

First Supplement to Memorandum 2002-9

Nonjudicial Dispute Resolution Under CID Law: Procedural Fairness in Association Rulemaking and Decisionmaking (Commentary)

We have received two emails commenting on the staff draft tentative recommendation that is attached to the main memorandum. The first, from Lester H. Thompson, is attached to the First Supplement to Memorandum 2002-10. The second email, which is attached to this supplement, conveys the comments of Sam Dolnick, a Community Associations Institute Homeowner Delegate. Also attached is an article from the January 2002 issue of the *Echo Journal*, the periodical of the Executive Council of Homeowners (ECHO). In that article, Sandra Bonato, chair of ECHO's legislative committee, raises issues regarding the adequacy of the Commission's proposed definition of "operating rule."

Issues raised by the commentators are discussed below. Except as indicated, all statutory references are to the Civil Code.

DEFINITION OF "OPERATING RULE"

In its early discussion of operating rules, the staff raised the question of whether there are classes of rules that are different enough in character to justify different procedural treatment. The inquiry did not produce a workable distinction. Instead, the staff drafted a broad definition of "operating rule," based on the expansive definition of "regulation" provided in the Administrative Procedure Act. See proposed Section 1357.1(a). The *Echo Journal* article argues that the current approach is flawed, and suggests that there are types of rules that should not be subject to the proposed procedures (see Exhibit p. 3):

On the one hand, many boards decisions and policies that are the semblance of rules are "ministerial" in scope (e.g., setting the hours of pool use, issuing parking placards, managing clubhouse use) that are very appropriately vested in the board alone. Many operational policies reflect statutory fiat (e.g., collection policies or annual budget disclosures are required by law) or are designed to protect residents' health and safety. These types of rules or policies should not be subject to repeal by members. If rules are defined so broadly as to invoke member involvement in the board's day-to-day

operational decisions, the results would be unacceptably chaotic. At the other extreme, however, some boards attempt to impose rules that are well beyond the limits of their authority or intrude so far into owners' private property rights that such rules become de facto CC&R amendments without a member vote. Somewhere along this continuum, we argued, is a point at which member review of an "operating rule" becomes appropriate. The problem lies in defining that point with crystal clarity, so that directors and members alike would know when it has been reached and when the uniform statutory procedures would apply.

The categories mentioned by ECHO may serve as a starting point for a new approach and are worth discussing.

Regulation of Common Areas

First, ECHO proposes that "ministerial" rules should not be subject to the operating rule procedures. Based on the examples provided, it seems that the category ECHO has in mind could perhaps be described as rules regulating common areas and facilities. Such rules, governing parking, traffic regulation, use of a park, clubhouse, or pool, landscaping, and maintenance of common structures (such as outside lighting, common walls and roofs, sidewalks and stairways, etc.) may well be matters that are so routine and noncontroversial that there is no need for member involvement in their formulation.

Rules Mandated by Statute

ECHO also suggests that rules adopted pursuant to legislative directive should not be subject to the rulemaking procedure. Where the Legislature directs that homeowners associations adopt a particular rule, *and specifies the rule's content*, the staff agrees that member involvement is not crucial. In such a case, the association is merely implementing a rule imposed on it by the Legislature. However, if the Legislature's directive is more general, allowing an association to exercise discretion as to the actual contents of a required rule, the rationale for exemption from the rulemaking procedure does not apply. For example, the staff draft would require that an association adopt standards to guide its review of proposed alteration of members' separate interests, but is silent as to the content of those standards. See proposed Section 1378(a)(2). A board's decision as to what aesthetic or architectural standards should govern will directly effect member use of their separate interests and seems the sort of rule that should be reviewed by

the membership — regardless of whether adoption of the rule is mandated by law.

Health and Safety Rules

Finally, ECHO suggests that rules designed to protect residents' health and safety should be exempt from rulemaking procedures. This point raises many of the same issues discussed above in the discussion of emergency rulemaking. However, emergency rulemaking involves *imminent* risks and *temporary* rules. In such circumstances member participation can reasonably be set aside in the interests of haste. On the other hand, a general exemption from rulemaking procedures for any rule certified by a board to be necessary to protect members' health and safety could create a significant loophole. Boards that wish to avoid the rulemaking procedures could undoubtedly find health and safety rationales for many operating rules. The staff believes that the proposed emergency rulemaking procedure and an exemption of emergency rules from the referendum process would give boards enough of a free hand to deal with health and safety problems expeditiously.

