

Memorandum 2001-94

**Nonjudicial Dispute Resolution Under CID Law: Due Process in
Association Rulemaking and Decisionmaking (Staff Draft)**

The Commission has considered a number of different nonjudicial approaches to resolving disputes between the members of a common interest development and their governing association. One approach considered is to require that the decisionmaking procedures followed by an association be fair and reasonable — that members have advance notice and an opportunity to be heard, and that decisions be made in good faith. Such basic fairness may not help *resolve* disputes over association decisions, but it should help prevent disputes from arising in the first place.

At its September meeting, the Commission generally approved proposed statutory procedures for (1) association review of a proposed alteration of a member's separate interest (i.e., architectural review), and (2) adoption, amendment, or repeal of an association operating rule. The Commission also made a number of specific decisions refining the proposed procedures. This memorandum presents a staff draft tentative recommendation that implements the Commission's decisions. A number of issues related to the staff draft are discussed below. After considering these issues and making any necessary changes, the Commission should decide whether to approve the staff draft for circulation as a tentative recommendation.

At its September meeting, the Commission approved circulation of a proposed organization of the Davis-Stirling Common Interest Development Act, which would add chapter and article headings where appropriate. The staff draft is drafted so as to be consistent with the proposed organization (i.e., it uses article and chapter headings that are *not* consistent with existing law).

OPERATING RULES

Existing law recognizes that an association may adopt "operating rules" that govern the operation of a common interest development. See Civ. Code §§ 1351(j) ("governing documents" includes "operating rules"), 1360.5 (restriction on rules

governing pets), 1363(g) (monetary penalty for violation of “governing documents or rules”); 10 Cal. Code Regs. § 2792.21(a) (association may formulate “rules of operation of the common areas and facilities owned or controlled by the Association”). There is no statutory or regulatory procedure governing adoption of operating rules. Nor is there any clear limit on the scope of such rules. The staff draft includes provisions defining “operating rule,” limiting the permissible scope of an operating rule, establishing procedures for the adoption, amendment, and repeal of operating rules, and requiring that operating rules be accessible to members. These provisions are discussed below.

“Operating Rule” Defined

Proposed Civil Code Section 1357.1 defines “operating rule.” The proposed definition is drawn from the definition of “regulation” applicable to the Administrative Procedure Act. See Gov’t Code § 11342.600. Under the proposed definition, an “operating rule” is a generally applicable rule that (1) is adopted under the new procedure, (2) implements, interprets, or makes specific other provisions of the governing documents or implements a provision of law (e.g., a statutory mandate).

Language providing that an operating rule must be “generally applicable” is intended to limit the term to “quasi-legislative” decisions. This concept is restated for emphasis in the second sentence of the definition (“‘Operating rule’ does not include a decision by an association in a particular case.”), and is further emphasized in the Comment.

Also excluded from the definition of “operating rule” is a decision setting the amount of an assessment (which might otherwise fall within the proposed definition). Existing law already provides procedures governing the levying of assessments. See Civ. Code § 1366.

Scope of Operating Rule

Proposed Civil Code Section 1357.2 borrows two other concepts from the Administrative Procedure Act: (1) “[an] operating rule is not valid unless it is within the scope of authority conferred by another provision of the governing documents or a provision of law,” and (2) an operating rule is not valid unless “consistent with the provision of the governing documents that it implements, interprets, or makes specific, or the provision of law that it implements.” Cf. Gov’t Code §§ 11342.1 (“Each regulation adopted, to be effective, shall be within

the scope of authority conferred and in accordance with standards prescribed by other provisions of law.”), 11342.2 (“Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, or make specific or otherwise carry out the provisions of the statute, no regulation is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”). The purpose of proposed Section 1357.2 is to ensure that an association does not use an operating rule to expand its powers beyond those conferred by the governing documents. If an association wishes to change the basic authority of the association it should do so by amending its declaration, articles, or by-laws, which would require a vote of the membership, not just a decision of the board.

The staff previously raised the question of whether there should be areas that are, by statute, outside the scope of operating rules (e.g., conduct within a member’s separate interest property). Attempts to draw such lines have not been fruitful. Nor may it be necessary to draw such distinctions, given the checks on operational rulemaking already proposed in Section 1357.2 (scope limitation) and Section 1357.5 (member referendum — discussed below). Nonetheless, the Commission may wish to include a note in the tentative recommendation requesting comment on whether there are areas that should not be subject to regulation by operating rule. The staff draft includes such a note following proposed Section 1357.2.

Basic Notice and Comment Procedure

Proposed Section 1357.3 establishes the basic procedure for adopting, amending, or repealing an operating rule. It provides for advance notice to members of a proposed rule change, an opportunity for members to submit written comments regarding the rule change, and requires that the final decision regarding a proposal rule change be made at a meeting of the board of directors. Existing law requires that members be given notice of board meetings, that board meetings be open to members, that members be permitted to speak at board meetings, and that minutes of board meetings be available to members. Civ. Code § 1363.05 (“Common Interest Development Open Meeting Act”).

