PUBLIC POLICY POSITION PAPER

Lead Committee: **Home Ownership Housing Committee**
Level of Government Committee: **Legislative Committee**

01/2014

COMMON INTEREST DEVELOPMENT DISCLOSURE DOCUMENT FEES

THE QUESTION

Should CAR sponsor "follow-up" legislation in 2014 to our AB 771 (Butler) of 2011 to attempt to provide tighter parameters for CID transaction document fees?

ACTION

Required only If legislation is to be sponsored by C.A.R. in 2014.

POSSIBLE POSITIONS

1. **Technical "tune-ups" to the anti-bundling provisions of C.A.R.'s AB 771 of 2011.**
2. **Impose a "hard cap" on fees third party agents of HOAs can charge for processing documents required by the Davis-Stirling Act.**
3. **Add an "anti-kickback /referral fee" provision to the statutory requirements that apply to sales transactions of CID units.**
4. **A combination of items 1-3.**
5. **Other**
6. **Do Nothing**

DISCUSSION

It has been suggested by several REALTORS® who specialize in the sales transactions involving units in CIDs that the Davis-Stirling Act, as amended by C.A.R.'s 2011 legislation (AB 771), should be further amended to do the following:

1. **Expressly prohibit inclusion of any documents not expressly required in the Davis-Stirling Act disclosure requirements (9 items; see below for a summary of this requirement.), as well as expressly prohibit any form of a bundled report;**
2. **Limit requests by the seller to seller-mandated disclosures or requests by a prospective purchaser for information the prospective purchaser specifies;**

3. Authorize the seller to provide to the prospective purchaser any documents in the possession of the seller that meet the Davis-Stirling Act disclosure requirement and reduce the cost of any third party report by the documents so provided.
4. Require the seller, or a third party consultant working on behalf of the seller, to specifically identify (itemize) the individual fee for each document provided by the seller to the prospective purchaser.
5. Establish a "reasonable, but not to exceed" fee cap for the charges imposed upon the seller by a third party provider for provision of the documents required by the Act.
6. Prohibit referral fees/kickbacks being paid to HOA Managers or Listing Agents by Third Party Document Providers.
7. Expressly prohibit any third party agent of the seller from imposing a requirement on the prospective purchaser that the fees for the CID unit sales transaction are to be borne by the prospective purchaser.

The statutory model for CID unit disclosures is designed to supplement traditional seller disclosures like the Transfer Disclosure Statement that are required in single family detached homes. Civil Code Section 4525 contains a list of the documents required (see below) that must be provided to a prospective purchaser by a unit seller. The law also allows a seller to direct the Homeowners Association (HOA) to provide the documents, and allows the HOA to collect a "reasonable fee" to cover its costs to do so. Many, if not most HOAs, contract with a third party provider to compile these (and other) documents. Unlike the HOA, these providers are for-profit, and profitable, companies. At least one court case has supported their position that the provider's charges, including whatever profit margin they include in their report, are by definition the provider's reasonable cost of producing the requested documents, notwithstanding the fact that the HOA might have been able to perform the work in-house at a lesser cost. Reports by REALTORS® in some areas stated that costs for the reports were in the hundreds of dollars and sometimes approaching a thousand dollars.

An additional "abuse", in the view of some, is that the report providers demand payment upon delivery of the documents to escrow. That payment for the report (even though it is a statutory seller obligation) is charged against the prospective purchaser's funds and no refund is given if the transaction does not close. In effect, current practices have converted the seller obligation into a buyer cost, even if the transaction does not close. Sellers have little incentive to control this advance fee since they do not pay it at the time it is incurred and never see it except in the closing statement. Even worse, it has been alleged that the

situation actually encourages HOA managers to seek incentives from disclosure report providers for the referral of report business. The required reports thus become a profit center when performed by third parties, even though they would not be profit centers if done in-house.

When C.A.R sponsored AB 771 (Butler) in 2011, HOA managers and report providers argued persuasively in the Legislature that the reason for the high cost of reports was not gouging or excess fees, but was instead due to the required reports being bundled with other requested documents (such as a FHA Rent Percentage Certification). These multi-purpose reports, it was argued, were necessarily more expensive but worth it and a convenient accommodation to the parties. AB 771 went into effect on January 1, 2012. C.A.R. sponsored this legislation to eliminate over-charges for CID documents by prohibiting the "bundling" of these Davis-Stirling Act fees with fees for other escrow-related services and documents in a sale of a unit in a CID. Two years of experience with the guidelines created by AB 771 suggest that it has not been entirely effective at reducing unnecessary costs and that some clarifying amendments may be necessary to achieve the goals of AB 771.

C.A.R. Members who specialize in CID transactions have complained that several "abuses" continue to be experienced in the exchange of documents required in a transaction involving the sale of a unit in a CID. Such abuses include the following:

1. Representatives of the seller continue to "bundle" fees for documents not related to the Davis-Stirling Act requirements with the Davis-Stirling fees.

2. Third party agents of the seller are requiring the *prospective purchaser* **to pay for required documents that the seller already has in his or her possession, have not been changed since seller acquired the CID unit, and that could be directly provided to the prospective purchaser by the seller at no cost.**

3. Inflated charges by third party agents of the seller, for documents being provided to or on behalf of the prospective purchaser, making the total charge for the statutorily-required documents more than the accumulated individual costs of providing just the documents actually required by the Davis-Stirling Act.

4. Prospective purchasers are being forced to pay for disclosures that are currently statutorily required to be provided by sellers.

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Documents required by the Davis-Stirling Act for the seller to provide to the prospective purchaser include the following:

1. A copy of the governing documents for the CID.

2. A statement as to any restriction in the governing documents limiting the occupancy or residency in the CID.

3. A copy of the most recent documents distributed pursuant to the requirements of Section 4530.

4. A summary of any current regular or special assessments.

5. A copy of any notice previously sent to the owner for any violation of the governing documents that has not been resolved.

6. A copy of any list of defects provided to each member of the CID association that exist.

7. Copies of any settlement agreements regarding alleged defects and notices of resolution.

8. Any change in the association's current regular and special assessments.

9. A copy of minutes of the association's board of directors if requested by the prospective purchaser.

No other documents and fees therefor can be included in this packet. Yet some third party agents appear to be doing so notwithstanding this prohibition created by AB 771.

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AB 771 evolved from REALTORS® in Southern California who had repeatedly been exposed to fee abuses in transactions involving the sale of units in CIDs. The foundation for AB 771 consisted of the following factors:

1. Information required by the Civil Code to complete a sales transaction for a unit in a CID was being provided by the HOAs and their managers or third party agents.

2. Fees above "reasonable costs" for provision of the Civil Code-required documents were being imposed by agents of the HOAs.

3. Every dollar added to escrow expenses adversely affects prospective purchasers of CID units and ultimately prevents some prospective purchasers from buying a home in a CID.

4. Prospective purchasers of CID units were being required to pay the bundled fees for the transfer documents in advance and sellers would absorb these costs at close of escrow. If escrow failed to close, the prospective purchasers could not receive a refund of the fees paid and had to pay a second fee if another purchase was pursued, even though the disclosure is legally a seller's obligation.

Existing Civil Code Section 10177.4 limits the ability of a real estate licensee to accept or solicit money or other consideration for the referral of business to a service provider like a title, escrow, or pest control company. There is no similar prohibition that applies to HOA managers and document disclosure companies.
-- Should C.A.R.-sponsored legislation include an "anti-kickback" limitation?

<u>What action, if any, should CAR take with respect to fees assessed by third parties representing home ownership associations in transactions involving the sale of a unit in a CID?</u>