Regulation of Separate Interests

What other categories might be described? A category of rules regulating common areas (discussed above), suggests its opposite — rules regulating separate interests (and exclusive use common areas, i.e., parts of the common area that are designated for use by fewer than all members). Such rules would include architectural restrictions, noise regulations, pet restrictions, etc. Rules regulating use of separate interest property affect an owner's individual property rights directly. Such rules should probably be subject to member review. ECHO seems to concede as much (see Exhibit p. 4): "Some rule making might be appropriately subject to member vote (perhaps rules that directly limit or restrict use of an owner's separate interest or exclusive use areas)."

Member Discipline Rules

Another class of rules is those that govern member discipline, e.g., a regulation establishing a schedule of monetary penalties for violation of the governing documents. These too seem to be rules that directly affect members' individual interests, and should probably be subject to the rulemaking procedures.

Business Operation Rules

A final group of rules are those that regulate the business operations of the association (e.g., rules governing the board's financial practices). Many business operations will be subject to statutory procedures or provisions of the association's governing documents, but there will undoubtedly be situations where it would be useful to fill in a procedural gap with an operating rule. ECHO argues that such rules should not be subject to member review (see Exhibit p. 4):

To the extent that boards set financial and management policies at virtually every meeting, and to do so have only the authority vested in them through the governing documents and the law, [the proposed definition of "operating rule"] comes close to being what boards do every time they meet and is far from the necessarily narrow niche where member review of board rule and policy making is appropriate.

The staff is unsure whether financial and management policies should be subject to the rulemaking procedures. As ECHO suggests, it might be difficult to draft a bright line distinguishing between matters of significant member interest and more mundane matters that can be delegated to the board without any member participation. What's more, some very significant financial policies are so crucial to the collective interests of an association (e.g., collection of assessments), that they arguably shouldn't be subject to obstruction by a minority. On the other hand, the Commission has heard repeated anecdotal complaints about insensitive collection policies, and many who believe board power is too great may wish to see such policies subject to member referendum.

Possible Alternative Approach

Part of the concern expressed by ECHO derives from the very broad nature of the proposed definition. Pursuant to proposed Section 1357.1(a), "'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." Such breadth is appropriate when dealing with state administrative agencies, in part because agencies have the legal expertise and resources to determine when their rules are "regulations" subject to the APA. However, such an expansive definition may be too broad and legalistic for use by volunteer homeowner directors.

Perhaps, instead of setting up a broad catch-all definition and then carving out exceptions, we might work from the other end, providing that the rulemaking procedures apply only to specific types of rules. The definition of “operating rule” in proposed Section 1357.1 could be deleted entirely and replaced with a provision along the following lines:

Civ. Code § 1357.1. Application of rulemaking procedure

1357.1. (a) Sections 1357.3 to 1357.5, inclusive, only apply to an operating rule adopted by the board of directors of an association to regulate one of the following subjects:

- (1) Use of a separate interest.
- (2) Use of an exclusive use common area.
- (3) Member discipline.

(b) Notwithstanding subdivision (a), Sections 1357.3 to 1357.5, inclusive, do not apply to an operating rule that is required by law, where the board of directors has no discretion as to the substance of the rule.

Comment. Section 1357.1 limits the scope of the rulemaking, emergency rulemaking, and referendum procedures.

The list of applicable rule types would be easy to adjust if the Commission wishes to add, remove, or modify the categories. **The staff favors this approach.**

Note that the scope limitations set out above would not apply to the provision limiting the validity of operating rules to those that are authorized by and consistent with existing law and the association’s governing documents (proposed Section 1357.2), or the provision requiring that rules be provided to and available for inspection by members (proposed Section 1357.6). Those sections would continue to apply to all operating rules.

