

Memorandum 2002-9

**Nonjudicial Dispute Resolution Under CID Law:
Procedural Fairness in Association Rulemaking and Decisionmaking
(Draft of Tentative Recommendation)**

The Commission has considered a number of different nonjudicial approaches to resolving disputes between the members of a common interest development and its governing association. One approach would be to require that an association follow fair and reasonable procedures in making certain types of decisions — members should have advance notice and an opportunity to be heard, and the decision should be made in good faith. Such basic fairness may not help *resolve* disputes regarding association decisions, but it should help reduce the number of disputes that arise.

For the most part, existing law provides association decisionmaking procedures that are fair and reasonable. However, there are presently no statutory procedures governing: (1) adoption, amendment, or repeal of an association operating rule, or (2) association review of a proposed alteration of a member's separate interest (i.e., architectural review). The attached draft tentative recommendation would add provisions governing these two types of association decisionmaking. A previous version of the draft was considered at the Commission's November 16 meeting. However, due to time constraints, only the provisions relating to operating rules were discussed. Consequently, while the attached draft includes a revised version of the operating rule provisions, the architectural review provisions are largely unchanged from those included in the previous draft. Once the Commission has considered the draft and made any necessary changes, it will need to decide whether the draft is ready to circulate 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 attached draft, which would be circulated together with the proposed organization, assumes enactment of that proposal (i.e., it uses article and chapter headings that

are *not* consistent with existing law). Unless otherwise indicated, all statutory references in this memorandum are to the Civil Code.

OPERATING RULES

Existing law recognizes that an association may adopt “operating rules” to govern the operation of a common interest development. 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 draft tentative recommendation 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.

Proposed Section 1357.1 defines “operating rule.” Under the proposed definition, an “operating rule” is a “generally applicable rule adopted by the board of directors of an association to implement, interpret, or make specific a power, duty, or restriction imposed by law, or by the declaration, articles of incorporation or association, or bylaws of the association.” The definition of “operating rule” also includes a number of specific exceptions. See proposed Section 1357.1(b). Issues related to the definition are discussed below.

Restatement of Law or Governing Documents

Proposed Section 1357.1(b)(3) would add an exception to the definition of “operating rule” for a “mere restatement of law or of the governing documents of the association.” This is intended to make clear that a *description* of a rule is not itself a rule. For example, if an association’s declaration restricts line drying of laundry, the board of directors of the association could send members notice of that restriction without first adopting an operating rule. This seems obvious, but an express exception should eliminate arguments about whether a board has violated the law when it restates a rule without going through the rulemaking process.

One problem with the proposed exception is that “restate” can mean either to repeat verbatim, or to express again in a new form. Permitting restatement in a new form would be more flexible, allowing for clarification and explanation. However, such flexibility could result in accidental or intentional mischaracterization. An alternative would be to replace the word “restatement” with the word “repetition” or use other language to limit the exception to

verbatim repetition. This would provide a bright line rule and would eliminate the possibility of mischaracterization. However it would also reduce the usefulness of the exception, as it would require that a board adopt an operating rule in order to restate unclear or technical language in a more understandable form.

Interpretation of Law or Governing Documents

In proposed Section 1357.1 the term “interpret” is bracketed, both in the basic definition and in the exception for a mere restatement of law (discussed above). This reflects staff uncertainty as to whether a board of directors’ interpretation of law or of an association’s governing documents should be considered an operating rule subject to the proposed procedure for adoption, amendment, or repeal.

On the one hand, it isn’t clear that member input would be helpful in interpreting law or legal documents. Legal interpretation should be an analytical process, rather than a political one, and a board would probably be better advised to seek legal counsel than the opinions of members. On the other hand, language is often open to more than one interpretation and the choice of one construction over another can have practical consequences on which the members might usefully comment. Also, it would be helpful if members were given advance notice of an interpretation before it was acted on and if the interpretation were memorialized in an accessible form (as it would be if it were added to the association’s body of operating rules). The question then is whether the advantages of subjecting board interpretations to the operating rule procedure justify the cost and delay that would be involved (primarily from mailing notices and waiting for the comment period to run).

