

Memorandum 2002-24**Nonjudicial Dispute Resolution Under CID Law:
Procedural Fairness in Association Rulemaking and Decisionmaking
(Draft Tentative Recommendation)**

As part of its general study of common interest development law, the Commission is examining ways in which to minimize reliance on the courts to resolve disputes between homeowners associations and their members. One approach is to reduce the number of disputes that arise by insuring that decisionmaking procedures used by a homeowners association are fair. A decision made under a fair procedure is more likely to be just and is more likely to be accepted as legitimate by homeowners who are unhappy with the result.

At its March meeting, the Commission reviewed a staff draft tentative recommendation proposing the creation of statutory procedures to govern association rulemaking and association review of proposed alterations of separate interest property ("architectural review"). The Commission made a number of specific decisions regarding the content of the proposed law. Those decisions have been implemented in the attached draft tentative recommendation.

A number of new issues are discussed in staff notes in the attached draft. In addition, a description of the organization of the draft, and some observations on member participation in association governance are set out in the memorandum, below.

After reviewing the attached draft and considering the various issues, the Commission should decide whether to approve the draft for circulation as a tentative recommendation.

ORGANIZATION OF DRAFT

The Commission has 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 assumes enactment of the proposed chapter and article organization (i.e., it uses article and chapter

headings that are *not* consistent with existing law). The structure of the proposed organization is as follows:

Title 6. Common Interest Developments

- Chapter 1. General Provisions
 - Article 1. Preliminary Provisions
 - Article 2. Definitions
- Chapter 2. Governing Documents
 - Article 1. Creation
 - Article 2. Enforcement
 - Article 3. Amendment
- Chapter 3. Ownership Rights and Interests
- Chapter 4. Governance
 - Article 1. Association
 - Article 2. Common Interest Development Open Meeting Act
 - Article 3. Managing Agents
 - Article 4. Public Information
- Chapter 5. Operations
 - Article 1. Common Areas
 - Article 2. Fiscal Matters
 - Article 3. Insurance
 - Article 4. Assessments
- Chapter 6. Transfer of Ownership Interests
- Chapter 7. Civil Actions and Liens
- Chapter 8. Construction of Instruments and Zoning
- Chapter 9. Construction Defect Litigation
- Chapter 10. Improvements

In the previous draft, the provisions relating to operating rules were located with sections relating to amendment of an association's declaration (as Article 4 of proposed Chapter 2). That is a logical location. However, in order to locate the rulemaking provisions there, it was necessary to limit them to a single article.

The attached draft moves the operating rule provisions to a new Chapter 11. See proposed Sections 1380.010-1380.130. This allows the provisions to be divided into two articles, which simplifies the drafting of proposed Sections 1380.010 and 1380.100. Those sections now refer to "this chapter" and "this article," respectively, rather than referring to specific sections. This is not only cleaner, but avoids any future reference problems that might result if sections are added or renumbered.

The staff has also taken the opportunity to break some sections that had grown overlong into several smaller sections, and to streamline the drafting somewhat.

These organizational changes are technical, and the staff does not intend to discuss them unless issues are raised at the meeting.

MEMBER PARTICIPATION IN ASSOCIATION GOVERNANCE

In an April 1 letter to the staff, Curtis Sproul writes:

A persistently popular proposal advanced by critics of community association boards of directors is that California law ought to embrace some sort of “property owners bill of rights” or member initiative process. While these concepts have been defined in various ways, generally they include the identification of certain property owner or membership rights that cannot be disturbed by board action alone (i.e., action by the Board of Directors that does not require concurrent consent by some percentage of the owner/members) and the right of members to reverse Board decisions or establish Association policy by some sort of private initiative process.

The first response to these critics of the status quo is that current California law already identifies a number of important decisions or Association actions that can only be undertaken with the prior consent of the Association’s members. Those member protection provisions are found not only in the Davis-Stirling Act (see Civil Code §§ 1355, 1356, 1366), but also in the Department of Real Estate Regulations governing the content of common interest governing documents (see DRE Regulation §§ 2792, 2792.21(b)), and California Corporations Code (see Corporations Code §§ 7222, 7224, 7233, 7812, 8610, and 8719). In accordance with traditional concepts of corporate governance the types of actions that statutory law reserves for member review and approval are typically “big ticket” items that are likely to have a significant impact on the nature, or even the existence of, the subject corporation, such as a proposal to merge, dissolve, sell all or substantially all of the assets, or a proposal to remove directors without cause. To that list, the Davis-Stirling Act and the DRE Regulations add amendment of the governing documents, approval of long-term contracts, and the approval of large increases in the regular assessment and substantial special assessments.

