Report of the IREM® Legislative and Public Policy Committee

To Executive Committee
October 21, 2015

Chair: Aaron Bosshardt, CPM®
Vice Chair: Mindy Gronbeck CPM®
Staff Liaison: Beth Wanless (Ron Gjerde and Megan Booth)

Motions Requiring Executive Committee Approval:
New statement of policy on homelessness and the Right to Rest Act. This SOP was approved by the committee in August and awaits confirmation.

MOTION 1 was approved by the Executive Committee and the Governing Council on October 22, 2015.

Motion 1: Right to Rest Act
Background:
Recent state legislation has been introduced across the nation that would establish certain protections and rights to allow the homeless to sleep, eat, and congregate on public spaces. IREM is concerned with such legislation in that it would infringe on a private property owner’s rights and thus disturb the flow of business of certain properties such as shopping centers. This new statement of policy was adopted by the committee at their August, 2015 meeting.

Please see page 18-19 for full language of the statement of policy.

Action:
To approve the legislative statement of policy on homelessness and the Right to Rest Act.

MOTION 2 was approved by the Executive Committee and the Governing Council on October 22, 2015.

Motion 2: E-Cigarettes
Background: In recent years, there has been increased use of electronic or e-cigarettes in residential and commercial properties. The FDA is currently investigating e-cigarettes, following a proposed rule in 2014 that would regulate the sale and distribution of e-cigarettes. A final rule is still pending. IREM reiterates our existing policy banning workplace smoking. But IREM encourages all managers to review the FDA guidance, when it is published.

Please see page 20 for full language of the statement of policy.

Action:
To approve the legislative statement of policy on Electronic Cigarettes

MOTION 3 was approved by the Executive Committee and the Governing Council on October 22, 2015.

Motion 3: Community Assessment Protection Lien
Background: Following the recent foreclosure crisis, many common interest associations are facing
difficulties recovering outstanding dues and fees owed by current and former property owners. Many of these associations face financial hardship when these payments go uncollected. This policy was previously referred to a working group, led by David Barrett, CPM. The Committee reviewed the changes proposed by the working group, and passed this motion to bring the SOP up to date and make it more relevant to today’s economic climate.

Please see page 21-22 for full language of the statement of policy.

**Action:**
To approve the amended legislative statement of policy on Community Assessment Protection Lien

**Other Actions:**

**Approved Revisions of Existing Statements of Policy:**
Aaron Bosshardt led the committee through the recent revisions of 13 existing IREM statements of policy for this committee meeting. Two of these SOPs – imminent domain and employee free choice were sent back to staff for further updates to the background. The other 11 revisions were approved by the committee.

**Other Items:**

**Report on 2015 Committee Goals:**
Aaron Bosshardt gave a brief update on committee goals as of October, 2015. All goals have been accomplished ahead of or by the stated deadline.

**Information on Executive Edge Session:**
Mindy Gronbeck informed the committee of an upcoming IREM Executive Edge Session on the recent U.S. Supreme Court’s ruling on the disparate impact housing theory that will take place on Friday, October 23 from 1:00P-2:30P here in Salt Lake City, UT.

**IREM Federal Housing Advisory Board Report:**
2015 FHAB Chair George Caruso gave a brief report on the most recent FHAB meetings with the department of Housing and Urban Development and Rural Housing Service that took place on September 24.

**Update on Revised Uniform Residential Landlord and Tenant Act (“RURLTA”):**
Megan Booth gave a report on her work as an observer and participant in the Uniform Law Commission’s revisions of the Uniform Residential Landlord and Tenant Act.

**Future IREM Government Affairs Activity:**
Aaron Bosshardt and Mindy Gronbeck, both members of the IREM Government Affairs Task Force, gave an update on their work with the group including a discussion of what the goal and objective is and their responsibilities and deadlines.

**Open Discussion on State Public Policy Activity:**
Members discuss various public policy issues around the country including: tax assessments on Low Income Housing Tax Credit (LIHTC) properties; source of income laws; VRBO and AirBNB restrictions; and rent control.