It may be worth noting that generally applicable state agency interpretations are treated as regulations under the Administrative Procedure Act. See Gov’t Code § 11342.600 (“regulation” defined); *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 572, 927 P.2d 296, 59 Cal. Rptr. 2d 186 (1996).

Resolution Acknowledging Change in the Law

At the November 16 meeting, it was noted that association boards must occasionally adjust their governing documents to reflect changes in the law and that this does not really constitute the making of a new rule — it simply acknowledges a requirement imposed by law. Proposed Section 1357.1(b)(4) provides an exception to the definition of operating rule for the following:

(4) A resolution of the board of directors of an association that a provision of its governing documents is superseded by a change in the law.

Comment. ... Subdivision (b)(4) is intended to preserve a simple mechanism whereby a board of directors may acknowledge that a provision of the association's governing documents has been superseded by a change in the law. This subdivision does not affect the extent to which contractual or property rights established by an association's governing documents are subject to modification by statute, regulation, or court decision.

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. In unusual circumstances, this type of decisionmaking by a homeowners association may be subject to constitutional due process requirements. See generally Memorandum 2001-55. Regardless of the applicability of constitutional due process, the common law clearly requires procedural fairness in making adjudicative decisions affecting 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.").

Existing law does not provide a procedure for making a decision regarding alteration of a member's separate interest. The draft tentative recommendation 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

Section 1379 spells out a detailed decisionmaking procedure. This procedure would serve as a default, to be followed by an association that has not adopted its own procedure. See proposed Section 1379(a). It would also serve as a floor — an association's procedure must be at least as protective as the default procedure. See proposed Section 1378(a)(1).

In broad outline, the proposed procedure is as follows:

- (1) A member submits a proposal to the 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 Section 1379(f)(2). The latter problem could be addressed 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, the tentative

recommendation should include a note soliciting input on which rule is preferable.

Alternative Approaches

Representatives of the Executive Council of Homeowners have informally suggested that the Commission consider making the review procedure in proposed Section 1379 mandatory, rather than establishing it as a default. This would simplify the law and would eliminate the need for homeowners associations to adopt a procedure or conform existing procedures to the new requirements.

One issue raised by creation of a mandatory procedure is whether it could be imposed on associations in existence prior to its enactment. As a general matter, a retrospective law is invalid if it deprives a person of a vested right or substantially impairs the exercise of such a right. This shouldn't be a problem. While many CID owners have a mutually enforceable right to regulate the appearance of individual properties, imposition of an enforcement *procedure* would not impair the substance of that right. It would simply control the manner of its exercise. It is well settled that there is no vested right in remedies or procedures, and that statutes may change procedures retrospectively, so long as the change does not effectively cut off all remedy. See 7 B. Witkin, *Summary of California Law Constitutional Law* §§ 492-93, at 682-83 (9th ed. 1988). A mandatory architectural review procedure would be consistent with the mandatory procedures we are proposing for adoption, amendment, or repeal of an operating rule.

Another alternative would be to preserve the default nature of the procedure in Section 1379, but give associations the choice whether to adopt their own decisionmaking procedures. This would be efficient and flexible.

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). However, it appears that other remedies are available in this context. See, e.g., *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). Rather than foreclosing these alternatives, **the staff favors** adding language making clear that administrative mandate is one possible remedy, rather than the exclusive remedy. That is the approach taken in proposed Section 1380(b).

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 (a)(2) 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 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,

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PROCEDURAL FAIRNESS IN ASSOCIATION
RULEMAKING AND DECISIONMAKING

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

10 Fair and reasonable procedures are already required by law¹ and reflect good
11 public policy. The Commission recommends the creation of statutory procedures
12 governing two types of association decisions: (1) association review of a proposed
13 alteration of a member's separate interest² property, and (2) adoption, amendment,
14 or repeal of an "operating rule" to govern the association.³ These procedures and
15 related provisions are discussed below.