Expedited Procedure

The Administrative Procedure Act includes a procedure for “emergency rulemaking,” which permits expedited changes to regulations “as necessary for

the immediate preservation of the public peace, health and safety or general welfare....” Gov’t Code § 11346.1(b). This policy is sensible and the staff draft includes a provision designed to achieve the same end. See proposed Section 1357.4. Although members do not have advance notice and an opportunity to comment under this expedited procedure, a rule adopted under Section 1357.4 would still be subject to member referendum under Section 1357.5.

Member Referendum

In general, when a city adopts an ordinance, that ordinance does not become effective for 30 days. Elec. Code § 9235. During that period, a petition protesting adoption of the ordinance may be submitted to the elections official of the legislative body of the city. If the petition bears the signatures of not less than 10 percent of the voters of the city, or in a city with 1,000 or fewer registered voters, of not less than 25 percent of the voters or 100 voters, whichever is fewer, then the effective date of the ordinance is suspended. Elec. Code § 9237. The city legislative body may then either repeal the ordinance or submit it to the voters for approval. If the ordinance is repealed or is not submitted to the voters and is not approved, it cannot be enacted by the legislative body of the city for one year after the date of its repeal or disapproval by the voters. Elec. Code § 9241. See also Elec. Code §§ 9140-9147 (county referendum).

The staff draft includes an analogous referendum procedure. However, it varies in important ways. Because the proposed procedure for adoption of an operating rule does not include a deferred effective date, it is not possible to limit the referendum process to suspension of an ordinance before it becomes effective. Instead, the referendum process repeals an already effective operating rule. The staff sees no reason to limit the referendum option to a period immediately following enactment of an operating rule and the staff draft does not include such a limit.

Based on an assumption that most common interest developments will have fewer than 1,000 members, the staff draft borrows the higher signature requirement from municipal referendum law — 25 percent or 100 voters, whichever is fewer. This is a significant enough burden to prevent frivolous use of the referendum power, but is not insurmountable. Where an association board adopts a rule that is objectionable to a large part of the association membership, obtaining the required number of signatures should be possible.

Note that the number of signatures required for a successful referendum is based on the number of interests owned by signatories, rather than the number of owners who sign (i.e., one-interest-one-vote, rather than one-owner-one-vote). This is generally consistent with the Department of Real Estate regulation governing member voting rights, which provides a default rule of “one vote for each subdivision interest owned.” 10 Cal. Code Regs. § 2792.18(a). It is also consistent with the default statutory procedure for amending a declaration. See Civ. Code § 1355(a) (requiring approval of “owners representing more than 50 percent ... of the separate interests in the common interest development...”). An alternative approach would be to require the signatures of more than 25 percent of the association’s members, or 100 members, whichever is fewer. Each rule would strike a different balance between the interests of individual homeowners and the members who own more than a single unit. The staff draft includes a note soliciting input on which is the better approach.

If the Commission feels that automatic repeal is too great a power to be wielded by a minority of the membership, the referendum provision could be redrafted in either of the following ways: (1) Require the signatures of a majority of the members for repeal of the rule. (2) Provide that a petition submitted by the specified minority does not repeal the rule, but instead requires that the rule be put to a vote of the membership within 30 days. If the rule is not submitted to a vote in that time it would be repealed by operation of law. Either of these alternatives serves the same policy as the version set out in the draft, but would make it more difficult for members to overturn an operating rule.

Access to Operating Rules

Proposed Section 1357.6 provides rules governing member access to operating rules. It requires that each member receive a complete copy of the rules, that annual updates be provided if operating rules are changed, and that members have the right to inspect the operating rules. These requirements should be noncontroversial.

REVIEW OF PROPOSED ALTERATION OF SEPARATE INTEREST

The governing documents of many common interest developments require association approval before a member can make certain types of changes to the member’s separate interest. This type of decisionmaking by a homeowners association may be subject to constitutional due process requirements. See

generally Memorandum 2001-55. In addition, the common law requires that a homeowners association provide procedural fairness in making adjudicative decisions affecting its members. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772 (1986) (“When a homeowners’ association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable, and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious.”); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651 (1983) (“The business and governmental aspects of the association and the association’s relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.”).

Existing law does not provide a procedure for making a decision regarding alteration of a member’s separate interest. The staff draft includes provisions establishing such a procedure (discussed below).

General Requirements

Proposed Section 1378 establishes general requirements governing association review of a proposed alteration of a member’s separate interest. These requirements are consistent with the principles stated in *Ironwood* and *Cohen*.

Subdivision (a) requires that the association adopt a fair and reasonable procedure for making its decision. It also requires that the association adopt standards to govern its decisionmaking. The procedure and standards adopted must be included in the association’s governing documents. In making a decision regarding alteration of a member’s separate interest, the association must follow its own procedure and apply its standards.

