

Testimony of
Kim McClain

Before the Judiciary Committee
Friday, March 25, 2011
11:00 a.m.

H.B. 6620 AN ACT CONCERNING CONDOMINIUMS AND COMMON INTEREST OWNERSHIP COMMUNITIES

Summary

H.B. 6620 proposes to create an Office of Condominium Ombudsman; create new fees for associations and managers and alter the improvements create by the 2010 amendments to CIOA. CAL-CT opposes these sections. The components of the bill which should remain concern minor amendments to improve the CIOA revisions including a clearer definition of business procedures versus rule; allowing for an assessment against a unit owner for common expenses caused by ordinary misconduct or negligence; and prohibit criminal prosecutions of members of condominium boards unless such members are acting outside the scope of their authority.

Kim McClain

I currently serve as the Executive of the Connecticut Chapter of the Community Associations Institute (CAL-CT). CAL-CT is the educational and technical assistance entity for community associations and their service providers in Connecticut. We are one of 57 chapters of a National organization. Through this alliance we are able to provide up-to-the-minute information on the issues and trends affecting associations, programs to enable community association managers to obtain professional credentials and access to hundreds of publications which provide tools to assist association members in their operations.

I am submitting comments, to present my insights into how the proposed bill will affect the more than 4,000 common interest communities in Connecticut, and the hundreds of thousands of people who live in them.

Background

CAL-CT works diligently to protect the rights and foster the responsibilities of all of our members. Through our programs, website and magazine, we foster *Best Practices* for associations throughout the State.

When Zogby International recently performed a survey on behalf of CAI, the results showed that overall unit owners are satisfied with their associations. Despite compelling stories, survey data does not support the assertion that homeowner problems with elected boards are widespread, in fact, more than 99% of residents surveyed report that their elected board represent the best interests of the community as a whole. When surveyed, 87% of respondents indicated that they would oppose greater government intervention on their community association, through ombudsman programs or other legislative efforts to override local, elected boards. (See attachment

of Zogby survey results.)

Our state now has a law, Public Act 06-23 AN ACT CONCERNING TRAINING FOR MEMBERS OF ASSOCIATIONS OF COMMON INTEREST COMMUNITIES. CAL-CT offers a solid day-long program which covers the basics of association operations. It is open to board members, managers and unit owners. Since this law does not include any enforcement provisions, only a few hundred board members, managers and unit owners have availed themselves to this training. We continue to encourage both the Department of Consumer Protection and the Office of Attorney General to work with us to provide greater access to information that would lead unit owners and board members to seek educational opportunities.

We take our education programs very seriously. We are fortunate to have a significant pool of devoted members who volunteer their time to provide our high quality programs. Throughout the year, we offer a plethora of low-cost education programs open to all who are interested. In 2010 when the major revisions to CIOA (Common Interest Ownership Act) were nearing the implementation date, we presented over one dozen education sessions spanning the entire state. Our volunteer attorney and insurance professional members provided guidance about how to comply with the changes in the law. Nearly 800 people attended these sessions.

Each year, we have an annual conference and expo open to everyone. Both in 2010 and just two weeks ago, we had nearly 800 people in attendance at just this event alone.

We have also offered a course: What to Know Before You Buy a Condo, through local adult education programs.

We are well aware of the fact that all communities within our borders are not healthy. Yet, there is a clear correlation that unhealthy communities tend to breed unhealthy boards. But the issue in these communities is not usually intentionally "bad" boards, it is absolute apathy. It is apathy that is the enemy of a well run association. Most boards would be thrilled to have greater participation amongst their unit owners. Unfortunately, many association board members are criticized when things do not seem to go well, and are rarely offered a hand to make things function better. We firmly believe that harmonious communities do not happen by chance, rather it is due to the concerted efforts of dedicated volunteers that healthy communities thrive.

Please note that we have met with members of the Connecticut Condo Owners Coalition on two occasions. We spent several hours discussing our programs and resources. We explained the necessity of education in managing issues in associations before they rise to the level of a serious complaint. They are well aware of the complete access available to all through our website. We invited their members to attend our annual conference and our upcoming education sessions. We even offered to help devise more programs to address the needs and concerns of their group. Now, it is apparent our efforts to reach a consensus have been spurned. We are extremely disappointed.