Apart from those big ticket items requiring member approval, the idea that the general membership should have the upper hand in Association management through either additional approval requirements or a member initiative process is fraught with problems. As much as some community association members may distrust or even despise their association board members, it is only the elected directors who are bound by fiduciary principles to take actions that they believe to be in the best interest of the corporation

they are serving and the best interest of the members of that corporation, taken as a whole. In addition, it is only the members of the board who are under a statutory obligation to conduct a reasonable investigation of the facts before making corporate decisions.

The risks associated with member approval requirements and member initiative rights are heightened by the level of apathy Community Association members consistently demonstrate with respect to the business and affairs of their association. Apathy makes member approvals extremely difficult to obtain and, with very high percentages of the eligible voters asleep most of the time, resort to member initiative remedies is likely to be utilized, in most instances, by well organized minority factions who are often virtually at war with their community's duly elected board. Those factions are under no obligation to temper their policies and actions with a view towards the best interests of the community as a whole, they are under no obligation to be accurate in their presentation of issues, they have no duty to investigate relevant facts or circumstances, and they have no fiduciary obligations vis-a-vis their neighbors.

...

Many of the criticisms and reservations I have expressed with respect to member initiative and "Bill of Rights" proposals apply to proposals that members have the statutory right to approve association operating rules. There are certainly little downside risk in requiring that community association boards present proposed rules at open Board Meetings at least "X" days before a rule is scheduled for action by the Board. Also, it is clear that association directors should not be permitted to use the rule-making process as a means of adopting what are essentially amendments to the CC&Rs or Bylaws. However, in the case of rules and procedures that are clearly supplementary to the core governing documents, requirements of prior member approval are subject to the same criticism applicable to other proposals based on the theory that community association governance would be improved if the members governed instead of the board of directors. Five percent of the members always have the right under the Corporations Code to demand a special meeting be held "for any lawful purpose" and if a board really gets out of hand, that meeting can be for the purpose of voting on a recall.

At present, the procedure for suspension of an operating rule by referendum is the only part of the attached draft that would provide for direct member involvement in board decisionmaking. See proposed Sections 1380.130-1380.140. The concerns Mr. Sproul raises about member participation should be kept in

mind as the Commission considers whether the referendum procedure should be included in the tentative recommendation. Where an association's membership is generally apathetic, a well-organized minority faction could use the referendum procedure to achieve disproportionate influence in association decisionmaking. Also, it is true that members are not subject to the same fiduciary duties and standards of conduct that apply to directors (though this point may not carry much weight with those who believe that boards sometimes violate their duties with impunity).

Despite the points made by Mr. Sproul, the staff favors leaving the referendum procedure in the proposed law, in order to receive more comments. Also, the referendum procedure is limited in its effect and may be less likely to create the problems described by Mr. Sproul. The referendum procedure would only apply to operating rules in designated classes, which were selected on the basis of their potential effect on member interests. Those classes include rules that approach the "big ticket" status of decisions that already require member approval under existing law (e.g., adoption of architectural standards is arguably as important to members' interests as signing a 13-month landscaping contract). In addition, the referendum procedure would not require member pre-approval of rule changes. As a general matter, rule changes would be made by the board of directors acting alone. It is only in the exceptional case, where a significant minority of the members organize a referendum drive in the 30 days immediately following adoption of a rule change, that member approval would be required. Also, the referendum process would not apply to emergency rule changes, so especially crucial rule changes could not be suspended by referendum.

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 a homeowners association and its members.
4 One approach, presented in this tentative recommendation, is to reduce the number
5 of disputes that arise by insuring that the procedures used by a homeowners
6 association are fair and reasonable. A decision made under a fair and reasonable
7 procedure is more likely to be a just decision, and is more likely to be accepted by
8 a homeowner who would dispute a decision reached under a procedure that is
9 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 approval of the homeowners association before a member can alter separate
20 interest property. For example, a homeowner might be required to obtain

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 fair and reasonable. These include member discipline (see Civ. Code § 1363(g)-(h); 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 approval before adding a room, choosing a color of exterior paint, or
2 planting flowers in a front yard. Existing case law requires that the procedures
3 used in making such a decision be fair and reasonable.⁴ In order to avoid disputes
4 over whether the procedures followed by an association are fair, the Commission
5 recommends that a statutory procedure be created, which would be followed by all
6 associations in reviewing a member’s proposal to alter separate interest property.⁵