Subdivision (b) establishes a standard of conduct for an association decisionmaker — good faith, based on the information provided by the proponent or any opponent of the proposed alteration. This standard is drafted so as not to impose a duty of inquiry on the decisionmaker.

Subdivision (c) requires that the body responsible for making decisions regarding proposed alterations, which may be the board of directors or some other body specified in the association’s governing documents, post its agenda.

Interested members will then have notice and an opportunity to follow the process and comment to the decisionmaker.

Default Procedure

Where Section 1378 would require compliance with broad principles of procedural fairness, proposed Section 1379 would spell out a detailed decisionmaking procedure. This procedure would serve as a default, to be followed by an association that has not yet adopted its own procedure. See proposed Civ. Code § 1379(a). It would also establish a floor — an association’s procedure must be at least as protective as the default procedure. See proposed Civ. Code § 1378(a)(1).

In broad outline, the proposed procedure is as follows:

- (1) A member submits proposal to reviewing body, in writing.
- (2) If the proposal would require a variance from established standards or could have a substantial negative effect on other member’s separate interests, the reviewing body notifies the potentially affected members and invite comments.
- (3) The reviewing body delivers a written decision to the applicant within 45 days. If a decision is not delivered in that time, the request is deemed [approved] [disapproved].
- (4) The decision of the reviewing body may be appealed to the board of directors of the association by either the applicant or any member who submitted a negative comment regarding the proposed alteration to the reviewing body, before it made its decision.
- (5) Appeals are decided by the board of directors de novo.
- (6) Any member may testify at an appeal hearing and may submit supporting documents.
- (7) The decision of the board of directors regarding an appeal shall be in writing and shall include “reference to any facts, standards, or provisions of the governing documents that support the decision.”

An opportunity to appeal a decision should help reduce member disputes, as members are less likely to feel that their views have not been heard. A written decision that includes an explanation of the basis of decision will reduce the likelihood that members will perceive the decision as arbitrary and unreasonable. Such a decision would also be an important element of the record if the decision is eventually challenged in court.

In item (3) above, and in proposed Section 1379(d), the words “approved” and “disapproved” are bracketed. This reflects staff uncertainty as to which formulation of the rule is preferable. In an earlier draft of this procedure, the language provided that a proposal is deemed approved if the decisionmaker does not make a decision in the time specified. Such a rule is a common feature in the governing documents of existing associations. C. Sproul & K. Rosenberry, *Advising California Condominium & Homeowners Associations* § 48.6, at 361-63 (Cal. Cont Ed. Bar 1991).

A rule providing that a proposal is deemed approved conserves association resources, because the association need not act to approve proposals that it considers unobjectionable. However such a rule could result in approval of an inappropriate proposal through nonfeasance. Also, approval through inaction could foreclose participation in the process by those who are opposed to a proposal, who would not have an opportunity to object to the reviewing body and thus would not have standing to appeal. See proposed Civ. Code § 1379(f)(2). The latter problem could be resolved by providing that any member may file an appeal where a proposal is deemed approved. Nonetheless, the sense that a proposal was approved without careful deliberation and without soliciting comments from other members may well lead to the type of disputes the Commission’s proposal is aimed at preventing.

If the rule provides that a proposal is deemed disapproved where a decision is not made in the time specified, then the association must act to approve every proposal, even those that are clearly unobjectionable. This would impose an additional strain on its resources. However, the risk of approval through nonfeasance would be eliminated., and no one would be excluded from the association’s decisionmaking process. The applicant would simply appeal the decision to the board of directors. At that point, both the proponent and any member who opposes the proposal would have an opportunity to testify and present documents in opposition to the proposal. **The staff is slightly inclined toward a default rule of disapproval.** Whichever rule is chosen, it may make sense to include a note soliciting input on which rule is preferable.

Judicial Review

At its September meeting, the Commission instructed the staff to add language providing that judicial review of a decision regarding a proposed alteration of a separate interest is to be conducted under the procedure for

administrative mandate (Code of Civil Procedure Section 1094.5). This is implemented in proposed Section 1380(b).

One aspect of the administrative mandate procedure is that review is limited to the administrative record. This is efficient, because it avoids the civil discovery process. However, it could present problems for legally unsophisticated homeowners, who may not appreciate the importance of getting all relevant evidence into the administrative record. For example, a homeowner whose proposal is disapproved on appeal may investigate further and discover that almost identical proposals have been repeatedly approved by the same board. In a proceeding under Code of Civil Procedure Section 1094.5, the petitioner would not be permitted to introduce that evidence unless the petitioner could show that “in the exercise of reasonable diligence, [the evidence] could not have been produced or ... was improperly excluded at the hearing” — a difficult burden to meet. However, it may be that the efficiency of the administrative mandate procedure justifies the risk that some legally unsophisticated homeowners will not have been adequately diligent in the proceeding below. The Commission may wish to consider deleting the provision specifying the form of judicial review, or revising the provision to authorize use of administrative mandate, without requiring it. A plaintiff could then pursue other remedies as appropriate. For examples of other types of remedies sought in cases challenging an association decision regarding alteration of a separate interest, see *Clark v. Rancho Santa Fe Ass’n*, 216 Cal. App. 3d 606 (1989) (ordinary mandamus), *Ironwood Owners Ass’n IX v. Solomon*, 178 Cal. App. 3d 766, 772 (1986) (declaratory and injunctive relief), *Cohen v. Kite Hill Community Ass’n*, 142 Cal. App. 3d 642, 651 (1983) (damages and injunctive relief).