EXCEPTION FOR RESTATEMENT OF LAW

As presently drafted, the proposed definition of “operating rule” includes an exception for a “mere restatement of law or of the governing documents of the association.” As discussed in the main memorandum, this language is intended to make clear that reiteration of an existing rule is not itself rulemaking. The main memorandum poses the question of whether it is best to limit the exception to verbatim repetition of a rule (which would reduce its utility, but protect against mischaracterization or expansion of a rule through “restatement”), or whether it

should encompass paraphrasing of an existing rule. Mr. Thompson favors the narrower version:

I would suggest the use of repetition rather than restatement or interpretation. Keeping the purpose of helping to reduce the number of disputes in mind, numerous disputes are created between the association and the members when laws or governing documents which are uncertain or doubtful are restated or interpreted by the board. In the majority of instances this is done with the use of attorney opinions which in most cases are biased toward the Board's desire and which in many instances is not in the best interest of the association. The attorney opinions are not made available to members whose association is actually the client of the attorney and although no litigation is involved the reason cited is always that it is privileged communications. In some instances rules are created or resolutions are adopted that are not within the limits of the authority of the board and indeed may impair the declaration (contract) and amount to an amendment of the declaration without a vote of the members which is required by statute.

Mr. Thompson's principal concern seems to be that authority to restate rules will be used by board members to reshape rules toward the result desired by the board, to the detriment of association members. The extreme case cited, where a board "interprets" an existing rule in such a way as to create a new rule that exceeds the authority of the board under the declaration, and which amounts to an amendment of the declaration, is addressed by proposed Section 1357.2(a). That section provides that an operating rule is valid and enforceable only if it 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."

Mr. Thompson's suggestion may be moot. If the definition is replaced with a scope provision, as discussed above, **the staff doesn't believe it would be necessary to include an exception for mere restatements of existing law.** In the absence of a broad and technical definition of "operating rule," it is hard to see how a mere restatement of an existing rule would be considered adoption of a new rule.

RESOLUTION OF AMBIGUITY

In addition to stating his preference for the narrower version of the exception, Mr. Thompson suggests alternative ways in which an association might address ambiguity in the law or in its governing documents:

1. Any law that is uncertain, doubtful, needing clarification or conflicting with other statutes should be submitted to a court for interpretation prior to any action by the association. All costs should be an expense of the association. The doubtful or uncertain law should also be submitted to the legislature for a change or an explanation of the law.

2. Any provision of the governing documents that are doubtful, uncertain or needing clarification should be submitted to the association members with an opinion of the association's attorney for their information and a proposed amendment to the governing documents to be voted on by the members to resolve the problem.

These alternatives present certain practical problems. Judicial proceedings are costly and, if a board requests a judicial opinion on the meaning of an ambiguous statute *before* the board actually applies that statute (as Mr. Thompson proposes), the court might well decline to issue an opinion. See generally *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982) (discussing unwillingness of courts to issue purely advisory opinions, based on hypothetical facts). Legislative reform can be a lengthy and uncertain process. Amendment of an association's governing documents requires approval of a majority of the association's membership, which may not be achievable. A board should certainly consider use of the alternatives described by Mr. Thompson, **but the staff thinks it would be unwise to require that they be used every time a board confronts an ambiguity in the law or in its governing documents.**

COST OF REQUIRED NOTICES

Proposed Civil Code Section 1357.3 requires that notice be mailed to members before a homeowners association board adopts, amends, or repeals an operating rule, in order to facilitate member comment on the proposed change. After the board makes a final decision regarding the proposed change, it must then mail notice of the change to the members. Mr. Dolnick is concerned about the cost involved in preparing and mailing these notices. See Exhibit p. 1. Two cost-saving suggestions offered by Mr. Dolnick are discussed below, along with an alternative approach identified by the staff:

Provide for Distribution of Notices in Billing Statements or Newsletters

This may not work in every situation, but **the staff sees no problem with permitting it as an alternative means of distribution.** From a drafting point of view, the best approach to implementing this idea would be to add a general provision governing methods of delivery, rather than reiterating a complicated delivery rule in each place where the staff draft requires delivery of a document. The general provision could be combined with proposed Section 1357.7, which provides for delivery by electronic means:

Civ. Code § 1357.7. Method of delivery

1357.7. (a) Where this article provides for delivery of a notice, comment, or other document, the document shall be delivered by one of the following methods:

(1) Personal delivery.

(2) First class mail.

(3) Email, facsimile, or other electronic means, where the recipient has agreed to accept delivery by that method.

(b) A notice or other document that is to be delivered pursuant to this article may be included in or delivered with a billing statement, newsletter, or other document that is delivered by one of the methods provided in subdivision (a).

