CACM - REBUTTEL TO CAI
Letter Urging the Governor to Veto AB 1328

The Honorable Arnold Schwarzenegger
Governor
State of California
State Capitol
Sacramento, CA 95814
(via mail and fax (916) 916-558-3160)

Dear Governor Schwarzenegger:

I am writing to ask you to veto AB 1328 which authorizes homeowner association (HOA) boards to enter five year contracts without getting a vote of the association property owners and without obligating the board to determine that the contract would, in fact, prove to be financially beneficial to the association.

- This bill is unnecessary as current law already allows all contracts that exceed one year to be approved by the members. That procedure could easily be followed here, but AB 1328 allows an association board to move ahead on its own in Executive Session.

Typically, most associations are restricted to contracts of one year unless the CC&Rs allow for a longer term. Although currently the CC&Rs could be amended to provide for a longer term, this process can be extremely costly for homeowners at a time where every penny matters. We know of associations where this process has cost approximately $10,000 and had to be paid by the homeowners. This bill would allow a limited type of contract to be effective without having to incur the expense of amending governing documents. AB 1328 requires disclosure of the contract to all members

***prior* to approval. Furthermore, there is already precedent for multi-year contracts in CIDs (see DRE Regulations 2792.21(b)(1)). Although the DRE Regulations allow for contracts up to three years, this allowance would not apply to associations in existence prior to the regulation and many efficiency contracts require at least a five year period.**

- The bill expressly says "Notwithstanding any provision of the governing documents to the contrary" a board may act on such a contract. This overrules any previously adopted governing policy which prohibits making long term contracts.

The bill is permissive. If associations want to continue to abide by the previously adopted governing policy, they may do so. This simply provides an option for a limited type of contract that will save homeowners money.

- The bill doesn't even require a board to explain to the members the contract approval procedure pursuant to AB 1328, and therefore allows a board to circumvent the members entirely. It only requires that the contract duration shall be posted as a notice on the Board's Executive Committee Agenda since the contract terms are not subject to discussion or vote at regular association meetings.

The approval process is the same as any 3rd party contract the board signs, such as insurance, landscaping, pool, maintenance, etc Multi-year contracts are not new to associations.

- This bill would have the details of these long term obligation decisions rest entirely with the board, outside of members' view, and will bind future boards and owners well into the future.

The bill requires, prior to approval, disclosure of the contract duration on all meeting agendas where the contract will be discussed or voted upon. Additionally, All members have access to records. This bill does not mandate but allows a board to sign a contract for energy and water conservation for up to five years.

- Members would not know the reasons upon which a contract was entered nor the terms of the contract until after it is signed.

The Board is allowed to sign this type of contract as long as there are verifiable savings, as the board deems reasonable for the association. The board makes these decisions all of the time on behalf of the association. For example, associations may currently enter into multi-year contracts for laundry fixtures, cable, etc. without a vote of the membership. Additionally, prior to approval of the contract, the duration of the contract must be listed on any meeting agenda where the contract will be discussed or voted upon.

- Additionally, the bill doesn't require proof that the services will result in actual significant savings to the association: it is totally speculative and based on "anticipated savings" of an undefined type and amount. In reality, low, first year savings may erode over the five year contract term.

Just as with any other contract, the board determines what is appropriate for the association. Savings may be financial, energy, or other items specific to the association.

- Worse, it fails to provide adequate prohibitions on potential conflicts of interest among the service contract providers, future board members, managers, and affiliated company subsidiaries.

The California Corporations Codes already have restrictions and protections in place in case of self-dealing interests. Associations are governed by the California Corporations Code and section 7233 already establishes protections against conflicts of interest. Furthermore, the board has a fiduciary duty to act in the best interests of homeowners.

- The bill lacks several important definitions, such as what is a water or energy "program"? Does it include materials or services, or both?

There are a variety of efficiency technologies now available, such as solar rooftops or water monitoring systems. AB 1328 is intended to enable any technology that promotes efficiency. Again, if the board doesn't determine that the technology will conserve water or energy, it doesn't need to enter into the contract. Creating a static definition would tie the hands of boards in a time where green technology is constantly evolving.

- AB 1328 also lacks guidance as to how the board calculates (anticipates) "verifiable" savings. Are "savings" measured by gallons of water used or utility bills? Will "savings" mean lower owners' HOA assessments? Are

savings needed in each year or only in year one, or five? The bill allows for mere speculation.

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- It will engender lawsuits for the foregoing reasons, costing association members money.

This is a very misleading statement with no foundation or basis.

Since the bill contains so many open issues, why obligate the HOA members to a long term and uncertain financial risk?

The bill is not a mandate but allows the board to use its discretion in determining whether the contract is appropriate for that particular association. If the association believes the contract may involve uncertain financial risks, it doesn't have to enter into the contract. Again, the board has a fiduciary duty to act in the best interests of the association. Furthermore, the bill contains disclosure provisions and is consistent with current practices.

In short, there is no need for AB 1328. It is very problematic because it opens the door to abuse, misuse and misinterpretation, and as poorly written, it creates a bad public policy precedent. In the interest of homeowners, it needs to be vetoed.

CAI was provided CACM's responses to these concerns several months ago.