Analysis of Complaints Submitted to the Connecticut Attorney General

CAL-CT thoroughly reviewed the 206 written complaints received by former Attorney General

Blumenthal between 2007 and 2010. It is significant to note that the totality of these complaints represents approximately one percent of all the units in the entire state.

It took several weeks to pour through the 3,360 pages in the complaint files. We found the contents to be quite revealing. 105 of the complaints addressed financial concerns, e.g. accountability and access to financial records, disagreement with board financial decisions, and payment disputes. 63 complaints dealt with issues involving governance, and disagreements with board decisions. Thus, 168, or 81.5% concerned issues that are directly related to the transparency requirements of the revisions to CIOA. (Copies of our summary analysis are available.)

Consequently, it seems prudent to allow CIOA revisions the chance to be fully implemented before any type of ombudsman program should even be contemplated. It has long been our contention that the greater transparency required by CIOA revisions offer the best protection and opportunities for owners to take control and responsibility in their communities.

Statement

CAI-CT OPPOSES the provisions of H.B. 6620 which propose the creation of an office of condominium ombudsman for the following reasons:

1. A Condominium Ombudsman is unnecessary because the officers and directors of an association ultimately serve at the pleasure of the unit owners within the community, and Connecticut law currently contains adequate provisions governing the election and removal of directors that enable owners to control the composition of both officers and directors.

Community Associations are legal entities which are run democratically. Therefore, it is incumbent upon the unit owners in an association to elect persons who represent their interests. Conversely, unit owners also have the power to remove elected board members who are not performing up to the standards the community desires.

2. Alternate Dispute Resolution (ADR) programs are a much more appropriate option for handling complaints. An ADR program can and should be developed to address issues which occur at individual associations. From a purely practical standpoint, it is reasonable to expect those who are to pay for ADR are those who have the issues - not the majority of content homeowners. Such a program would be composed of licensed/experienced condominium attorneys who are knowledgeable about association documents and the state statutes and can readily instruct, mediate and come recommend proper resolutions. The most equitable process would require that the party who *loses* pays the legal fees. This would hold the boards accountable as well as the homeowners. It is important to note, however, that although our sister chapter of CAI for New England has had such a program for almost seven years, i that time, they have had only once complaint go through the process. Apparently, once it was understood that the parties would have to pay to file a complaint, they were no longer interested in pursuing the issue. A extremely small fee of \$35 to file a complaint would instead serve as an incentive to put the burden of a problem's resolution on the state, rather than on the source of the issue: the association and its members.
3. If the Condominium Ombudsman is to be the authority on what constitutes a violation in an association, what would be the incentive for a unit owner to be informed about their rights and responsibilities? Unit owners have an obligation to read and understand the

documents and rules that come with their purchase of a unit. We strongly believe that all potential purchasers should be able to know the answer to some very basic questions BEFORE they say yes to the community living lifestyle. We have posted a simple test on our website to help guide the decision process. In most matters of the law, ignorance is not usually considered a defense. In the situation of uninformed unit owners it winds up being a harsh offense. (See attached "Take the Test.")

Fundamental Issues

1. Allow 2010 CIOA revisions to take hold - The key intent of the major overhaul of the Common Interest Ownership Act was to greatly enhance transparency in the governance and operations of common interest communities.
2. Indentification of all the association units - If the state is to impose a \$4 per door fee on all associations in order to fund an ombudsman program, how does it intend to locate all of these units? It is our belief that we possess the most comprehensive database of associations in our state, but we are quite certain that we are missing hundreds. Indeed, although we are constantly cleaning our database, the records are also ever changing, as contacts resign, move or die. What methods will the state employ to track down all of the associations in Connecticut? Does the fee requirement also pertain to *de minimus* associations? Beach Associations?
3. There is no evidence of success with the existing state run ombudsman programs. Three states currently have ombudsman programs, Nevada, Florida and Virginia. Colorado has a newly created office of information for homeowners. In observing the implementation of these Ombudsman programs, CAI does not believe that these organizations have had a positive impact on helping homeowners who have problems with their associations for the following reasons:

∟ Where problems exist, they involve private disputes of a contractual nature and the state has no standing or ability to dictate outcomes.