7 Under the proposed procedure, a member wishing to alter separate interest
8 property would submit a written application. If the association determines that the
9 proposed alteration would require a variance from established standards, or could
10 have a substantial negative effect on the separate interests of other members,
11 notice of the proposal would be provided to potentially affected members. Within
12 45 days after receipt of an application, the association would issue its written
13 decision. If a decision is not issued in the time required, the proposal would be
14 deemed approved.⁶ The applicant and any member who objected to the proposal
15 would have a right to appeal the decision to the board of directors. On appeal, the
16 application would be considered *de novo*, and the board of directors would issue a
17 written decision that includes a statement explaining the basis for the decision.⁷

18 In addition, the proposed law would require that an association adopt substantive
19 standards to guide its decisionmaking and would require that any decisionmaker
20 act in good faith.⁸

21 O P E R A T I N G R U L E S

22 Existing law recognizes that a homeowners association may adopt “operating
23 rules” to govern the operation of a common interest development.⁹ However, there
24 is no statutory or regulatory procedure governing adoption of operating rules. Nor
25 is there any clear limit on the scope of such rules.¹⁰ Operating rules may regulate

4. See *supra* n.1.

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

6. See proposed Civ. Code § 1378.040, *infra*.

7. See proposed Civ. Code § 1378.060, *infra*.

8. See proposed Civ. Code § 1378.030 *infra*.

9. 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”).

10. Section 2792.21(a) of Title 10 of the California Code of Regulations includes a limitation on the scope of operating rules, 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

1 minor procedural matters (e.g., rules regulating use of a pool) or important
2 substantive matters (e.g., rules regulating the appearance of one’s home, or
3 establishing monetary penalties for violation of the association’s rules). If such
4 rules are adopted as part of an association’s declaration or by-laws, member
5 approval is required.¹¹ However, it appears that a board of directors could adopt
6 such rules as “operating rules” without any member notice or involvement.

7 If an operating rule is adopted in secret, is applied without advance notice, or
8 exceeds the association’s regulatory authority, disputes are likely to result. The
9 proposed law would reduce the likelihood of such disputes by (1) requiring that
10 copies of an association’s operating rules be provided to all member,¹² (2)
11 requiring advance notice of and an opportunity to comment on proposed rule
12 changes that could affect a member’s interests,¹³ (3) providing an opportunity to
13 challenge a rule change by member referendum,¹⁴ and (4) providing that a rule
14 change is valid and enforceable only if it is authorized by and consistent with law
15 and the association’s governing documents.¹⁵ The rulemaking and referendum
16 provisions would only apply to operating rules that regulate use of the common
17 area, use of a separate interest, use of an exclusive use common area, member
18 discipline, or assessment collection procedures.¹⁶ Those types of rules are likely to
19 have a direct effect on member interests.

20 In emergencies the board of directors would be authorized to make an immediate
21 rule change without prior notice to members or member comment.¹⁷ Emergency
22 rule changes would be temporary and would not be subject to the member
23 referendum procedure.

matter that involves more than “operation of the common areas and facilities owned or controlled by the Association.”

11. Civ. Code § 1355 (amendment of declaration); 10 Cal. Code Regs. § 2792.24 (amendment of bylaws).

12. Proposed Civ. Code § 1380.040, *infra*.

13. Proposed Civ. Code § 1380.110, *infra*.

14. Proposed Civ. Code §§ 1380.130-1380.140, *infra*. Cf. Elec. Code §§ 9235-9247 (referendum suspending municipal ordinance).

15. Proposed Civ. Code § 1380.030, *infra*.

16. See proposed Civ. Code § 1380.100(a), *infra*.

17. Proposed Civ. Code § 1380.120, *infra*. While the emergency rulemaking procedure would not require a pre-adoption comment period, adoption of a rule under Section 1392 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”).

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PROPOSED LEGISLATION

1 **Civ. Code § 1350.7 (added). Delivery and posting of documents**

2 SECTION 1. Section 1350.7 is added to the Civil Code, to read:

3 1350.7. (a) This section applies to a notice or other document to the extent it is
4 made applicable by another provision of this title.

5 (b) A notice or other document shall be delivered by one of the following
6 methods:

7 (1) Personal delivery.

8 (2) First class mail.

9 (3) Email, facsimile, or other electronic means, if the sender and recipient have
10 agreed to that method of delivery. Agreement to electronic delivery of a document
11 may not be inferred from a provision of the governing documents.

12 (c) A notice or other document may be included in or delivered with a billing
13 statement, newsletter, or other document that is delivered by one of the methods
14 provided in subdivision (b).

15 (d) If feasible, a document that is required to be delivered shall also be posted in
16 a prominent place within the common area and on the association's Internet Web
17 site, if the association has an Internet Web site.