16 REVIEW OF PROPOSED ALTERATION
17 OF SEPARATE INTEREST PROPERTY

18 The governing documents of many common interest developments require
19 association approval before a member can make certain types of changes to the
20 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); Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives, and Planned Developments*, 19 Real Prop., Prob. & Tr. J. 1 (1984).

2. See Civ. Code § 1351(l) ("separate interest" defined).

3. 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 §§ 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.⁴ 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 Commission
5 recommends revising the Davis-Stirling Common Interest Development Act to
6 expressly state the basic fairness requirements⁵ and to provide a default procedure
7 applicable where an association has not adopted its own procedure.⁶ The default
8 procedure would establish minimum standards of fairness that an association must
9 meet or exceed in drafting its own procedure.⁷

10 ADOPTION OF “ OPERATING RULE ”

11 Existing law recognizes that a homeowners association may adopt “operating
12 rules” to govern the operation of a common interest development.⁸ However, there
13 is no statutory or regulatory procedure governing adoption of operating rules. Nor
14 is there any clear limit on the scope of such rules.⁹ A perception that rules have
15 been adopted unfairly, or exceed an association’s regulatory authority, may lead to
16 disputes. The Commission recommends revisions to (1) define “operating rule,”
17 (2) require that an operating rule be authorized by and consistent with the
18 association’s governing documents¹⁰ and with law,¹¹ and (3) provide fair
19 procedures for the adoption, amendment, or repeal of an operating rule.

4. See *supra* note 1.

5. See proposed Civ. Code § 1378, *infra*.

6. See proposed Civ. Code § 1379, *infra*. 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.”).

7. See proposed Civ. Code § 1378(a)(1), *infra*.

8. 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”).

9. 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.”

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

11. 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), *infra*.

1 The proposed law would create a rulemaking procedure that would require
2 member notice and comment, but would vest decisionmaking with the board of
3 directors alone.¹² In emergencies the board of directors would be authorized to
4 make an immediate change to the association’s operating rules without prior notice
5 to members or an opportunity to comment.¹³ The proposed law also includes a
6 referendum procedure whereby the membership can challenge an objectionable
7 rule.¹⁴ Finally, the proposed law would impose requirements regarding distribution
8 and availability of operating rules to members of the association.¹⁵ The
9 recommended operating rule provisions are similar in basic concept to rules
10 governing state agency regulations,¹⁶ but are significantly simpler.

12. Proposed Civ. Code § 1357.2, *infra*.

13. Proposed Civ. Code § 1357.3, *infra*. 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”).

14. Proposed Civ. Code § 1357.4, *infra*

15. Proposed Civ. Code § 1357.5, *infra*.

16. 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

PROPOSED LEGISLATION	6
Article 4. Operating Rules	6
Civ. Code § 1357.1. “Operating rule” defined	6
Civ. Code § 1357.2. Scope and validity of operating rule	6
Civ. Code § 1357.3. Rulemaking procedure	7
Civ. Code § 1357.4. Emergency rulemaking procedure	7
Civ. Code § 1357.5. Referendum on operating rule	8
Civ. Code § 1357.6. Availability of rules	9
Civ. Code § 1357.7. Use of electronic communications	9
Civ. Code § 1357.8. Application of article	9
Chapter 11. Review of Proposed Alteration of Separate Interest	10
Civ. Code § 1378. Association review of proposed alteration of separate interest	10
Civ. Code § 1379. Default procedure for review of proposed alteration of separate interest	10
Civ. Code § 1380. Judicial review of decision on proposed alteration of separate interest	12
Civ. Code § 1381. Use of electronic communications	12
Civ. Code § 1382. Application of Chapter	12

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PROPOSED LEGISLATION

Civ. Code §§ 1357.1-1357.8 (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

Civ. Code § 1357.1. “Operating rule” defined

1357.1. (a) For the purposes of this article, “operating rule” means a generally applicable rule adopted by the board of directors of an association to implement [, interpret,] or make specific a power, duty, or restriction imposed by law, or by the declaration, articles of incorporation or association, or bylaws of the association.