Proposed Section 1380 also includes two other provisions relating to judicial review. Subdivision (a)(1) requires that the association’s appeal process be exhausted before a decision can be challenged in court. This allows the nonjudicial process to run its course and also ensures that a written decision with findings will be included in the record before the dispute reaches the courts. Subdivision (b)(1) expressly requires that the alternative dispute resolution provision in Section 1354 be satisfied before a decision can be challenged in court. It isn’t clear that the ADR provisions in Section 1354 are very effective in resolving disputes, and those provisions will be considered separately by the Commission. However, assuming that they are beneficial, they should apply in the context of disputes over proposed alterations. An express provision

regarding the applicability of Section 1354 is required because it is presently limited by its terms to cases where the judicial relief sought involves declaratory relief or injunctive relief. While a writ of mandate shares some characteristics of an injunction, the two are sufficiently different that Section 1354 would probably not apply to a mandate proceeding unless it is expressly incorporated.

TIME PERIODS

Throughout the staff draft, various time periods are specified (notice requirements, comment periods, decision deadlines, etc.). The staff has attempted to provide reasonable time periods, but would welcome any suggested adjustments to these periods from homeowners, practitioners, or anyone else with practical experience in the administration of homeowners associations.

Respectfully submitted,

Brian Hebert
Staff Counsel

1 NONJUDICIAL DISPUTE RESOLUTION UNDER CID LAW:
2 PROCEDURAL FAIRNESS IN ASSOCIATION
3 RULEMAKING AND DECISIONMAKING

4 As part of a general study of common interest development law, the Law
5 Revision Commission is examining ways in which to minimize reliance on the
6 courts to resolve disputes between members of a common interest development
7 and their governing association. One approach, explored in this tentative
8 recommendation, is to reduce the number of disputes that arise by insuring that the
9 procedures used by a homeowners association are fair and reasonable. A decision
10 made under a fair and reasonable procedure is more likely to be a just decision,
11 and is more likely to be accepted by a homeowner who would dispute a decision
12 reached under an procedure that is perceived to be unfair.

13 Fair and reasonable procedures are already required by law¹ and reflect good
14 public policy. The Law Revision Commission recommends the creation of
15 statutory procedures governing two types of association decision: (1) association
16 review of a proposed alteration of a member's separate interest property, and (2)
17 adoption, amendment, or repeal of an "operating rule" to govern the association.²
18 These procedures and related provisions are discussed below.

19 REVIEW OF PROPOSED ALTERATION
20 OF SEPARATE INTEREST PROPERTY

21 The governing documents of many common interest developments require
22 association approval before a member can make certain types of changes to the
23 member's separate interest property. Existing case law requires that a homeowners

1. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772 (1986) ("When a homeowners' association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable, and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious."); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651 (1983) ("The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing."). There may also be circumstances where decisionmaking by a private homeowners association is subject to the due process requirements of the U.S. or California Constitutions. See Siegel, *The Constitution and Private Government: Toward The Recognition Of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 Wm. & Mary Bill Rts. J. 461, 493-94 (1998), Rosenberg, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives, and Planned Developments*, 19 Real Prop., Prob. & Tr. J. 1 (1984).

2. Other types of association decisionmaking are already the subject of statutory or regulatory procedures that appear adequately fair and reasonable. These include member discipline (see Corp. Code § 7341, 10 Cal. Code Regs. § 2792.26(b)), amendment of governing documents (see Civ. Code §§ Civ. Code § 1355, 1355.5, 1356, 10 Cal. Code Regs. § 2792.24), and levying and collection of assessments (see Civ. Code §§ 1366-1367).

1 association provide procedural fairness in making such decisions.³ Considering
2 that homeowners associations are governed by volunteers who may not be legally
3 sophisticated, some association board members may not be aware of the existing
4 fairness requirements or how to adequately implement them. The Law Revision
5 Commission recommends that provisions be added to the Davis-Stirling Common
6 Interest Development Act to expressly state the basic fairness requirements⁴ and to
7 provide a default procedure that an association can follow where it has not adopted
8 its own procedure.⁵ The default procedure would establish minimum standards of
9 fairness that an association must meet or exceed in drafting its own procedure.⁶

10 ADOPTION OF “ OPERATING RULE ”

11 Existing law recognizes that an association may adopt “operating rules” that
12 govern the operation of a common interest development.⁷ However, there is no
13 statutory or regulatory procedure governing adoption of operating rules. Nor is
14 there any clear limit on the scope of such rules.⁸ A perception that rules have been
15 adopted unfairly, or exceed an association’s regulatory authority may lead to
16 disputes. The Law Revision Commission recommends that provisions be added to
17 (1) define “operating rule,” (2) require that an operating rule be authorized by and
18 consistent with other provisions of the association’s governing documents⁹ or a
19 provision of law,¹⁰ and (3) provide fair procedures for the adoption, amendment,
20 or repeal of an operating rule.