Specific delivery method provisions would then be deleted throughout the staff draft. For example, Section 1357.3(a) would be revised as follows:

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

Increase Flexibility of Delivery Date

As drafted, the staff draft requires that a board deliver notice of a final rulemaking decision within 15 days after making its decision. Proposed Section 1357.3(b). This timing requirement might preclude combining the delivery of the notice with delivery of a billing statement or newsletter. Mr. Dolnick suggests that the board be free to mail notice of its final decision at any time, subject to a rule that the decision does not take effect until some number of days after mailing. This would allow a board to economize in situations where it deems that time is not of the essence. **The staff believes that this is a sensible proposal and recommends that proposed Section 1357.3(b) be revised to read:**

(b) A final decision to adopt, amend, or repeal an operating rule takes effect 15 days after the board of directors delivers a copy of the adoption, amendment, or repeal to the members of the association.

However, a provision tying the effectiveness of a rule change to delivery of notice poses a new question — should a defect in delivery affect the effectiveness of the rule change? With respect to state administrative regulations, the Legislature has answered this question in the negative. Government Code Section 11346.4, which requires delivery of a notice of proposed action as part of the administrative rulemaking process, provides: “the failure to mail notice to any person as provided in this section shall not invalidate any action taken by a state agency pursuant to this article.” This is appealing in principle — a mere technical defect should not bar a substantively necessary rule change. On the other hand, the language quoted opens a loophole which could be invoked to excuse broad noncompliance with the notice requirement. If such language were to be added to the staff draft, it might be wise to narrow it, especially considering the general distrust of boards demonstrated by many of our commentators. For example, the provision could be limited to “an inadvertent and minor” failure to provide notice.

Allow Posting of Notices

Another alternative, which would significantly reduce the cost of required notices, would be to permit posting of notices, rather than delivery. For example, existing Section 1363.05(g), relating to notice of a board meeting, provides: “Notice may be given by posting the notice in a prominent place or places within the common area, by mail or delivery of the notice to each unit in the development, or by newsletter or similar means of communication.” In some associations, posting of notices would not only be the most economical approach, it might also be the most effective means of communication (e.g., in a condominium where all residents enter through a common lobby). However, in other associations posting may be a very ineffective way to communicate with the membership. Perhaps a fourth alternative could be added to the proposed notice provision set out on above, permitting:

(4) Posting in a prominent place or places within the common area, if authorized by the governing documents.

This would allow a majority of the membership to determine whether posting is right for their association. **The staff recommends that a provision along the lines of paragraph (4) be added to the tentative recommendation.**

REFERENDUM ON OPERATING RULE

Proposed Section 1357.5 provides for a member referendum on recently adopted operating rules. If a petition bearing the required number of signatures is presented within the specified time, the rule is suspended until it is either repealed by the board or the board holds an election to determine the rule's fate. In such an election, a majority of the votes cast would determine whether the rule is repealed or reinstated. Mr. Dolnick asks a number of questions regarding the election procedure (see Exhibit p. 1):

Application of the Referendum Provision to Rules Adopted for Reasons of Health or Safety

Proposed Section 1357.4 provides an expedited "emergency" procedure for adoption of operating rules that are "necessary to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association." There is nothing in the proposed referendum provision that would preclude its application to operating rules adopted under the emergency procedure.

Liability for Reversal of Emergency Rule

If an emergency rule is reversed by referendum and the harm that the rule sought to avoid is realized, injured parties may sue for negligence. Mr. Dolnick asks who might be a defendant in such a suit.

The Davis-Stirling Act protects volunteer directors of a homeowners association from personal liability so long as they abide by a specified standard of conduct (in brief, the director's act or omission was within the scope of the director's duties, was in good faith, was not willful, wanton, or grossly negligent, and the association maintains liability insurance in the specified amounts). Section 1365.7(a). If the criteria of Section 1365.7 are not met, a director could potentially be a defendant in a suit arising from a repealed emergency rule. However, it would probably be difficult to establish a director's negligence where the board had implemented a rule to avoid the very harm suffered by a plaintiff, only to have the rule reversed by the membership.

The Davis-Stirling Act also shields owners of separate interests from personal tort liability “arising solely by reason of an ownership interest as a tenant in common in the common area of a common interest development,” so long as minimum levels of liability insurance are maintained. In such a case, the suit must be “brought only against the association and not against the individual owners of the separate interests....” Section 1365.9. However, one could argue that a vote to reverse a rule deemed by the board to be necessary to avoid an imminent risk is itself a negligent act, in which case the liability of a member voting in favor of reversal would not arise “solely” from joint ownership of the common area. However, it seems unlikely that the general policy shielding members from personal liability would be overridden by mere participation in a lawful election.