**Committee Members in Attendance**

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<tr>
<th>Committee Members in Attendance</th>
<th>Stephen Burger, CPM®</th>
<th>Debbie Prejeant, CPM®</th>
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<tr>
<td>Aaron Bosshardt, CPM®</td>
<td>Chet Fitzell, CPM®</td>
<td>Warren Lizio, CPM®</td>
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<td>Mindy Gronbeck, CPM®</td>
<td>David Fortune, CPM®</td>
<td>Mary Scherer, CPM®</td>
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<td>Susan Heath, CPM®</td>
<td>Shawn Harvey, CPM®</td>
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Homelessness and the Right to Rest Act Statement of Policy

Background:
In recent years state legislatures have passed bills seeking to protect homeless individuals from potential discrimination. Illinois, Rhode Island, and Connecticut have all adopted “Homeless Bill of Rights” legislation, which seek to affirm the civil rights of homeless people, particularly their access to medical care, having equal opportunity for employment, and being able to register to vote.

In addition to these laws already enacted, state legislatures across the nation have considered passing homeless “Right to Rest” bills. In 2015, legislation was introduced in California, Oregon, and Colorado that would create a certain set of rights to the homeless. The legislation would provide the homeless with certain protections and allow them to sleep and “rest” on public property, such as parks, plazas, parking lots, transportation facilities, shopping centers, and sidewalks.

The bill proposed in Colorado would have allowed anyone who felt discriminated against the ability to sue for damages and attorney’s fees. In California, the bill would have given people “the right to occupy a motor vehicle or a recreational vehicle provided that the vehicle is legally parked on public property or private property with the permission of the owner.” The premise of the legislation is to prohibit people from discriminating against and criminalizing the homeless. In many cities, ordinances are currently intact that prohibit anyone from camping and living in open spaces. Homeless rights advocates argue that these ordinances criminalize the homeless unfairly.

There have been many diverse reactions to this legislation across the nation. Homeless and religious groups have advocated for passage of the legislation in that it provides the homeless a place to “rest” and congregate.

Opponents of these bills are cities, government coalitions, industry trade groups, defense lawyers, and private
citizens. City and public park officials are concerned with the potentially high cost of maintaining the camp sites including trash removal, human- waste removal, and security. Those involved with the maintenance of public parks also argued that the public parks may become unusable to people if not safely maintained, which would be very expensive.

Many IREM Members have growing concerns with this legislation because it may force real estate owners and managers to allow the homeless to congregate in certain areas that may prevent or disrupt normal business activity. Specifically, members who manage and own shopping centers are worried people who wish to rest on properties will not make a clear division between public and private property. Similar to cities and local governments, shopping center owners and managers are concerned with the added expense of maintaining the safety and cleanliness of these areas which could create an unfair burden on their business and employees. Also, real estate practitioners worry they could be unfairly targeted for litigation for potential discrimination claims.

Further, opponents claim legislation such as the “Right to Rest” acts allow unfair protections to a certain group of people, while simultaneously disregarding the rights of others.

**IREM POSITION:**
The underlying issue of homeless cannot be solved by adopting legislation that would allow people to “rest” in certain areas. Affordable housing options, job training and placement, mental health treatment and counseling, and many other origins of homelessness must be addressed first.
The “criminalization” of homelessness is often cited by homeless advocates as a reason for passage of Right to Rest legislation. However, the bills proposed in Colorado, California, and Oregon do not provide solutions for chronic homelessness, and avoid the reality that the only effective way to address chronic homelessness is through increased federal funding for affordable housing, and social service programs which focus on development of life skills that empower individuals and families to be lifted out of homelessness.

With such legislation comes many unintended consequences including creating major financial burdens on public and private groups and citizens. The safety of citizens and sanitation of public areas are also of concern.

IREM supports the national goal of a decent home and a suitable living environment for every family. IREM strongly endorses federal funding and/or state and local initiatives and development of private and public partnerships for social service programs which might include development of personal "life skills" that empower individuals/families in such a way as to assist them from ever being homeless again.