18 (e) A document is delivered on the date that it is sent, not the date it is received.

19 **Comment.** Section 1350.7 is new. It provides general document delivery rules that may be
20 incorporated by reference. For provisions incorporating this section by reference, see Sections
21 1378.080, 1380.050.

22 See also Sections 1351(b) ("common area" defined), (j) ("governing documents" defined).

23 ☞ **Staff Note.** At the March meeting, the Commission approved addition of a section governing
24 the manner of delivery of documents relating to operating rules. That section has been revised in
25 two significant ways:

26 (1) It has been applied to the provisions governing architectural review as well. This has been
27 implemented by adding the general provision (Section 1350.7) and incorporating that provision
28 by reference in Sections 1378.080 and 1380.050. This drafting approach avoids duplication of the
29 delivery provision and makes it easier to extend application of the delivery provision to other
30 parts of the Davis-Stirling Act, if that is determined to be desirable.

31 (2) It requires posting to an association's Web site, if it has a Web site. This would impose a
32 slight additional burden on associations that maintain a Web site, but should significantly
33 improve member awareness in those cases. The Commission should consider whether Internet
34 posting of documents relating to a member's proposed alteration of a separate interest would
35 constitute too great an invasion of the member's privacy.

36 **Civ. Code §§ 1378.010-1378.090 (added). Review of proposed alteration of separate interest**

37 SEC. 2. Article 2 (commencing with Section 1378.010) is added to Chapter 10
38 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

1 Article 2. Review of Proposed Alteration of Separate Interest

2 § 1378.010. Scope of article

3 1378.010. This article applies if an association’s governing documents require
4 that an association member obtain approval before altering a separate interest.

5 **Comment.** Section 1378.010 is new. See also Section 1351(a) (“association” defined), (j)
6 (“governing documents” defined), (l) (“separate interest” defined).

7 § 1378.020. Definitions

8 1378.020. (a) The definitions in this section govern the construction of this
9 article.

10 (b) “Project opponent” means an association member who submits to the
11 reviewing body a comment critical of a proposed alteration of a separate interest,
12 before the reviewing body makes its decision on the proposed alteration.

13 (c) “Reviewing body” means the person or group authorized, under an
14 association’s governing documents, to approve the alteration of a separate interest.

15 **Comment.** Section 1378.020 is new. See also Section 1351(a) (“association” defined), (j)
16 (“governing documents” defined), (l) (“separate interest” defined).

17 § 1378.030. Review standards

18 1378.030. (a) An association shall adopt substantive standards to govern its
19 review of a proposed alteration of a separate interest.

20 (b) A person who participates in making a decision on a proposed alteration of a
21 separate interest shall do so in good faith, based on the information provided.

22 **Comment.** Section 1378.030 is new. See also Section 1351(a) (“association” defined), (l)
23 (“separate interest” defined).

24 § 1378.040. Approval process

25 1378.040. (a) An association member proposing to alter a separate interest shall
26 submit a written application to the reviewing body.

27 (b) If feasible, the reviewing body shall post a notice of the application. The
28 notice shall state the address of the separate interest that is the subject of the
29 application and the date on which the application is received by the reviewing
30 body. The notice shall be posted in a prominent place within the common area, and
31 on the association’s Internet Web site, if the association has an Internet Web site.

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

38 (d) Within 45 days after receipt of an application, the reviewing body shall
39 deliver a written decision to the applicant and to any project opponent. If the

1 reviewing body does not deliver a written decision within 45 days after receipt of
2 the application, the application is deemed approved on the 45th day.

3 **Comment.** Section 1378.040 is new. See also Section 1351(j) (“governing documents”
4 defined), (l) (“separate interest” defined), 1378.020(b) (“project opponent” defined), 1378.020(c)
5 (“reviewing body” defined), 1378.080 (delivery of notice).

6 ☞ **Staff Note.** The previous draft included a provision requiring that a reviewing body “post its
7 agenda in a location accessible to members and on its Internet Web site ... if it maintains an
8 Internet Web site....” The Commission has acknowledged that posting of documents may be
9 impractical in some associations, and should only be required “where feasible.”

10 At a minimum, the agenda posting requirement should likewise be limited to posting “where
11 feasible.” In addition, it might be helpful to be more specific as to what would be posted. To that
12 end, proposed Section 1378.040(b) requires that notice of an application be posted, and that the
13 notice include both the address of the separate interest that is the subject of the application and the
14 date the application is submitted.