3. See *supra* note 1.

4. See proposed Civ. Code § 1378.

5. See proposed Civ. Code § 1379. See also Merritt & Siino, *Architectural Control Committees and the Search for Due Process*, 15 CEB Real Prop. L. Reporter 117, 123-24 (Apr. 1992) (“Although the decisions in *Cohen v. Kite Hill Community Ass’n* and *Ironwood Owners Ass’n IX v. Solomon* provide a basis for the courts to build a body of law setting forth due process requirements for architectural committees, it would be preferable if the legislature were to provide guidance. Thoughtful legislation designed to set forth procedural standards for architectural committees would be less costly and more effective than having these standards evolve on a trial-and-error basis through litigation.”).

6. See proposed Civ. Code § 1378(a)(1).

7. See Civ. Code §§ 1351(j) (“governing documents” includes “operating rules”), 1360.5 (restriction on rules governing pets), 1363(g) (monetary penalty for violation of “governing documents or rules”); 10 Cal. Code Regs. § 2792.21(a) (association may formulate “rules of operation of the common areas and facilities owned or controlled by the Association”).

8. Section 2792.21(a) of Title 10 of the California Code of Regulations includes a limitation on the scope of operating rules to which it refers, but statutory law does not. Compare Civil Code Section 1360.5(d), which implicitly recognizes the authority of an association to adopt a rule or regulation restricting pet ownership, a matter that involves more than “operation of the common areas and facilities owned or controlled by the Association.”

9. These include the declaration, articles of incorporation or association, and by-laws. See Civ. Code § 1351(j) (“governing documents” defined).

10. A statute or regulation may require that an association adopt certain rules. See, e.g., proposed Civ. Code § 1378(a) (requiring adoption of standards and procedure for review of proposed alteration of member’s separate interest property).

1 The proposed law would create a basic notice and comment rulemaking
2 procedure that would require member notice and comment but would vest
3 decisionmaking with the board of directors alone.¹¹ In cases of emergency, the
4 board of directors would be authorized to make an immediate change to the
5 association's operating rules without prior notice to members or an opportunity to
6 comment.¹² However, the proposed law also includes a referendum procedure
7 whereby the membership can directly repeal an objectionable rule.¹³ Finally, the
8 proposed law would impose requirements regarding distribution and availability of
9 operating rules to members of the association.¹⁴

10 The recommended operating rule provisions are similar in basic concept to rules
11 governing state agency regulations,¹⁵ but are significantly simpler.

11. Proposed Civ. Code § 1357.2.

12. Proposed Civ. Code § 1357.3. While the rulemaking procedure would not require a pre-adoption comment period, adoption of a rule under Section 1357.3 would necessarily take place at a meeting of the board, at which members are permitted to attend and address the board. See Civ. Code § 1363.05 ("Common Interest Development Open Meeting Act").

13. Proposed Civ. Code § 1357.4.

14. Proposed Civ. Code § 1357.5.

15. See, e.g., Gov't Code §§ 11342.1-11342.2 (limits on scope of regulation), 11342.600 ("regulation" defined), 11346.1(b) (emergency rulemaking).

Contents

1		
2	PROPOSED LEGISLATION	5
3	Civ. Code §§ 1357.1-1357.7 (added). Operating rules	5
4	Article 4. Operating Rules	5
5	§ 1357.1. “Operating rule” defined	5
6	§ 1357.2. Scope and validity of operating rule	5
7	§ 1357.3 . Rulemaking procedure	6
8	§ 1357.4. Immediate rule rulemaking action	6
9	§ 1357.5. Referendum regarding operating rule	7
10	§ 1357.6. Availability of rules	8
11	§ 1357.7. Use of electronic communications	8
12	Civ. Code §§ 1378-1381 (added). Review of proposed alteration of separate interest	8
13	Chapter 11. Review of Proposed Alteration of Separate Interest	8
14	§ 1378. Association review of proposed alteration of separate interest	8
15	§ 1379. Default procedure for review of proposed alteration of separate interest	9
16	§ 1380. Judicial review of decision regarding proposed alteration of separate interest	10
17	§ 1381. Use of electronic communications	11

PROPOSED LEGISLATION

Civ. Code §§ 1357.1-1357.7 (added). Operating rules

SECTION 1. Article 4 (commencing with Section 1357.1) is added to Chapter 3 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 4. Operating Rules

§ 1357.1. “Operating rule” defined

1357.1. For the purposes of this article, “operating rule” means a generally applicable rule adopted by an association under Section 1357.3 or 1357.4 to implement, interpret, or make specific another provision of its governing documents or to implement a provision of law. “Operating rule” does not include a decision by an association in a particular case or a decision setting the amount of a regular or special assessment.