IREM opposes blanket legislation that does not address the underlying issues of homelessness, such as the “Right to Rest Act.” The legislation is a misguided effort to help society’s vulnerable citizens. This legislation tends to put an unfair burden on one group of citizens, while protecting another group. In addition, the law could prevent law-abiding business owners, managers, shoppers and other citizens in a difficult situation where they are unable to carry out daily life or partake in public activities.
Electronic Cigarettes (“e-cigarettes”) Statement of Policy

Background and Objective:
According to the National Institute on Drug Abuse, electronic cigarettes, also known as e-cigarettes, are defined as “battery-operated devices designed to deliver nicotine with flavorings and other chemicals to users in vapor instead of smoke.” The products tend to be made to look similar to traditional cigarettes, however there are some newer devices that look different and have various modern aspects such as lighting and fillable tanks. The tanks or cartridges are filled with nicotine, various flavors, and other chemicals. The act of using an electronic cigarette is commonly referred to as “vaping.” As of 2015 there were more than 250 brands of e-cigarettes on the market.

E-cigarettes have garnered much attention in recent years. Supporters of the product claim it is a healthier alternative to smoking traditional tobacco cigarettes and may even help long-time smokers quit tobacco products. On the other hand, opponents say e-cigarettes do in fact have negative impacts on health. In addition, teenagers are among the largest group to use e-cigarettes and many believe they are a gateway to tobacco cigarettes.

There has been growing concern over exactly how safe e-cigarettes are for users. In a study published in April of 2015 in Tobacco Control journal, it was found that the chemicals used to flavor the devices were indeed quite toxic to a user’s respiratory tract. The study concluded that the concentrations of the flavor chemicals in the fluid were of significant toxicological concern. The study recommended there be regulations placed on the e-cigarette fluid.

Despite e-cigarettes’ growing popularity, many states and municipalities are regulating the use of them. Many states prohibit the use of the products on school property, state office buildings and property, state and county fairgrounds, among other places. The U.S. Food and Drug Administration (FDA) is currently investigating e-cigarettes and published a proposed in April of 2014 rule to regulate the sale and distribution of electronic cigarettes.

Residential and commercial real estate managers are divided on how to address e-cigarettes in their properties. Some managers and owners are quick to lease space to e-cigarette sellers to fill vacant storefronts. In addition, some practitioner do not believe sufficient liability exists that would warrant restrictions in commercial or residential buildings. Because the federal government has yet to regulate the industry or offer any research on whether or not e-cigarettes and vaping create a significant health risk to users or if any secondhand health issues exist, some real estate managers are hesitant to regulate.

Conversely, some practitioners would like the freedom to ban e-cigarette sellers and device use on their properties altogether. The effects of e-cigarettes are not yet known and this creates a level of caution by real estate managers in order to protect other tenants and the property itself. Flavor additives and chemicals may leave behind residue or odor when used long-term in a property. Commercial property managers and owners worry about the image smoke shops bring to a shopping center.

IREM Position:
With so little being known about the impacts of electronic cigarettes, IREM believes that e-cigarettes should fall under the same laws and regulations of traditional tobacco cigarettes and products. In conjunction with an existing IREM statement of policy, IREM supports a ban on workplace smoking (all types of cigarettes and paraphernalia). Commercial building tenants should be responsible for their employees’ compliance with nonsmoking policies and laws. In addition, when no federal, state or local smoking laws exist, residential property managers and owners may decide what is in the best interest for their occupants and maintenance of the property. IREM encourages all real estate managers and owners to review the guidance and regulations set forth by the FDA when the final rule on electronic cigarettes and similar paraphernalia is published.
Community Assessment Protection Lien (new language is underlined)

**Background and Objective:**
In most states today, when a mortgage is foreclosed lenders do not recover enough money to pay the underlying debt and costs. Thus, the junior lienors, such as common interest associations, ultimately receive nothing.