15 One possible problem with this approach is that Web site access would not necessarily be
16 limited to members of the association, and might constitute too great an intrusion on the privacy
17 of the applicant. If this is a concern, the Web site publication requirement could be deleted. The
18 posted notice would then only be accessible to those with physical access to the development’s
19 common area.

20 ☞ **Commission Note.** Subdivision (d) provides that a proposed alteration is deemed approved if
21 the reviewing body does not issue a decision in the time specified. The Commission would like to
22 receive comment on whether this is the proper result, or if it would be better for a proposal to be
23 deemed disapproved where the reviewing body does not act. Commentators should consider that
24 either rule will affect not only the applicant, but also any other members whose interests would be
25 affected by the proposed alteration.

26 § 1378.050. Period for appeal

27 1378.050. An association member shall not proceed with an approved alteration
28 of a separate interest until either the period for appeal to the board of directors has
29 passed without an appeal being requested or the approval has been upheld on
30 appeal.

31 **Comment.** Section 1378.050 is new. See also Section 1351(l) (“separate interest” defined),
32 1378.060 (appeal process).

33 § 1378.060. Appeal process

34 1378.060. (a) An applicant or project opponent may appeal the approval or
35 disapproval of a proposed alteration of a separate interest by submitting a written
36 request to the board of directors within 30 days after the reviewing body delivers
37 its decision or the proposed alteration is deemed approved.

38 (b) Within 15 days after receipt of a timely request for appeal, the board of
39 directors shall deliver notice of the appeal to the applicant and to any project
40 opponent. The notice shall state the time and place where the appeal will be heard.

41 (c) Within 45 days after receipt of a timely request for appeal, the board of
42 directors shall meet and review de novo the proposed alteration that is the subject
43 of the appeal. Any association member may testify at the appeal and may submit
44 written materials in support of or opposition to the proposed alteration.

1 (c) Within 15 days after hearing the appeal, the board of directors shall deliver
2 its decision to the applicant and, if appeal is brought by a person other than the
3 applicant, to that person. The decision shall be in writing and shall include a
4 statement explaining the basis for the decision, including reference to facts,
5 standards, or provisions of the governing documents that support the decision.

6 **Comment.** Section 1378.060 is new. See also Section 1351(j) (“governing documents”
7 defined), 1378.020(b) (“project opponent” defined), 1378.020(c) (“reviewing body” defined),
8 1378.080 (delivery of notice).

9 **§ 1378.070. Judicial review**

10 1378.070. (a) Neither the applicant nor an association member who is sent notice
11 by the reviewing body pursuant to Section 1378.040 may obtain judicial review of
12 a decision made or deemed made under that section, unless the decision is first
13 appealed to the board of directors.

14 (b) The alternative dispute resolution provisions of Section 1354 apply to a civil
15 action related to enforcement of provisions of the governing documents that relate
16 to alteration of a separate interest, regardless of the form of relief sought.

17 (c) A decision of the board of directors made under Section 1378.060 may be
18 reviewed under Section 1094.5 of the Code of Civil Procedure.

19 **Comment.** Section 1378.070 is new. Subdivision (a) requires exhaustion of the appeals process
20 before the applicant or other member who had notice of a proposal alteration of a separate interest
21 may obtain judicial review of a decision on the proposed alteration. Members who were not
22 provided with notice of the proposal are not subject to the exhaustion requirement.

23 Subdivision (b) applies the alternative dispute resolution provisions of Section 1354 to judicial
24 review of enforcement of provisions of the governing documents that relate to alteration of a
25 separate interest, regardless of the form of relief sought. This overrides language in Section
26 1354(b) limiting the alternative dispute resolution provisions to civil actions for declaratory or
27 injunctive relief.

28 Subdivision (c) provides that a decision on a proposed alteration of a separate interest may be
29 reviewed under the procedure for administrative mandate. This is consistent with existing law.
30 See *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 815-819, 140 Cal. Rptr. 442, 567
31 P.2d 1162 (1977) (administrative mandate not limited to review of governmental agency
32 decisions).

33 See also Section 1351(a) (“association” defined), (j) (“governing documents” defined), (l)
34 (“separate interest” defined), 1378.020(c) (“reviewing body” defined).

35 ☞ **Staff Notes. (1)** In the previous draft, subdivision (a) provided, in part:

36 Before a person may obtain judicial review of a decision on a proposed alteration of a
37 member’s separate interest, the person must ... [appeal] the decision to the association’s
38 board of directors ...

39 The staff now sees two problems with that language:

40 (i) A member who is happy with an initial decision will not appeal the decision. If a second
41 member appeals and the initial decision is reversed, the first member might be barred
42 from obtaining judicial review of the board’s ultimate decision because *that member* did
43 not appeal the initial decision.