Comment. Section 1357.1 is new. It defines the term “operating rule” for the purposes of this article. *Cf.* Gov’t Code § 11342.600 (administrative “regulation” defined). The definition makes clear that an operating rule is a rule of general application and does not include case-specific decisions. For example, a decision to use a particular method to treat a specific termite infestation would not be an operating rule. “Operating rule” also does not include a decision setting the amount of an assessment. See Section 1366 (assessments).

§ 1357.2. Scope and validity of operating rule

1357.2. An operating rule is not valid unless it is within the scope of authority conferred by another provision of the governing documents or a provision of law, and is consistent with the provision of the governing documents that it

1 implements, interprets, or makes specific, or the provision of law that it
2 implements.

3 **Comment.** Section 1357.2 is new. *Cf.* Gov't Code §§ 11342.1-11342.2 (limits on
4 administrative regulations).

5 See also Sections 1351(a) (“association” defined), (j) (“governing documents” defined), 1357.1
6 (“operating rule” defined).

7 ☞ **Staff Note.** The Commission solicits input on whether there are matters that should not be
8 subject to regulation by operating rule. Such matters could still be subject to regulation under the
9 declaration, articles, or by-laws (which require member approval for amendment), but could not
10 be addressed by an operating rule adopted solely by action of the board of directors.

11 § 1357.3 . Rulemaking procedure

12 1357.3. Except as provided in Sections 1357.4 and 1357.5, the following
13 procedure governs the adoption, amendment, or repeal of an operating rule:

14 (a) Not less than 15 days before adopting, amending, or repealing an operating
15 rule, the board of directors shall deliver notice of the proposed rulemaking action
16 to every association member by personal delivery or first class mail. The notice
17 shall include the following:

18 (1) A description of the proposed rulemaking action.

19 (2) Notice that the board of directors will accept written comments regarding the
20 proposed rulemaking action for a specified period of not less than 15 days
21 following the date the notice is mailed.

22 (3) Notice that the board of directors will make its final decision regarding the
23 proposed rulemaking action at a board meeting following the close of the specified
24 comment period.

25 (b) After the period for comment has closed, the board of directors shall meet to
26 make its final decision regarding the proposed rulemaking action. It may adopt the
27 rulemaking action as originally proposed, adopt a modified version of the
28 rulemaking action, or reject the rulemaking action.

29 (c) Within 15 days after a final decision to take a rulemaking action, the board of
30 directors shall deliver a copy of the rulemaking action to every association
31 member by personal delivery or first class mail.

32 **Comment.** Section 1357.3 is new. It establishes a simple notice and comment procedure for
33 adopting, amending, or repealing an operating rule. Subdivision (b) provides that the final
34 decision regarding a proposed rulemaking action shall be made at a meeting of the board of
35 directors. See Section 1363.05 (“Common Interest Development Open Meeting Act”).

36 See also Sections 1351(a) (“association” defined), 1357.1 (“operating rule” defined).

37 § 1357.4. Immediate rule rulemaking action

38 1357.4. (a) If the board of directors of an association determines that immediate
39 adoption, amendment, or repeal of an operating rule is necessary to address a
40 threat to public health or safety, or to prevent substantial economic loss to the
41 association, it may adopt, amend, or repeal an operating rule immediately.

42 (b) Within 15 days after taking a rulemaking action pursuant to subdivision (a),
43 the board of directors shall deliver notice of the rulemaking action to every

1 association member by personal delivery or first class mail. The notice shall
2 include a copy of the adopted, amended, or repealed rule and an explanation of
3 why an immediate rulemaking action is required to address a threat to public
4 health or safety, or to prevent substantial economic loss to the association.

5 **Comment.** Section 1357.4 is new. It establishes a procedure for taking immediate rulemaking
6 action to address an emergency. *Cf.* Gov't Code § 11346.1(b) (emergency rulemaking by state
7 agency).

8 See also Sections 1351(a) (“association” defined), 1357.1 (“operating rule” defined).

9 **§ 1357.5. Referendum regarding operating rule**

10 1357.5. (a) An association operating rule is repealed immediately on submission
11 to the board of directors of a referendum against the provision, that is signed by
12 members owning more than 25 percent of the separate interests, or more than 100
13 separate interests, whichever is fewer.

14 (b) Within 15 days after repeal of an operating rule pursuant to subdivision (a),
15 the board of directors shall deliver notice of the repeal to every association
16 member by personal delivery or first class mail.