Since the early 1960's when the Federal Housing Administration (FHA) Model State Act for apartment ownership was promulgated, priority has been given to the lien of first mortgage over the lien of common expense assessments. The FHA required mortgage priority as a condition for approval of association development and other lenders followed suit. Therefore, community associations usually received no money upon mortgage foreclosure to cover common expense assessments. In the absence of an assessment lien priority, non-defaulting unit owners must unfairly cover insurance, security, and maintenance expenses creating inequitable and unanticipated financial hardships.

Lenders holding mortgages on both defaulting and non-defaulting mortgages have a vested interest in ensuring the continuation of the maintenance of a community association's common areas during foreclosure proceedings. Such continued maintenance and general upkeep is essential to the preservation of the value of their mortgage security interests. If a significant number of units are not paying their assessments, and they are uncollectible, the burden falls on the other unit owners, weakening their equity.

The 1980 Uniform Condominium Act provides for a limited six-month association lien for common expense assessments prior to all liens and encumbrances except for those recorded before the date of the declaration. The lien is also prior to any mortgage or deed of trust for common expense assessments assessed against all of the units in proportion to their common expense liability, and due during six months immediately preceding institution of an action to enforce the lien. The adoption of the super priority assessment lien strikes a balance between the protection of the lenders and the need to enforce collection of assessments.

22 states have enacted legislation allowing for common interest association super priority liens. In those states collections have been much easier and lenders have paid the assessments. In most cases, lenders have made the delinquent owner pay the assessment. Lenders have had no problem purchasing and selling mortgages on the secondary markets. Virtually all secondary mortgage market lenders have been purchasing mortgages in these states without objection or second thought. The community association six month lien priority has been accepted by The Department of Housing and Urban Development, the Veterans Administration, the Federal National Mortgage Association (Fannie Mae), and the Federal Home Loan Mortgage Corporation (Freddie Mac). In general, the super lien priority has not affected the availability of condominium unit financing and has had a substantial positive effect on the ability of the associations to easily and effectively collect on delinquent assessments.

On August 15, 2013, Freddie Mac announced new guidelines for their reimbursement of servicers’ payment of association regular assessments in super lien states, which would be in the amount equal to the lowest of:

- The actual amount of regular assessments advanced by the servicer
- The maximum amount of regular assessments that, pursuant to the project declaration or bylaws, would take priority over the mortgage, or
- The maximum amount of regular assessments that, pursuant to applicable State statute, would take priority over the mortgage

The reimbursement requirement was amended for mortgages with note dates on or after February, 14, 2014. Reimbursement for servicers for association assessments in super lien states would be in the amount equal to the lowest of:

- For mortgages secured by property in the State of Florida — no more than 12 months (or any lesser amount provided by State statute)
- For mortgages secured by property in the State of Connecticut—no more than nine months (or any lesser amount provided by State Statute)
For Mortgages secured by property in all other States (including States that provide an exception for Freddie Mac Mortgages, such as Nevada) — no more than six months (or any lesser amount provided by State statute)

In September 2014, the Nevada Supreme Court ruled that super priority lien can extinguish a first deed of trust on a property.

**IREM Position:**

IREM supports state legislation which authorizes the recovery of up to six months of community association assessments through a lien of first priority as governed by state statute. The priority lien should apply only to monthly or periodic common expense assessments made by an association, pursuant to an annual operating budget, and due during the six months immediately preceding institution of an action to enforce the lien. In the past, a six month limit of community assessment recovery was deemed appropriate, however, with the recent recession creating an environment of significant condominium foreclosures IREM feels it is appropriate to remove the time limit and allow the full collection of monthly assessments, and associated fees as stated in the governing documents, in order for community associations to be financially sound. Such a provision will strike a balance between the protection of the security of the lenders and the need to enforce collection of assessments.

In addition, IREM encourages the U.S. Office of the Comptroller of the Currency to reiterate the necessity for lending institutions to continue to pay community assessments and also monitor the property while in foreclosure.