1 (ii) A member who does not have notice of a proposed alteration of a neighbor’s separate
2 interest will not know to appeal a decision approving that alteration. This could prevent
3 that person from obtaining judicial review of the decision.

4 In Section 1378.070, these problems are addressed by (1) revising the exhaustion provision to
5 require that the initial decision *be appealed*, without requiring that it be appealed *by the person*
6 *seeking judicial review*, and (2) limiting the exhaustion requirement to those who actually
7 received notice of the proposed alteration at issue.

8 (2) In the previous draft, subdivision (c) provided generally that a decision on a proposed
9 alteration of a separate interest was reviewable under the procedure for administrative mandamus.
10 Because the previous draft required exhaustion of the appeal process, this meant that any civil
11 action would be reviewing the decision on appeal, which would be based on a hearing before the
12 board, with a written decision. Administrative mandamus is appropriate in such circumstances,
13 because it applies to a proceeding where, by law, a hearing is required and because it is based on
14 review of the hearing record.

15 If the exhaustion requirement is narrowed as discussed above, then some civil actions may be
16 filed without an appeal having been heard by the board. In such cases administrative mandamus
17 would not be appropriate — there would have been no hearing and there would be little or no
18 record. Consistent with the proposed change in subdivision (a), the staff has revised subdivision
19 (c) to limit it to review of decisions on appeal.

20 **§ 1378.080. Delivery of documents**

21 1378.080. A document that is required to be delivered by the board of directors
22 or a reviewing body pursuant to this article is subject to Section 1350.7.

23 **Comment.** Section 1378.080 is new. See also Section 1378.020(c) (“reviewing body” defined).

24 **§ 1378.090. Application of article**

25 1378.090. (a) This article applies to an alteration of a separate interest that is
26 proposed to the reviewing body on or after January 1, 2004.

27 (b) Nothing in this article affects the validity of a decision on an alteration of a
28 separate interest that is proposed to the reviewing body before January 1, 2004.

29 (c) This article supersedes any inconsistent provision of an association’s
30 governing documents.

31 **Comment.** Section 1378.090 governs the application of this article. While the validity of a
32 decision made on a proposal submitted before January 1, 2004 is not affected by this article, it
33 may be affected by other law, including the common law requirement that an association follow
34 fair procedures and act in good faith when enforcing restrictions. See *Ironwood Owners Ass’n IX*
35 *v. Solomon*, 178 Cal. App. 3d 766, 772 (1986); *Cohen v. Kite Hill Community Ass’n*, 142 Cal.
36 App. 3d 642, 651 (1983).

37 See also Sections 1351(a) (“association” defined), (j) (“governing documents” defined), (l)
38 (“separate interest” defined), 1378.020(c) (“reviewing body” defined).

39 ☞ **Staff Notes.** (1) Subdivision (a) has been adjusted to state the prospective application of this
40 article with respect to the date an alteration is proposed. This avoids any question as to what law
41 applies to a proposal that is under consideration at the time that the proposed law becomes
42 operative.

43 (2) The rulemaking and architectural review provisions are intended to be mandatory,
44 superseding an association’s governing documents. To make this clear, subdivision (c) has been
45 added to Sections 1378.090 and 1380.060. The staff recommends that this change be adopted by
46 the Commission, with the understanding that the staff will do additional research on the question

1 of whether there is any constitutional impediment to a statutory procedure overriding an
2 association’s governing documents.

3 However, the Commission should consider whether provisions of an association’s governing
4 documents should be allowed to supplement the procedures provided in the proposed law. In
5 other words, should the proposed statutory procedures be both mandatory and exclusive, or
6 should an association be allowed to follow the statutory procedures *plus* any supplemental
7 procedures provided by its governing documents. For example, an association’s governing
8 documents might require that a proposed alteration of a separate interest be reviewed by an “art
9 committee” that makes a nonbinding recommendation on the aesthetic merit of the proposal
10 before the architectural review board makes its decision. Should this extra level of review be
11 permitted?

12 If the proposed procedures are exclusive, useful local innovations may be squelched. If
13 supplemental procedures are permitted, disputes may arise about whether they are consistent with
14 the mandatory procedure. In recognition of the diversity of common interest developments, the
15 staff is inclined toward permitting local rules to supplement the mandatory procedures.
16 Regardless of which approach is chosen, it might be helpful to add language eliminating any
17 ambiguity on the point.