Furthermore, Corporations Code Section 7350 provides that a member of a nonprofit mutual benefit corporation “is not, as such, personally liable for the debts, liabilities, or obligations of the corporation.” Where an association is incorporated, and liability arises from corporate property or conduct, the members would not be subject to personal liability.

The association itself can be a defendant in a tort suit. Where the directors and members are shielded from personal liability, the association would be the only available defendant. However, if a judgment against an association exceeds the scope of its insurance against such claims, the excess would have to be paid from association funds, which ultimately come from the association’s members.

Exemption of Emergency Rule from Referendum

The directors have been chosen democratically to manage the association and are likely to have better information as to imminent risks and how to avoid them than the membership generally. Where the board determines that a rule is necessary to avoid an imminent risk, that judgment should be given some deference. Under the staff draft, an emergency rule is only effective for 120 days, so the need for reversal of a problematic rule is less acute. If the board decides to readopt a lapsed emergency rule it must do so under the regular rulemaking procedure, which would then be subject to the referendum process. Because emergency rules are temporary and can only be adopted to address imminent risks, **the staff recommends that the referendum provision not apply to rules adopted under the emergency procedure.**

How is an Election Conducted?

The staff draft is silent as to the procedures used in a member election regarding a referendum. Provisions of the Davis-Stirling Act that establish member elections generally provide that the election shall be “conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Section 7613 of, the Corporations Code.” The referenced provisions specify the notice to be provided before a member meeting or election, state the quorum requirement for a member meeting (one-third of the voting power), authorize written balloting in lieu of voting at a member meeting, and authorize proxy voting. These are reasonable provisions, and considering that boards should already be familiar with them, **the staff recommends that the following sentence be added to proposed Section 1357.5(c):** “An election held pursuant to this subdivision shall be conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Section 7613 of, the Corporations Code.”

The note following proposed Section 1357.5 asks for input on whether referendum signatures and votes should be counted by the number of interests owned or by the number of members signing or voting. Mr. Dolnick states strong support for the approach taken in the staff draft: “Voting should definitely be one vote per separate interest AND NOT one vote per member. Vote should also be only by ‘owner(s) of record, with one owner, in the case of multiple owners, binding all owners of that separate interest.” The voting of interests that are jointly owned is already the subject of a Department of Real Estate Regulation: “If a subdivision interest is owned by more than one person, each such person shall be a member of the Association, but there shall be no more than one vote for each subdivision interest.” 10 Cal. Code Regs. § 2792.18(a).

It isn’t clear what the result would be if more than one member wanted to vote on behalf of a jointly-owned interest. Corporations Code Section 7612 provides a rule for voting a jointly-controlled membership in a nonprofit mutual benefit corporation:

- (a) If only one votes, such act binds all; or
- (b) if more than one vote, the act of the majority so voting binds all.

When the Commission is studying the Davis-Stirling Act as a whole, it may wish to add language making clear how the votes of members who jointly own a separate interest are to be counted.

Is a Member Referendum Equivalent to Amendment of the Association's Governing Documents?

Generally, a majority vote of the membership is required to amend an association's declaration, articles, or bylaws. Where it is necessary that the board adopt an operating rule in order to implement a provision of its governing documents, a minority of members could use the referendum process to block adoption of the necessary rule, thereby blocking implementation of the provision of the governing documents. For example, the staff draft would require that a board adopt standards to be used in reviewing proposed improvements to a member's separate interest. See proposed Section 1378(a)(2). If for some reason members representing at least 25 percent of the voting power are opposed to the board exercising its architectural review power, they could use the referendum process to block adoption of the necessary standards.

Of course, the referendum process provides for reinstatement of a suspended rule on approval of a majority in an election, so a minority would not have the ability to block rules that are supported by the majority. Furthermore, provisions of the governing documents that are sufficiently well developed to be self-executing would not be affected by a board's inability to adopt operating rules. Thus, while the referendum procedure gives an organized minority some control over how the governing documents are implemented, this control is not equivalent to a power to amend the governing documents.