17 (c) An operating rule repealed pursuant to subdivision (a) may not be reenacted
18 by the board of directors for a period of one year, except with the approval of the
19 members casting a majority of the votes at a meeting or election of the association
20 constituting a quorum and conducted in accordance with Chapter 5 (commencing
21 with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations Code and
22 Section 7613 of the Corporations Code.

23 (d) For one year after an operating rule is reenacted pursuant to subdivision (c),
24 that operating rule is not subject to repeal under subdivision (a).

25 **Comment.** Section 1357.5 is new. It authorizes repeal of an operating rule by member
26 referendum. *Cf.* Elec. Code § 9235-9247 (referendum suspending municipal ordinance). The
27 member approval provision in subdivision (c) is drawn from Section 1355.5(d), governing
28 member approval of certain changes to a declaration.

29 See also Sections 1351(a) (“association” defined), (c) (“common interest development”
30 defined), (l) (“separate interest” defined), 1357.1 (k) (“operating rule” defined).

31 ☞ **Note.** In subdivision (a), the number of signatures required for a successful referendum is
32 based on the number of interests owned by signatories, rather than the number of owners who
33 sign (i.e., one-interest-one-vote, rather than one-owner-one-vote). This is generally consistent
34 with the Department of Real Estate regulation governing member voting rights, which provides a
35 default rule of “one vote for each subdivision interest owned.” 10 Cal. Code Regs. § 2792.18(a).
36 It is also consistent with the default statutory procedure for amending a declaration. See Civ.
37 Code § 1355(a) (requiring approval of “owners representing more than 50 percent ... of the
38 separate interests in the common interest development...”). An alternative approach would be to
39 require the signatures of more than 25 percent of the association’s members, or 100 members,
40 whichever is fewer. Each rule would strike a different balance between the interests of individual
41 members and the interests of members who own more than a single separate interest. The
42 Commission solicits input on which is the better approach.

1 **§ 1357.6. Availability of rules**

2 1357.6.(a) The association shall provide a complete copy of its operating rules of
3 to each of its members.

4 (b) At the time that the pro forma budget required by Section 1365 is distributed,
5 the association shall also distribute a rule update to each of its members, indicating
6 any changes to its operating rules that were made in the preceding fiscal year. A
7 rule update need not be distributed if there were no changes to the operating rules
8 in the preceding fiscal year.

9 (c) An association’s operating rules shall be available for inspection by any
10 association member.

11 **Comment.** Section 1357.6 is new. It provides for member access to the operating rules of an
12 association.

13 See also Sections 1351(a) (“association” defined), 1357.1 (k) (“operating rule” defined)..

14 **§ 1357.7. Use of electronic communications**

15 1357.7. Wherever this article provides for transmittal of a notice, comment, or
16 other document, that document may be transmitted by electronic means if the
17 recipient has agreed to that method of transmission.

18 **Comment.** Section 1357.7 is new. It authorizes use of electronic mail or other forms of
19 electronic transmission for transmittal of documents pursuant to this article, where the recipient
20 has agreed.

21 ☞ **Note.** The Commission would like to receive input on whether this provision could be
22 generalized to apply to the entire Davis-Stirling Common Interest Development Act.

23 **Civ. Code §§ 1378-1381 (added). Review of proposed alteration of separate interest**

24 SEC. 2. Chapter 11 (commencing with Section 1378) is added to Title 6 of Part
25 4 of Division 2 of the Civil Code, to read:

26 Chapter 11. Review of Proposed Alteration of Separate Interest

27 **§ 1378. Association review of proposed alteration of separate interest**

28 1378. (a) If the governing documents require approval of the board of directors
29 or other reviewing body before an association member may alter the member’s
30 separate interest, the association shall do all of the following:

31 (1) Adopt a fair and reasonable procedure for making a decision regarding a
32 proposed alteration of a member’s separate interest. The procedure shall be at least
33 as protective of member interests as the default procedure provided in Section
34 1379.

35 (2) Adopt standards governing alteration of a member’s separate interest.

36 (3) Include the decisionmaking procedure and standards adopted under this
37 subdivision in the association’s governing documents.

1 (4) Follow the procedure and apply the standards adopted under this subdivision
2 in making a decision regarding a proposed alteration of a member's separate
3 interest.

4 (b) A person who participates in making a decision regarding a proposed
5 alteration of an association member's interest shall do so in good faith, based on
6 the information provided by the member proposing the alteration or by a member
7 opposing the proposed alteration.

8 (c) The association body responsible for reviewing a proposed alteration of a
9 separate interest shall post its agenda in a location accessible to members and on
10 its website or other similar forum for publication of written material, if it
11 maintains a website or other similar forum.

12 **Comment.** Section 1378 is new. It is consistent with existing law requiring procedural fairness
13 in making a decision regarding a proposed alteration of an association member's separate interest.
14 See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772 (1986); *Cohen v. Kite Hill*
15 *Community Ass'n*, 142 Cal. App. 3d 642, 651 (1983)

16 Subdivision (a)(1) requires that an association adopt a fair and reasonable decisionmaking
17 procedure. Section 1379 provides a default procedure to be used by an association that has not yet
18 adopted its own procedure.