18 **Civ. Code §§ 1380.010-1380.140 (added). Operating rules**

19 SEC. 3. Chapter 11 (commencing with Section 1380.010) is added to Title 6 of
20 Part 4 of Division 2 of the Civil Code, to read:

21 **CHAPTER 11. OPERATING RULES**

22 **Article 1. General Provisions**

23 **§ 1380.010. Scope of chapter**

24 1380.010. This chapter does not apply to the following actions by a board of
25 directors:

- 26 (a) Making a decision in a specific case that is not intended to apply generally.
- 27 (b) Setting the amount of a regular or special assessment.
- 28 (c) Issuing a document that merely repeats existing law or the governing
29 documents.
- 30 (d) Adopting a resolution acknowledging that a provision of the governing
31 documents is superseded by a change in the law.

32 **Comment.** Section 1380.010 provides that certain actions are not subject to the requirements of
33 this chapter. Subdivision (a) excludes decisions that are adjudicative or executive in nature.
34 Subdivision (b) excludes the setting of generally applicable assessments. Budgeting and the
35 setting of assessments are governed by other law. See Sections 1365-1365.5, 1366. Subdivision
36 (c) recognizes that mere repetition of an existing rule is not the making of a new rule.

37 See also Section 1351(j) (“governing documents” defined).

38 ☞ **Staff Note.** A provision substantively similar to subdivision (d) was included in the previous
39 draft, but was not specifically approved by the Commission. The Commission should decide
40 whether to retain subdivision (d).

1 **§ 1380.020. “Rule change” defined**

2 1380.020. For the purpose of this chapter, “rule change” means the adoption,
3 amendment, or repeal of an operating rule.

4 **Comment.** Section 1380.020 is new.

5 **§ 1380.030. Validity of operating rule**

6 1380.030. An operating rule is valid and enforceable only if all of the following
7 conditions are satisfied:

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

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

13 (c) The rule is in writing.

14 (d) The rule is adopted or amended in good faith and in substantial compliance
15 with the requirements of this chapter.

16 **Comment.** Section 1380.030 is new. See also Sections 1351(a) (“association” defined), (j)
17 (“governing documents” defined).

18 ☞ **Staff Note.** A minor defect in providing required notice of a proposed rule change, made in
19 good faith, should not invalidate that rule change. The Commission directed staff to draft
20 language implementing this policy. As it turns out, Section 1380.030(d) seems sufficient to
21 address this concern. If additional clarity is desirable, the following sentences could be added to
22 the Comment:

23 Subdivision (d) requires substantial compliance with the requirements of this chapter, in good
24 faith. Note that a minor procedural defect, made in good faith, does not invalidate the
25 adoption or amendment of a rule.

26 **§ 1380.040. Availability of rules**

27 1380.040. (a) As soon as practicable after a person becomes an association
28 member, the board of directors shall provide the member with a complete copy of
29 the operating rules of the association.

30 [(b) At the time that the pro forma budget required by Section 1365 is
31 distributed, the board of directors shall also distribute a copy of any rule change
32 made in the preceding fiscal year.]

33 (c) The operating rules of an association shall be available for inspection by an
34 association member.

35 **Comment.** Section 1380.040 is new. See also Sections 1351(a) (“association” defined),
36 1380.020 (“rule change” defined).

37 ☞ **Staff Note.** The rulemaking procedure requires that a rule change made by the board of
38 directors be delivered to every member before it can become effective. See proposed Section
39 1380.110(d)-(e). If members receive copies of rules as they are adopted or revised, what purpose
40 is served by requiring an annual distribution of the preceding year’s rule changes? Should
41 subdivision (b) be deleted as unnecessary?

1 (3) The deadline for submission of a comment on the proposed rule change.

2 (b) For not less than 15 days following delivery of notice of a proposed rule
3 change, the board of directors shall accept written comments from association
4 members on the proposed rule change.

5 (c) A decision on a proposed rule change shall be made at a meeting of the board
6 of directors. A decision shall not be made until after the deadline for submission of
7 a comment by a member.

8 (d) The board of directors shall deliver notice of a rule change to every
9 association member. The notice shall set out the text of the rule change and state
10 the effective date of the rule change.

11 (e) A rule change takes effect 15 days after delivery of notice of the rule change.

12 **Comment.** Section 1380.110 is new. It establishes a notice and comment procedure for
13 adoption, amendment, or repeal of an operating rule. Subdivision (c) provides that a decision on a
14 proposed rule change shall be made at a meeting of the board of directors. See Section 1363.05
15 (“Common Interest Development Open Meeting Act”).