(b) “Operating rule” does not include the following:

- (1) A decision in a specific case, that is not intended to apply generally.
- (2) A decision setting the amount of a regular or special assessment.
- (3) A mere restatement [or interpretation] of law or of the governing documents of the association.
- (4) A resolution of the board of directors of an association that a provision of its governing documents is superseded by a change in the law.

Comment. Section 1357.1 is new. Subdivisions (a) and (b)(1) make clear that an operating rule is a rule of general application and does not include case-by-case decisionmaking. For example, a decision to use a particular method to treat a specific termite infestation would not be a generally applicable decision and therefore would not be an operating rule.

Subdivision (b)(4) is intended to preserve a simple mechanism whereby a board of directors may acknowledge that a provision of the association’s governing documents is superseded by a change in the law. This subdivision does not affect the extent to which contractual or property rights established by an association’s governing documents are subject to modification by statute, regulation, or court decision.

See also Sections 1351(a) (“association” defined), (j) (“governing documents” defined), 1366 (assessments). *Cf.* Gov’t Code § 11342.600 (state agency “regulation” defined).

☞ **Note.** The Commission solicits comment on whether there are areas that should not be subject to regulation by the board of directors acting alone (i.e., matters that should only be regulated by amendment of the declaration, articles, or bylaws).

☞ **Staff Note.** The bracketed text in subdivisions (a) and (b)(3) provides alternative formulations, as discussed in the memorandum.

Civ. Code § 1357.2. Scope and validity of operating rule

1357.2. An operating rule is valid and enforceable only if all of the following conditions are satisfied:

- (a) The rule is within the authority of the board of directors conferred by law or by the declaration, articles of incorporation or association, or bylaws of the association.

1 (b) The rule is consistent with governing law and the declaration, articles of
2 incorporation or association, and bylaws of the association.

3 (c) The rule was adopted or amended in substantial compliance with the
4 requirements of this article.

5 **Comment.** Section 1357.2 is new. *Cf.* Gov't Code §§ 11340.5(a), 11342.1-11342.2 (limits on
6 administrative regulations).

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

9 **Civ. Code § 1357.3. Rulemaking procedure**

10 1357.3. Except as provided in Sections 1357.4 and 1357.5, the following
11 procedure governs the adoption, amendment, or repeal of an operating rule:

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

16 (1) A description of the purpose and effect of the proposed adoption,
17 amendment, or repeal.

18 (2) A statement that the board of directors will accept written comments on the
19 proposed adoption, amendment, or repeal for a specified period of not less than 15
20 days following the date the notice is mailed.

21 (3) A statement that the board of directors will make its final decision on the
22 proposed adoption, amendment, or repeal at a board meeting following the close of
23 the specified comment period.

24 (b) Within 15 days after making a final decision to adopt, amend, or repeal an
25 operating rule, the board of directors shall deliver a copy of the adoption,
26 amendment, or repeal to every association member by personal delivery or first
27 class mail.

28 **Comment.** Section 1357.3 is new. It establishes a simple notice and comment procedure for
29 adopting, amending, or repealing an operating rule. Subdivision (a)(3) provides that the final
30 decision on a proposed adoption, amendment, or repeal shall be made at a meeting of the board of
31 directors. See Section 1363.05 (“Common Interest Development Open Meeting Act”).

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

33 **Civ. Code § 1357.4. Emergency rulemaking procedure**

34 1357.4. (a) If the board of directors of an association determines that immediate
35 adoption, amendment, or repeal of an operating rule is necessary to address an
36 imminent threat to public health or safety, or an imminent risk of substantial
37 economic loss to the association, it may adopt, amend, or repeal an operating rule
38 immediately.

39 (b) Within 15 days after adopting, amending, or repealing an operating rule
40 pursuant to subdivision (a), the board of directors shall deliver notice of the
41 adoption, amendment, or repeal to every association member by personal delivery
42 or first class mail. The notice shall include a copy of the adopted, amended, or

1 repealed rule and an explanation of why an immediate adoption, amendment, or
2 repeal is required to address an imminent threat to public health or safety, or an
3 imminent risk of substantial economic loss to the association.