∟ Such programs remove dispute resolution from the community to the state bureaucracy, increasing costs and complexity of resolving legitimate homeowner disputes.

∟ Other effective means exist to empower residents in community associations at much lower cost to taxpayers.

To the extent that problems arise within community associations, CAI believes they can be best addressed through comprehensive board member education, pre-sale disclosure requirements, and professional credentialing of managers. We once again extend our offer to work in concert with the Department of Consumer Protection and the Office of Attorney General to provide effective and meaningful methods for educating members of common interest communities before purchase and during their tenure as owners. Our common interest communities need more owners to be aware of their responsibilities to themselves and their communities, not an avenue to negate obligations and ignore the basic tenets of successful democracy and self-governance - be informed and get involved!

We would be happy to further discuss with you this issue, or any others affecting common interest

communities in Connecticut. Please do not hesitate to contact us with any questions or concerns. I can be reached at 860-633-5692 or email: caictkmclain@sbcglobal.net.

Thank you for your consideration.

Respectfully submitted,

Kim McClain

Ombudsman Analysis from National CAI

CAI supports the development of well governed and managed communities, from our experience, Ombudsman offices do not lend themselves to such goals and have in practice, proved of little value to resolving homeowner complaints.

First, despite compelling stories, survey data does not support the assertion that homeowner problems with elected boards are widespread, in fact, more than 99% of residents surveyed report that their elected board represent the best interests of the community as a whole. When surveyed, 87% of respondents indicated that they would oppose greater government intervention on their community association, through ombudsman programs or other legislative efforts to override local, elected boards.

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To the extent that problems arise within community associations, CAI believes they can be best addressed through comprehensive board member education, pre-sale disclosure requirements, professional credentialing of managers and through the adoption of uniform common interest ownership acts.

Ombudsman programs impose new taxes and fees on homeowners association, which are frequently not used to support the programs for which they are levied.

CAI has developed board member education programs, both online and in person to address board member governance issues and CAI has a Rights and Responsibilities program to encourage boards and residents to engage in good governance practices.

National Survey Affirms Community Association Success

For the fourth time over a span of 10 years, community association residents have told pollsters they are satisfied with their homeowners associations, condominium communities and cooperatives.

Independent, national research conducted by Zogby International in December 2009 showed that seven in ten community association residents are satisfied in their communities, with only 12 percent expressing some level of discontent and 17 percent neither satisfied nor unsatisfied.

More than 60 million Americans reside in an estimated 305,000 association-governed communities, from town home communities and cooperatives to high-rise condominiums and city-size master-planned associations.

The 2009 findings are strikingly similar to the results of surveys conducted by Zogby in 2005 and 2007. A Gallup Organization survey in 1999 showed similar results.

The news is positive for the homeowner volunteer leaders who serve on association boards, with almost 90 percent of residents saying board members "absolutely" or "for the most part" strive to serve the best interests of their communities. Only 7 percent expressed displeasure with their boards. An estimated two million homeowner volunteers serve on the boards that govern associations.

Other key findings

- 91 percent of residents say they are on friendly terms with their association board members; just 3 percent indicate a negative relationship.
- 82 percent say they get a "good" or "great" return on their association assessments; 16 percent say they don't.
- 76 percent say their professional community managers provide value and support to residents and the association at large; 18 percent say they don't.

The survey was sponsored by the Foundation for Community Association Research, a nonprofit organization affiliated with Community Associations Institute (CAI).

"Given the state of the economy and housing market, these findings are reassuring," says Foundation President Lincoln Hobbs, Esq., and a member of CAI's College of Community Association Lawyers (CCAL). "Americans have weathered difficult times, and that would normally create more negative views toward most institutions. That hasn't happened in the case of community associations. That says a lot about the dedication and skill of the vast majority of homeowner volunteers and professionals who govern and manage these communities."