The *ECHO Journal* article raises a point similar to Mr. Dolnick's:

ECHO argued that the referendum power as proposed could essentially void the board's power to implement existing CC&R provisions (and defeat the members' reasonable expectation of CC&R enforcement), since implementation is the very function of rules. A good example would be a power in the minority to repeal an association's delinquency policy, which generally contains authorized procedures for collecting assessments, the lifeblood of an association. If this were a focus of a referendum, a minority of members could in effect amend or repeal the CC&Rs, by the sole mechanism of preventing them from being enforced.

The Commission should bear these critiques in mind as it considers the merits of the proposed referendum power.

AVAILABILITY OF OPERATING RULE

Proposed Section 1357.6 provides for member access to the operating rules of an association. Subdivision (a) requires that a complete copy of the rules be provided to each member. Subdivision (b) requires that annual updates of the rules be provided to members. Subdivision (c) provides that an association's operating rules be available for inspection by any association member. Mr. Dolnick suggests that subdivision (c) is unnecessary considering the distribution of rules required under (a) and (b). See Exhibit p. 2. **The staff disagrees.** A member may have lost his or her copy of a rule, or may never have received it. In such cases, the staff sees no harm in allowing the member to inspect the association's rules.

ELECTRONIC COMMUNICATION

Proposed Section 1357.7 authorizes use of electronic communications for transmission of rulemaking documents where the recipient has agreed to such a method of transmission. Mr. Dolnick comments:

This presumes that the association office or association manager has electronic capability. Can a member insist that the association, that does not have this capability, spend money to install this type of communication?

The staff had not intended that use of electronic communications be mandatory. This could be made clear with comment language (e.g., "Use of electronic communications is optional. An association board or member is not required to use electronic communications."), or by revising the proposed language as follows: "if the sender and recipient ~~has~~ have agreed to this method of transmission." **The statutory approach is probably preferable.**

TERMINOLOGY

Mr. Dolnick suggests that the words "member" and "membership" are used too loosely throughout the staff draft:

“Separate interest” would be more appropriate. Example: Our complex has 506 separate interests (units), but there are over 850 names on the recorded deeds. Does each one of these 850 have to receive notification in a separate envelope with that particular member’s name? I know of some associations that do not even keep a record of who the owners, by recorded deed, actually are.

This has to be clarified.

References to “members” of an association are common throughout the Davis-Stirling Act and the Department of Real Estate’s regulations. The term is not defined in either body of law, though the regulations do provide: “If a subdivision interest is owned by more than one person, each such person shall be a member of the Association, but there shall be no more than one vote for each subdivision interest.” 10 Cal. Code Regs. § 2792.18(a). Thus, references to “members” in existing law would seem to refer to any owner of a separate interest, and not just to the person who occupies the separate interest. So, for example, where Section 1356(g) provides that an “association shall mail a copy of [any amended declaration] to each member of the association,” this appears to require that the amended declaration be mailed to every owner. This makes sense. All owners have an interest in the rules that govern use of their property — even absentee owners. Questions about whether notices to owners who share the same address can be mailed in the same envelope or the adequacy of some associations’ membership records are already issues under existing law. **The staff believes that the Commission’s use of the term “member” is consistent with existing law, and properly so.** When the Commission reaches the stage of reviewing the Davis-Stirling Act as a whole, it should consider whether it would be useful to add a definition of “member” to further clarify matters.

DEFAULT PROCEDURE FOR REVIEW OF PROPOSED ALTERATION OF SEPARATE INTEREST

Mr. Dolnick makes three specific suggestions regarding the proposed architectural review procedure (see Exhibit p. 2):

- (1) Require that an applicant certify that a proposed alteration would be consistent with local building codes.
- (2) Extend the review period from 45 to 60 days.

- (3) If an application is not approved within 60 days, it should be deemed disapproved. It may then be resubmitted. If not approved within 60 days after resubmission, it should be deemed approved.

The Commission should consider whether to make these changes to the staff draft tentative recommendation.

CONCLUSION

This supplement discusses many suggestions for improvement of the staff draft tentative recommendation. After deciding whether to implement any of the those suggestions, the Commission should decide whether to approve a tentative recommendation for circulation. Once a tentative recommendation is approved, the staff may need to adjust section numbering to provide for the best integration with existing law.