4 (c) The adoption, amendment, or repeal of an operating rule under this section is
5 only effective for 120 days.

6 **Comment.** Section 1357.4 is new. It establishes a procedure for taking immediate rulemaking
7 action to address an emergency. *Cf.* Gov't Code § 11346.1(b) (emergency rulemaking by state
8 agency). Subdivision (c) provides that an emergency rulemaking action is temporary. An
9 emergency rulemaking action may be made permanent by following the procedure provided in
10 Section 1357.3.

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

12 **Civ. Code § 1357.5. Referendum on operating rule**

13 1357.5. (a) The adoption, amendment, or repeal of an operating rule is
14 suspended if the board of directors receives a petition satisfying all of the
15 following conditions:

16 (1) The petition sets out the text of the adoption, amendment, or repeal that is
17 proposed for suspension and indicates the date that the adoption, amendment, or
18 repeal was approved by the board of directors.

19 (2) The petition is signed by members owning more than 25 percent of the
20 separate interests, or more than 100 separate interests, whichever is fewer.

21 (3) The petition is received within 30 days after delivery of notice of the
22 adoption, amendment, or repeal pursuant to subdivision (b) of Section 1357.3 or
23 subdivision (b) of Section 1357.4.

24 (b) Within 15 days after the adoption, amendment, or repeal of an operating rule
25 is suspended pursuant to subdivision (a), the board of directors shall deliver notice
26 of the suspension to every association member by personal delivery or first class
27 mail.

28 (c) The board of directors may reverse the adoption, amendment, or repeal that
29 has been suspended under this section or may hold an election to determine
30 whether the suspension should be lifted.

31 (d) In an election held pursuant to subdivision (c), the ballot shall set out the text
32 of the suspended adoption, amendment, or repeal and shall present the following
33 question for decision:

34 “Shall the operating rules of the association be adopted, amended, or repealed as
35 provided in this ballot?”

36 (e) If a majority of the votes cast in the election are affirmative, the suspension is
37 lifted and the adoption, amendment, or repeal takes immediate effect. If fewer than
38 a majority of the votes cast in the election are affirmative, the adoption,
39 amendment, or repeal is reversed and may not be reinstated by the board of
40 directors for a period of one year.

41 **Comment.** Section 1357.5 is new. It authorizes repeal of an operating rule by member
42 referendum. *Cf.* Elec. Code §§ 9235-9247 (referendum suspending municipal ordinance).

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

3 ☞ **Note.** In subdivision (a)(2), the number of signatures required for a successful referendum is
4 based on the number of interests owned by signatories, rather than the number of members who
5 sign (i.e., one-interest-one-vote, rather than one-member-one-vote). This is generally consistent
6 with the Department of Real Estate regulation governing member voting rights, which provides a
7 default rule of “one vote for each subdivision interest owned.” 10 Cal. Code Regs. § 2792.18(a).
8 It is also consistent with the default statutory procedure for amending a declaration. See Civ.
9 Code § 1355(a) (requiring approval of “owners representing more than 50 percent ... of the
10 separate interests in the common interest development”). An alternative approach would be to
11 require the signatures of more than 25 percent of the association’s *members*, or 100 *members*,
12 whichever is fewer. Each rule would strike a different balance between the interests of individual
13 members and the interests of members who own more than a single separate interest. Note that
14 the same issue arises with respect to the results of voting in an election under subdivision (e).
15 However, that subdivision has been drafted so as to avoid predetermining whether the votes cast
16 represent interests owned or individual members. The Commission solicits comment on whether
17 the standards for qualifying petitions or for election results should be based on the number of
18 interests owned or the number of individual members.

19 **Civ. Code § 1357.6. Availability of rules**

20 1357.6. (a) The association shall provide a complete copy of its operating rules
21 to each of its members.

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

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

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

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

32 **Civ. Code § 1357.7. Use of electronic communications**

33 1357.7. Where this article provides for transmittal of a notice, comment, or other
34 document, the document may be transmitted by electronic means if the recipient
35 has agreed to this method of transmission.