Association rules

While some homeowners chafe when confronted by rules they don't like, 70 percent say their association rules "protect and enhance" property values, while only 2 percent say the opposite. Twenty-seven percent believe rules have no impact. Often called Covenants, Conditions and Restrictions (CC&Rs), rules in community associations typically address issues such as architectural guidelines, yard upkeep, pets and parking.

Although the enforcement of association rules can generate discontent and calls for more stringent regulation of community associations, only 10 percent of those surveyed want additional government control of association- governed communities. Almost 90 percent oppose more government involvement.

The best and worst

Asked to name the best aspects of living in an association, residents most often cite neighborhood attractiveness (23 percent), less maintenance for individual homeowners (22 percent), community safety (13 percent) and property values (11 percent).

Asked to name the worst aspects of their associations, 37 percent say there is nothing bad. That is followed by restrictions on exterior improvements (14 percent), dealing with neighbors (12 percent) and paying assessments (10 percent). Association homeowners pay assessments for services and amenities provided by the association. Services can include landscaping, building maintenance, garbage pickup, snow removal and street lighting. Amenities can include pools, club houses, tennis courts, playgrounds and association- sponsored social functions.

Conflict among neighbors

Of those who cite neighbor-to- neighbor issues, 24 percent say conflict relates to the appearance of homes. Other leading reasons for strife include parking (12 percent), personal habits and noise (11 percent, respectively).

“Conflict and dissention make headlines, and that’s what many Americans read in newspapers and see on television about community associations,” says Thomas M. Skiba, CAE, chief executive officer of Community Associations Institute (CAI). “But when you ask residents themselves, the news is largely positive. While there are serious issues in some communities, this research affirms that vast majority of homeowner board members and professional managers are doing good work for the community associations they serve.”

Homeowners who are unsatisfied need to “step up and play a constructive and positive role in their associations,” Skiba adds. “You get out of your communities what you put into them. There’s no substitute for active and constructive homeowner involvement and no better way to build a true sense of community.”

Based on telephone interviews conducted in December 2009, the survey has a margin of error of +/- 3.8 percent. Zogby International has been tracking public opinion in North America, Latin America, the Middle East, Asia and Europe since 1984.

Created by CAI in 1975, the Foundation for Community Association Research is an independent, nonprofit organization devoted to common-interest community research, development and scholarship. CAI, with almost 30,000 members and 58 chapters across the country, provides education, resources and best practices to the homeowner volunteer leaders and professionals involved in the governance and management of common-interest communities.

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Rights and Responsibilities for Better Communities

Principles for Homeowners and Community Leaders

More than a destination at the end of the day, a community is a place people want to call home and where they feel at home. This goal is best achieved when homeowners, non-owner residents and association leaders recognize and accept their rights and responsibilities. This entails striking a reasonable balance between the preferences of individual homeowners and the best interests of the community as a whole. It is with this challenge in mind that Community Associations Institute (CAI) developed Rights and Responsibilities for Better Communities.

Rights and Responsibilities can serve as an important guidepost for all those involved in the community—board and committee members, community managers, homeowners and non-owner residents.

Homeowners Have the Right To:

- A responsive and competent community association.
- Honest, fair and respectful treatment by community leaders and managers.
- Participate in governing the community association by attending meetings, serving on committees and standing for election.
- Access appropriate association books and records.
- Prudent expenditure of fees and other assessments.
- Live in a community where the property is maintained according to established standards.
- Fair treatment regarding financial and other association obligations, including the opportunity to discuss payment plans and options with the association before foreclosure is initiated.
- Receive all documents that address rules and regulations governing the community association—if not prior to purchase and settlement by a real estate agent or attorney, then upon joining the community.
- Appeal to appropriate community leaders those decisions affecting non-routine financial responsibilities or property rights.

Homeowners Have the Responsibility To:

- Read and comply with the governing documents of the community.
- Maintain their property according to established standards.
- Treat association leaders honestly and with respect.
- Vote in community elections and on other issues.
- Pay association assessments and charges on time.
- Contact association leaders or managers, if necessary, to discuss financial obligations and alternative payment arrangements.
- Request reconsideration of material decisions that personally affect them.
- Provide current contact information to association leaders or managers to help ensure they receive information from the community.
- Ensure that those who reside on their property (e.g., tenants, relatives, friends) adhere to all rules and regulations.

