- Although this letter is not intended to catch each and every bad proposal in SB 1265, the last item on my list is the change that is proposed to the list of "Association Documents" that are open to member inspection. Currently on that list (Civil Code section 5200) are: "Membership lists, including name, property address, and mailing address, but not including information for members who have opted out [of having their information shared] pursuant to Section 5220." SB 1265 amends that provision to say that "membership lists" include each member's email contact information. Again that may seem like a small and harmless change. However other provisions of the Davis-Stirling Act (specifically Civil Code sections 5225 and 5230) and Corporations Code section 8338 prohibit the use of membership lists by requesting members for commercial purposes or any other purpose that is not reasonably related to the requesting member's interests in the organization.

Under Corporations Code section 8330(c) nonprofit mutual benefit corporations also have the right to offer a requesting member a reasonable alternative to actual delivery of the membership list information (again, to protect the privacy rights of other members). As the recent international scandals involving Amazon, Facebook, and Edward Snowden have demonstrated, once electronic information and data are widely distributed, their use for improper purposes is almost impossible to control. Even if the requesting member has no improper or ulterior motives and states a reason for requesting the list that is validly related to his or her interest in the association, once that member's email blast goes out into cyberspace, every member's email address that is shown in the communication is free to be used by any recipient of the email for any purpose.

For all these reasons, it is respectfully requested that the Assembly Housing & Community Development Committee voice a strong opposition to this very damaging and ill-conceived legislative proposal.

Sincerely,

SPROUL TROST LLP

By: Curtis C. Sproul