Respectfully submitted,

Brian Hebert
Staff Counsel

Exhibit

COMMENTS OF SAM DOLNICK

Date: Mon, 28 Jan 2002
To: sterling@clrc.ca.gov
From: CAICLAC@aol.com
Subject: CID Submittal

Nat , I am passing along a submittal by a CAI Homeowner Delegate, Sam Dolnick.

RE: CLRC's MM02-9 Fairness Dated 12-21-2001

The reference to the following comments are keyed to the Proposed Legislation to Civil Code 1357.1-1357.8 (to be added)

1357.3 Rulemaking procedure

Comment on (a): This will be an added expense of 34 cents (37 cents after June) plus envelope, paper, copying and manager expenses, plus attorney expenses of one is needed. Instead of "not less than 15 days..." the option should be of sending the notices with billing statements or newsletters. This will significantly reduce the costs.

Comment on (b): Again, this will entail extra costs. It would be best to state that the operating rule cannot go into effect until 30 days after the separate interests have received the notice.

1357.4 Emergency rule making procedure

Comment on (b): Same comment as above on extra costs. The costs are mounting up with all the paper work and postage necessary.

1357.5 Referendum on operating rule

Comment: Does the referendum also apply to health and safety concerns? If membership votes to overturn the operating rule adopted by the board, who will be the defendant if some members file a lawsuit? Will it be the association, the directors or members who voted to rescind rule? Will this be a secret vote? Will proxy voting be allowed? If membership has referendum rights does this mean that the CC&Rs or bylaws are amended?

Voting should definitely be one vote per separate interest AND NOT one vote per members. Vote should also be only by "owner(s) of record, with one owner, in the case of multiple owners binding all owners of that separate interest."

1357.7 Availability of rule

Comment on (c): Why is this necessary? Since (a) states that a complete copy should be sent to each member. This subparagraph is a redundancy.

1357.7 Use of electronic communication

Comment: This presumes that the association office or association manager has electronic capability. Can a member insist that the association, that does not have this capability, spend money to install this type of communication? Can the members force this as an operating rule?

General Comment: The words "member" and "membership" are used too loosely throughout. "Separate interest" would be more appropriate. Example: Our complex has 506 separate interests (units), but there are over 850 names on the recorded deeds. Does each one of these 850 have to receive notification in a separate envelope with that particular member's name? I know of some associations that do not even keep a record of who the owners, by recorded deed, actually are.

This has to be clarified.

Comments on Civil Code 1378-1382 (to be added)

1379 Default procedure for review of proposed alteration of separate interest

Comment: Nowhere does it provide that prior to submission to the board, the petitioner has to include a document that the alteration is in conformity with all applicable municipality building codes. Many changes are made to the plumbing and electricity lines that need municipality permits.

Comment on (d): 45 days is too short a period of time. It should be 60 days. If not reviewed in 60 days, application is deemed to be disapproved, with the option of submitting the application again. If a decision is not reached in the second 60 days, the application should be deemed automatically approved.

General comment: People who propose legislation do not always realize that board members and architectural control committee members are volunteers who cannot devote full days to the operation of the association. Also, since a lot of these items are referred to the association community manager, there is a time delay. The manager can take care of a lot of the details, but cannot make the decision. Most boards meet once per month. Some meet on a quarterly basis. If the board has to meet outside of the defined times, then a special board meeting has to be called and it is not always easy to get a quorum at these special meetings.

Respectfully,

Skip Daum

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ECHO'S IN THE CAPITOL

When is a Rule an "Operating Rule"?

By Sandra M. Bonato, Esq.

As part of its multi-year review of community association law, the California Law Revision Commission began this year by considering a number of different nonjudicial approaches to resolving disputes between members and their associations. One approach that the Commission is now strongly considering focuses on a requirement that decision-making processes followed by associations be fair and reasonable. As the Commission staff explains, "Such basic fairness may not help resolve disputes over association decisions, but it should help prevent disputes from arising in the first place."

This past September, the Commission instructed its staff to look at rule making and architectural approval procedures in community associations. Staff was asked to propose tentative approaches for uniform "due process" rights for members when boards make rules and when association decision-makers approve or disapprove architectural applications.