36 **Comment.** Section 1357.7 is new.

37 ☞ **Note.** The Commission solicits comment on whether this provision could be generalized to
38 apply to the entire Davis-Stirling Common Interest Development Act.

39 **Civ. Code § 1357.8. Application of article**

40 1357.8. (a) On and after January 1, 2004, this article applies to all common
41 interest developments, regardless of whether they were created before, on, or after
42 January 1, 2004.

1 (b) Nothing in this article affects the validity of an operating rule adopted before
2 January 1, 2004.

3 **Comment.** Section 1357.8 governs the application of this article. Subdivision (a) provides the
4 general rule that the article applies to all common interest developments, regardless of when
5 created. Subdivision (b) is a specific application of the general rule in subdivision (a).

6 See also Section 1351(c) (“common interest development” defined).

7 ☞ **Note.** Proposed Section 1357.8 provides for application of this article to all “common interest
8 developments.” The Commission solicits input on whether use of the term “common interest
9 development” would create any problems.

10 **Civ. Code §§ 1378-1382 (added). Review of proposed alteration of separate interest**

11 SEC. 2. Chapter 11 (commencing with Section 1378) is added to Title 6 of Part
12 4 of Division 2 of the Civil Code, to read:

13 Chapter 11. Review of Proposed Alteration of Separate Interest

14 **Civ. Code § 1378. Association review of proposed alteration of separate interest**

15 1378. (a) If the governing documents require approval of the board of directors
16 or other reviewing body before an association member may alter the member’s
17 separate interest, the association shall do all of the following:

18 (1) Adopt a fair and reasonable procedure for making a decision on a proposed
19 alteration of a member’s separate interest. The procedure shall be at least as
20 protective of member interests as the default procedure provided in Section 1379.

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

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

24 (4) Follow the procedure and apply the standards adopted under this subdivision
25 in making a decision on a proposed alteration of a member’s separate interest.

26 (b) A person who participates in making a decision on a proposed alteration of
27 an association member’s interest shall do so in good faith, based on the
28 information provided by the member proposing the alteration or by a member
29 opposing the proposed alteration.

30 (c) The board of directors or other body responsible for reviewing a proposed
31 alteration of a separate interest shall post its agenda in a location accessible to
32 members and on its Internet website or other similar forum for publication of
33 written material, if it maintains an Internet website or other similar forum.

34 **Comment.** Section 1378 is new. It is consistent with existing law requiring procedural fairness
35 and good faith in making a decision on a proposed alteration of an association member’s separate
36 interest. See *Ironwood Owners Ass’n IX v. Solomon*, 178 Cal. App. 3d 766, 772 (1986); *Cohen v.*
37 *Kite Hill Community Ass’n*, 142 Cal. App. 3d 642, 651 (1983).

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

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

1 **Civ. Code § 1379. Default procedure for review of proposed alteration of separate interest**

2 1379. (a) This section provides a default procedure for making a decision on a
3 proposed alteration of an association member's separate interest, where the
4 alteration is subject to approval by the association. The procedure applies where an
5 association has not adopted a fair and reasonable procedure under Section 1378.

6 (b) An association member who proposes to alter the member's separate interest
7 shall submit a written application to the board of directors or other body
8 responsible for reviewing a proposed alteration of a separate interest.

9 (c) If a proposed alteration would require a variance from standards expressed in
10 the association's governing documents, or if the reviewing body determines that
11 the proposed alteration could have a substantial negative effect on the separate
12 interests of other association members, the reviewing body shall provide notice of
13 the proposed alteration to potentially affected members and solicit their opinions
14 on the proposed alteration.

15 (d) Within 45 days after receipt of an application, the reviewing body shall
16 deliver a written decision to the applicant, by personal delivery or first class mail.
17 If the reviewing body does not deliver a written decision within 45 days after
18 receipt of the application, the application is deemed [approved] [disapproved].

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

21 (1) The decision is upheld after appeal to the board of directors.