16 See also Section 1351(a) (“association” defined), 1380.020 (“rule change” defined), 1380.050
17 (delivery of notice).

18 **§ 1380.120. Emergency rulemaking procedure**

19 1380.120. (a) If the board of directors of an association determines that an
20 immediate rule change is necessary to address an imminent threat to public health
21 or safety, or an imminent risk of substantial economic loss to the association, it
22 may make the rule change immediately.

23 (b) Within 15 days after making a rule change under this section, the board of
24 directors shall deliver notice of the rule change to every association member. The
25 notice shall include the text of the rule change and an explanation of why the rule
26 change is required to address an imminent threat to public health or safety, or an
27 imminent risk of substantial economic loss to the association.

28 (c) A rule change made under this section is effective for 120 days.

29 (d) A rule change made under this section may not be readopted under this
30 section. In order to readopt a rule change made under this section, the board of
31 directors shall follow the procedure provided in Section 1380.110.

32 **Comment.** Section 1380.120 is new. It establishes a procedure for making an emergency rule
33 change. Subdivision (c) provides that an emergency rule change is temporary. Subdivision (d)
34 makes clear that the effective period of an emergency rule change may not be extended by
35 readopting the rule change under the emergency rulemaking procedure.

36 See also Section 1351(a) (“association” defined), 1380.020 (“rule change” defined), 1380.050
37 (delivery of notice).

38 **§ 1380.130. Referendum procedure**

39 1380.130. (a) Association members may suspend a rule change made under
40 Section 1380.110 by submitting a referendum petition to the board of directors
41 within 30 days after notice of the rule change is delivered. On receipt of a timely
42 referendum petition the effect of the rule change is immediately suspended.

1 (b) To be effective, a referendum petition shall be signed by association
2 members owning more than 25 percent of the separate interests, or more than 500
3 separate interests, whichever is less, and shall set out the text and effective date of
4 the rule change.

5 (c) Within 15 days after a rule change is suspended, the board of directors shall
6 deliver notice of the suspension to every association member.

7 **Comment.** Section 1380.130 is new. It authorizes suspension of a rule change by member
8 referendum. The referendum process does not apply to a rule change made under the emergency
9 rulemaking procedure. See Section 1380.120 (emergency rulemaking procedure). Disposition of a
10 suspended rule change is governed by Section 1380.140.

11 See also Sections 1351(a) (“association” defined), (c) (“common interest development”
12 defined), (l) (“separate interest” defined), 1380.020 (“rule change” defined), 1380.050 (delivery
13 of notice).

14 ☞ **Commission Note.** In subdivision (b), the number of signatures required for a successful
15 referendum is based on the number of interests owned by signatories, rather than the number of
16 members who sign (i.e., one-interest-one-vote, rather than one-member-one-vote). This is
17 generally consistent with the Department of Real Estate regulation governing member voting
18 rights, which provides a default rule of “one vote for each subdivision interest owned.” 10 Cal.
19 Code Regs. § 2792.18(a). It is also consistent with the default statutory procedure for amending a
20 declaration. See Civ. Code § 1355(a) (requiring approval of “owners representing more than 50
21 percent ... of the separate interests in the common interest development”). An alternative
22 approach would be to require the signatures of more than 25 percent of the association’s
23 *members*, or 500 *members*, whichever is fewer. Each rule would strike a different balance
24 between the interests of individual members and the interests of members who own more than a
25 single separate interest. Note that the same issue arises with respect to the results of voting in an
26 election under Section 1380.140. The Commission solicits comment on whether the standards for
27 qualifying petitions or for election results should be based on the number of interests owned or
28 the number of individual members.

29 § 1380.140. Disposition of suspended rule change

30 1380.140. (a) If a rule change is suspended by referendum, the board of directors
31 shall either reverse the rule change or hold an election to determine whether the
32 rule change should be reinstated.

33 (b) A referendum election shall be conducted in accordance with Chapter 5
34 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Section
35 7613 of, the Corporations Code.

36 (c) In a referendum election, the ballot shall set out the text of the suspended rule
37 change and shall present the following question for decision:

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

40 (d) If a majority of the votes cast in a referendum election are affirmative, the
41 rule change is immediately reinstated. If less than a majority of the votes are
42 affirmative, the rule change is reversed.

43 (e) Within 15 days after a referendum election is held, the board of directors
44 shall deliver notice of the results of the election to every association member.

1 (f) A rule change that is reversed under this section shall not be readopted by the
2 board of directors for one year following its reversal.

3 **Comment.** Section 1380.140 is new. See also Sections 1380.020 (“rule change” defined),
4 1380.050 (delivery of documents), 1380.130 (referendum procedure).

5 ☞ **Staff Note.** Subdivision (e) is added to require notice of the results of a referendum election.