At the time, we commented to the Commissioners that crafting workable, uniform procedures for rule making would have to turn on how carefully the term "rule" could be defined. On the one hand, many boards decisions and policies that are the semblance of rules are "ministerial" in scope (e.g., setting the hours of pool use, issuing parking placards, managing clubhouse use) that are very appropriately vested in the board alone. Many operational policies reflect statutory fiat (e.g., collection policies or annual budget disclosures are required by law) or are designed to protect residents' health and safety. These types of rules or policies should not be subject to repeal by members. If rules are defined so broadly as to invoke member involvement in the board's day-to-day operational decisions, the results would be unacceptably chaotic. At the other extreme, however, some boards attempt to impose rules that are well beyond the limits of their authority or intrude so far into owners' private property rights that such rules become de facto CC&R amendments without a member vote. Somewhere along this continuum, we argued, is a point at which member

review of an "operating rule" becomes appropriate. The problem lies in defining that point with crystal clarity, so that directors and members alike would know when it has been reached and when the uniform statutory procedures would apply.

On November 16, 2001, the Commission met in Los Angeles to consider the initial draft proposals. What was proposed included these points:

- (1) a basic definition of an "operating rule,"
- (2) provisions voiding any board-proposed rule that exceeds the board's authority to enact under the governing documents or the law,
- (3) procedures for prior written notice to members of any rule and for a comment period before enactment,
- (4) adoption of the final rule only at an open meeting of the board,
- (5) a period of time in which members could repeal the rule by referendum,
- (6) final distribution of the rule in writing,
- (7) permanent availability of the rule upon request.

Not surprisingly, the Commissioners focused much of their comments on Point 5, the proposed power in a minority of members to repeal a rule. While protective of member rights, the Commissioners were troubled that the proposal as drafted would give a minority of members too much power over the majority, and they suggested

major changes. ECHO argued that the referendum power as proposed could essentially void the board's power to implement existing CC&R provisions (and defeat the members' reasonable expectation of CC&R enforcement), since implementation is the very function of rules. A good example would be a power in the minority to repeal an association's delinquency policy, which generally contains authorized procedures for collecting assessments, the lifeblood of an association. If this were a focus of a referendum, a minority of members could in effect amend or repeal the CC&Rs, by the sole mechanism of preventing them from being enforced.

The Commissioners suggested different approaches that moderated these concerns. However, a fundamental problem persisted—that the underlying definition of an "operating rule" as proposed, which would trigger all of the procedures noted above, would be widely misunderstood by both boards and owners. The proposed language was as follows:

For the purposes of this article, "operating rule" means a generally applicable rule adopted by an association "...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.

Given the wide range of document provisions that boards regularly "implement, interpret, or make specific," we feared this definition would handcuff the managerial capacity of boards, discourage boards from making any rules or policies out of fear of not recognizing when they might make one defined by law, and throw the presently settled issue of "who decides" in associations, into complete disarray. To the extent that boards set financial and management policies at virtually every meeting, and to do so have only the authority vested in them through the governing documents and the law, this definition comes close to being what boards do every time they meet and is far from the necessarily narrow niche where member review of board rule and policy making is appropriate. If so, the definition could only inspire disagreements over its meaning and application, an ironic fate for a proposal intended to prevent disputes in the first place.

ECHO supports the notion that rules that affect the basic property rights of members should be made openly, that board-made rules must be consistent with other provisions in the governing documents and not exceed the board's decision-making authority, and that procedures for establishing rules must be fair and reasonable. Certain rule making is appropriately subject to notice and membership comment (though arguably not where a rule or policy is necessary for health and safety or mandated by law). Some rule making might be appropriately subject to member vote (perhaps rules that directly limit or restrict use of an owner's separate interest or exclusive use areas). We agree that duly adopted rules should always be in writing, distributed to members upon adoption or whenever modified, and available upon request.

At year's end, however, a sound, basic definition of an operating rule remains elusive, as do the final procedural parameters for rule-making that the Commission might recommend. Given the Law Revision Commission's normal pace, there might now

be no new legislation proposed in this area until 2003.

The Commission devoted a significant amount of time at its November meeting to the discussion of association rule making, and other issues that the Commission had hoped to take up that day were postponed. We expect that, in addition to continuing the rule-making discussion in mid-January 2002, the Commission will also consider uniform architectural application and approval procedures for associations, improved organization of provisions in the Davis-Stirling Common Interest Development Act, and the intriguing question of whether to recommend that the plethora of notices and disclosures required by the Act be sent to (consenting) members by electronic means.

For ECHO members who would like direct access to the Law Revision Commission's agenda and staff memoranda, the Commission's website is www.clrc.ca.gov.

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