19 See also Section 1351(a) ("association" defined), (j) ("governing documents" defined), (l)
20 ("separate interest" defined).

21 **§ 1379. Default procedure for review of proposed alteration of separate interest**

22 1379. (a) This section provides a default procedure for making a decision
23 regarding a proposed alteration of an association member's separate interest,
24 where the alteration is subject to approval by the association. The procedure
25 applies where an association has not adopted a fair and reasonable procedure, as
26 required by Section 1378.

27 (b) An association member who proposes to alter the member's separate interest
28 shall submit a written application to the body responsible for reviewing a proposed
29 alteration of a separate interest.

30 (c) If a proposed alteration would require a variance from standards expressed in
31 the association's governing documents, or if the reviewing body determines that
32 the proposed alteration could have a substantial negative effect on the separate
33 interests of other association members, the reviewing body shall provide notice of
34 the proposed alteration to potentially affected members and solicit their opinions
35 regarding the proposed alteration.

36 (d) Within 45 days after receipt of an application, the reviewing body shall
37 deliver a written decision to the member who submitted the application, by
38 personal delivery or first class mail. If the reviewing body does not deliver a
39 written decision within 45 days after receipt of the application, the application is
40 deemed [approved] [disapproved].

41 (e) A decision of the reviewing body does not become final until one of the
42 following conditions is satisfied:

43 (1) The decision is upheld by the board of directors of the association on appeal.

1 (2) The decision is not appealed within the time specified in subdivision (f).

2 (f) Within 45 days after a decision is made, any of the following persons may
3 appeal a decision by submitting a written notice of appeal to the board of directors
4 of the association:

5 (1) The member who proposed the alteration.

6 (2) A member who submitted a negative comment regarding the proposed
7 alteration to the reviewing body before it made its decision.

8 (g) Within 45 days after receipt of a timely notice of appeal, the board of
9 directors of an association shall meet to review de novo the proposed alteration
10 that is the subject of the appeal. Any member may testify at the appeal hearing and
11 may submit written materials to the board of directors in support of or opposition
12 to the proposed alteration. The board of directors shall issue a decision approving
13 or disapproving the proposed alteration within 15 days after the hearing. The
14 decision shall be in writing and shall include a statement explaining the basis for
15 the decision, including reference to any facts, standards, or provisions of the
16 governing documents that support the decision. The decision shall be delivered by
17 personal delivery or first class mail to the member who proposed the alteration
18 and, if appeal was brought by a member opposed to the proposed alteration, to that
19 person.

20 **Comment.** Section 1379 is added to provide a fair and reasonable procedure for review of a
21 proposed alteration of an association member's separate interest.

22 See also Section 1351(a) ("association" defined), (j) ("governing documents" defined), (l)
23 ("separate interest" defined).

24 ☞ **Staff Note.** The bracketed text in subdivision (d) provides alternative formulations, as
25 discussed in the memorandum.

26 § 1380. Judicial review of decision regarding proposed alteration of separate interest

27 1380. (a) Before a person may obtain judicial review of an association decision
28 regarding a proposed alteration of a member's separate interest, the person must
29 do both of the following:

30 (1) Appeal the decision to the association's board of directors, pursuant to
31 subdivision (f) of Section 1379 or an equivalent provision of the governing
32 documents of the association.

33 (2) Comply with the requirements of Section 1354. Section 1354 applies where a
34 member files a civil action challenging an association decision regarding a
35 proposed alteration of a member's separate interest, regardless of the form of relief
36 sought.

37 (b) Judicial review of an association decision regarding a proposed alteration of
38 a member's separate interest is governed by the procedure provided in Section
39 1094.5 of the Code of Civil Procedure.

40 **Comment.** Section 1380 is new. Subdivision (a)(2) provides that the alternative dispute
41 resolution requirements of Section 1354 apply where a person seeks judicial review of an
42 association decision regarding a proposed alteration of a member's separate interest, regardless of

1 whether the relief sought is declaratory or injunctive. See Section 1354, which is otherwise
2 limited to civil actions for declaratory or injunctive relief.

3 Subdivision (b) provides that judicial review is by administrative mandate.

4 See also Section 1351(a) (“association” defined), (j) (“governing documents” defined), (l)
5 (“separate interest” defined).

6 **§ 1381. Use of electronic communications**

7 1381. Wherever this chapter provides for transmittal of a notice, comment, or
8 other document, that document may be transmitted by electronic means if the
9 recipient has agreed to that method of transmission.

10 **Comment.** Section 1381 is new. It authorizes use of electronic mail or other forms of electronic
11 transmission for transmittal of documents pursuant to this chapter, where the recipient has agreed.

12 ☞ **Note.** The Commission would like to receive input on whether this provision could be
13 generalized to apply to the entire Davis-Stirling Common Interest Development Act.