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Community Leaders Have the Right To:

- ❑ Expect owners and non-owner residents to meet their financial obligations to the community.
- ❑ Expect residents to know and comply with the rules and regulations of the community and to stay informed by reading materials provided by the association.
- ❑ Respectful and honest treatment from residents.
- ❑ Conduct meetings in a positive and constructive atmosphere.
- ❑ Receive support and constructive input from owners and non-owner residents.
- ❑ Personal privacy at home and during leisure time in the community.
- ❑ Take advantage of educational opportunities (e.g., publications, training workshops) that are directly related to their responsibilities, and as approved by the association.

Community Leaders Have the Responsibility To:

- ❑ Fulfill their fiduciary duties to the community and exercise discretion in a manner they reasonably believe to be in the best interests of the community.
- ❑ Exercise sound business judgment and follow established management practices.
- ❑ Balance the needs and obligations of the community as a whole with those of individual homeowners and residents.
- ❑ Understand the association's governing documents and become educated with respect to applicable state and local laws, and to manage the community association accordingly.
- ❑ Establish committees or use other methods to obtain input from owners and non-owner residents.
- ❑ Conduct open, fair and well-publicized elections.
- ❑ Welcome and educate new members of the community—owners and non-owner residents alike.
- ❑ Encourage input from residents on issues affecting them personally and the community as a whole.
- ❑ Encourage events that foster neighborliness and a sense of community.
- ❑ Conduct business in a transparent manner when feasible and appropriate.
- ❑ Allow homeowners access to appropriate community records, when requested.
- ❑ Collect all monies due from owners and non-owner residents.
- ❑ Devise appropriate and reasonable arrangements, when needed and as feasible, to facilitate the ability of individual homeowners to meet their financial obligations to the community.
- ❑ Provide a process residents can use to appeal decisions affecting their non-routine financial responsibilities or property rights—where permitted by law and the association's governing documents.
- ❑ Initiate foreclosure proceedings only as a measure of last resort.
- ❑ Make covenants, conditions and restrictions as understandable as possible, adding clarifying "lay" language or supplementary materials when drafting or revising the documents.
- ❑ Provide complete and timely disclosure of personal and financial conflicts of interest related to the actions of community leaders, e.g., officers, the board and committees. (Community associations may want to develop a code of ethics.)

Sponsored by CAI's President's Club

Visit www.caionline.org; write cai-info@caionline.org;
call (888) 224-4321 (M-F, 9-6:30 ET)

CAI-NE Alternate Dispute Resolution Program

MISSION STATEMENT

Condominium Dispute Resolution is not a branch of government or the judiciary but an alternative dispute resolution organization established under the aegis of the New England Chapter of Community Associations Institute in order to assist in the resolution of conflicts arising in community associations including condominiums and cooperatives.

DEFINITIONS

ADR. ADR stands for alternative dispute resolution and may take the form of Arbitration or Mediation as defined below.

Arbitration. Arbitration is a process of dispute resolution whereby a Neutral (as defined herein) renders a decision after hearing an abbreviated version of the evidence that could be produced at trial. Arbitration is a form of adjudication, whereas mediation is not. Depending on the agreement of the parties, the facts found by the Neutral may or may not be binding. In non-binding arbitration, either party may demand a trial after arbitration, subject to the rules of court and laws of the particular jurisdiction.

By-Laws. By-Laws refer to the By-Laws of Condominium Dispute Resolution, which establish the internal rules and restrictions guiding the officers of Condominium Dispute Resolution, the appointment, qualification and training of Neutrals, and other matters pertinent to the operation of Condominium Dispute Resolution.

Initiator. This term refers to the person, or persons, who start the ADR process.

Mediation. Mediation is a process whereby a Neutral reasons with the parties in an attempt to facilitate a settlement. The Neutral attempts to focus the attention of the parties upon their needs and interests rather than upon their rights and positions. Any settlement is voluntary and the Neutral has no right to force a settlement, make any findings or rulings that are binding upon the parties, or enter any order. In the absence of settlement the parties lose none of their rights to a trial on the merits of their case. In order to facilitate settlement discussions, all parties to a mediation agree that all comments, concessions, offers and positions will not be used against the other party in any further proceeding.