22 (2) The decision is not appealed within the time provided in subdivision (f).

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

26 (1) The applicant.

27 (2) A member who submitted a negative comment on the proposed alteration to
28 the reviewing body before it made its decision.

29 (g) Within 45 days after receipt of a timely notice of appeal, the board of
30 directors of an association shall meet and review de novo the proposed alteration
31 that is the subject of the appeal. Any member may testify at the appeal and may
32 submit written materials to the board of directors in support of or opposition to the
33 proposed alteration. The board of directors shall issue a decision approving or
34 disapproving the proposed alteration within 15 days. The decision shall be in
35 writing and shall include a statement explaining the basis for the decision,
36 including reference to any facts, standards, or provisions of the governing
37 documents that support the decision. The decision shall be delivered by personal
38 delivery or first class mail to the applicant and, if appeal was brought by a member
39 opposed to the proposed alteration, to that person.

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

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

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

3 **Civ. Code § 1380. Judicial review of decision on proposed alteration of separate interest**

4 1380. (a) Before a person may obtain judicial review of a decision on a proposed
5 alteration of a member’s separate interest, the person must do both of the
6 following:

7 (1) Appeal the decision to the association’s board of directors, pursuant to
8 subdivision (f) of Section 1379 or an equivalent provision of the governing
9 documents of the association.

10 (2) Comply with the requirements of Section 1354. Section 1354 applies where a
11 member files a civil action challenging an association decision on a proposed
12 alteration of a member’s separate interest, regardless of the form of relief sought.

13 (b) A decision on a proposed alteration of a member’s separate interest may be
14 reviewed under Section 1094.5 of the Code of Civil Procedure.

15 **Comment.** Section 1380 is new. Subdivision (a)(2) provides that the alternative dispute
16 resolution requirements of Section 1354 apply where a person seeks judicial review of an
17 association decision on a proposed alteration of a member’s separate interest, regardless of
18 whether the relief sought is declaratory or injunctive. See Section 1354, which is otherwise
19 limited to civil actions for declaratory or injunctive relief.

20 Subdivision (b) provides that decisions under this chapter are reviewable under the procedure
21 for administrative mandate. This is consistent with existing law. See *Anton v. San Antonio*
22 *Community Hosp.*, 19 Cal. 3d 802, 815-819, 140 Cal. Rptr. 442, 567 P.2d 1162 (1977)
23 (administrative mandate not limited to review of governmental agency decisions).

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

26 **Civ. Code § 1381. Use of electronic communications**

27 1381. Where this chapter provides for transmittal of a notice, comment, or other
28 document, the document may be transmitted by electronic means if the recipient
29 has agreed to this method of transmission.

30 **Comment.** Section 1381 is new.

31 ☞ **Note.** The Commission solicits comment on whether this provision could be generalized to
32 apply to the entire Davis-Stirling Common Interest Development Act.

33 **Civ. Code § 1382. Application of Chapter**

34 1382. (a) On and after January 1, 2004, this chapter applies to all common
35 interest developments, regardless of whether they were created before, on, or after
36 January 1, 2004.

37 (b) Nothing in this chapter affects the validity of a decision made before January
38 1, 2004.

39 **Comment.** Section 1382 governs the application of this chapter. Subdivision (a) provides the
40 general rule that the chapter applies to all common interest developments, regardless of when
41 created. Subdivision (b) is a specific application of the general rule in subdivision (a). While the
42 validity of a decision made before January 1, 2004 is not affected by this chapter, it may be
43 affected by other law, including the common law requirement that an association follow fair

1 procedures and act in good faith when enforcing restrictions. See *Ironwood Owners Ass'n IX v.*
2 *Solomon*, 178 Cal. App. 3d 766, 772 (1986); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App.
3 3d 642, 651 (1983).

4 See also Section 1351(c) (“common interest development” defined).

5 ☞ **Note.** Proposed section 1382 provides for application of this chapter to all “common interest
6 developments.” The Commission solicits input on whether use of the term “common interest
7 development” would create any problems.