Neutral. The term Neutral as used in these rules refers to mediators, and arbitrators who, in all cases must be an impartial person without any relationship with the parties and witnesses. If a matter is mediated and later is submitted to arbitration, the Neutral in the mediation shall not conduct the arbitration.

Respondent. This term refers to the person, or persons, responding to the commencement of the ADR process.

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PROTECTIONS

Confidentiality

To the extent permitted by law, any statement made during a mediation or as part of intake by program staff in preparation for a mediation is confidential, not subject to disclosure by the Neutral or Condominium Dispute Resolution staff, and may not be used as evidence in any further proceeding. Unless a court's ADR rules provide otherwise, the confidentiality herein applies to non-binding arbitration conferences.

Confidentiality does not extend to items that are otherwise discoverable, threats of imminent violence to self or others, or matters otherwise required to be reported by statute.

Parties will be informed of limitations on confidentiality at the beginning of the ADR process. Collection of information necessary to monitor the quality of a program is not considered a breach of confidentiality.

Immunity

The agreement for ADR to be executed by each party prior to the commencement of any proceeding hereunder shall be deemed to provide that no Neutral, nor Condominium Dispute Resolution, nor its officers, directors, members, or employees is to be held liable for civil damages for any statement, action, omission or decision made in the course of any ADR process unless that

statement, action, omission or decision is a) grossly negligent and made with malice or b) is in willful disregard of the safety or property of any party to the ADR process.

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ADMINISTRATION

Condominium Dispute Resolution is administered by an Administrator appointed by the Directors of Condominium Dispute Resolution. The office of the Administrator is located at 888 Worcester Street, Suite 20, Wellesley, Massachusetts 02482. Phone: 781-237-9020 / Fax: 781-237-9028

Applicable Rules.

The parties shall be deemed to have made these rules a part of their ADR agreement whenever they apply for alternate dispute resolution of their issues to Condominium Dispute Resolution, regardless of the type of ADR selected. If a party establishes that any material inconsistency exists between the executed ADR agreement and these rules, the Neutral shall apply these rules, unless the parties to the agreement agree to amend these rules for purposes of their ADR proceeding. Nothing contained herein shall prevent parties to an ADR proceeding hereunder from establishing rules that are inconsistent with these rules provided that they bring such changes to the attention of the Neutral in writing and such are accepted by the Neutral. The form of the rules shall be that current at the time the request for services is received by Condominium Dispute Resolution.

Fee Schedule

Administrative Fee: A \$500 (\$600 for non-CAI members) non-refundable administrative fee is due and payable in advance at the time a dispute is submitted. If the submission is other than by court order or joint request, \$250 (\$300 for non-CAI members) shall be submitted by the Initiator with the Request and \$250 (\$300 for non-CAI members) shall be submitted by the Respondent with the Response. If either party is a CAI member the CAI rate shall apply.

Neutral's Fee: The Neutral shall be compensated by the parties at the rate of \$200 (\$300 for non-CAI members) per hour for the first three (3) hours and at \$300 (\$400 for non-CAI members) thereafter. A \$600 (\$900 for non-CAI members) deposit shall be submitted upon selection of the Neutral and additional deposits made at the Neutral's request. There shall be a two hour minimum charge.

Rescheduling Fee: A \$100 (\$150 for non-CAI members) fee shall be charged to reschedule a mediation or arbitration hearing within forty-eight hours of the scheduled time to be paid by the party so requesting, unless otherwise agreed.

Fee Policies: All fees are due and payable in advance and are non-refundable. Checks should be made payable to Condominium Dispute Resolution. The Neutral's fees shall be charged equally, unless the parties agree otherwise. In arbitration proceedings, a Neutral may award a party's administrative and Neutral's fees as part of the decision, unless the parties agree otherwise.

In the event that any administrative or Neutral's fees are not paid, the proceedings may be suspended or terminated until such fees are paid in full.

These fees are effective as of June 1, 2004 and may be changed at any time by Condominium Dispute Resolution.