Study H-851 June 2, 2003

Memorandum 2003-23

Procedural Fairness in CID Rulemaking and Decisionmaking: Issues on AB 512 (Bates)

The Commission's recommendation on *Common Interest Development Law: Procedural Fairness in Association Rulemaking and Decisionmaking* (December 2002) has been introduced as AB 512 (Bates). The bill has attracted significant attention from interest groups as it has progressed. This memorandum describes the history of the bill thus far and presents a number of proposed changes for Commission consideration.

Recent correspondence regarding the bill is attached as background. Except as otherwise indicated, all statutory references in this memorandum are to the Civil Code.

The contents of the Exhibit are as follows:

SUMMARY OF AB 512

AB 512 would make a number of minor improvements to the procedures used by homeowners associations to adopt operating rules and review proposed alterations of members' separate interest property ("architectural review"). The principal effects of the bill are summarized below:

Operating Rules

(1) Establish a statutory standard for the validity of an operating rule adopted by the board of directors of a homeowners association (i.e., it must be in writing, within the board of directors' authority, and consistent with law and the association's governing documents).

(2) Require that members of the association have advance notice and an opportunity to comment before a rule change is made.
(3) Provide a "referendum" procedure for member reversal of a recent rule change.
(4) Provide optional safe harbor procedures for rulemaking and "emergency" rulemaking.

Architectural Review

(1) Establish a statutory standard for architectural review (i.e., the procedure must be fair and reasonable and the decision must be made in good faith).
(2) Provide an optional safe harbor procedure for architectural review (featuring notice to neighbors, a preliminary decision by the "reviewing body," and a right of appeal to the board of directors).

BILL PROGRESS TO DATE

In the Assembly, the bill was referred to both the Housing and Community Development Committee and the Judiciary Committee.

Before the Housing and Community Development hearing, the author received a number of letters regarding the bill. The California Congress of Seniors ("Seniors") indicated that it would oppose the bill unless it were amended consistent with their suggestions. The Community Associations Institute California Legislative Action Committee ("CAI") indicated that it would support the bill if it were amended consistent with their suggestions. The Executive Council of Homeowners ("ECHO") expressed serious reservations about the bill. The positions taken by these groups (and others) will be discussed later in the memorandum.

The bill was approved unanimously by the Housing and Community Development Committee, with the understanding that Assembly Member Bates and the Commission would work with the interested groups regarding their concerns. In honoring that commitment, the staff met separately with representatives of the Seniors and ECHO. Changes proposed by each of the groups were provided to all of them, in an attempt to achieve consensus. Unfortunately, no consensus was reached before the bill was heard by the Judiciary Committee.

Bill Amended

The Judiciary Committee consultant analyzing the bill urged that amendments addressing the Seniors' concerns be prepared and submitted to the Committee before the hearing. After consulting with the Commission chair and Assembly Member Bates, the staff prepared amendments making the following changes to the proposed law:

> **1357.150 (added). Optional rulemaking procedure**
>
> 1357.150. …
>
> (c) For a period of not less than ~~15~~ 30 days following delivery of a notice of a proposed rule change, the board of directors shall accept written comments from association members on the proposed rule change.
>
> **1357.170 (added). Member reversal of rule change**
>
> 1357.170. (a) Members of an association owning ~~10~~ 5 percent or more of the separate interests may call a special meeting to reverse a rule change.
>
> (b) A special meeting may be called by delivering a written request on the chair or secretary of the board of directors. The written request may not be delivered more than 30 days after the members of the association are notified of the rule change. Members are deemed to have been notified of a rule change on delivery of notice of the rule change, or on enforcement of the resulting rule, whichever is sooner. For the purposes of Section 8330 of the Corporations Code, collection of signatures to call a special meeting under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list for that purpose may not be denied.
>
> …

Two technical corrections were also made.

Extension of the member comment period in Section 1357.150(c) was a compromise. The Seniors had requested that the period for review be extended to 60 days. That struck the staff as unnecessarily long.

The change to the threshold for calling a rule referendum meeting in Section 1357.170(a) was made at the request of the Seniors (who wanted to make it easier for homeowners to exercise the referendum power) and CAI (who felt that the threshold for calling a meeting should be the same as the general threshold for calling a member meeting provided in Corporations Code Section 7510(e), in

order to avoid confusion). Note that CAI has since reversed its position and now prefers a 10% threshold.

Section 1357.170(b) was amended to make clear that gathering signatures for a referendum meeting is a valid purpose for access to membership records. This was added to address the Seniors' concern that boards might try to avoid a referendum by denying access to membership lists, making it impossible to gather the necessary signatures in time.

These amendments were made with the approval of the author and of the Commission's chair, pursuant to our procedure for making necessary amendments during the legislative process.

Judiciary Committee Hearing

Just prior to the Judiciary Committee hearing, the author received letters of opposition from the various associations making up the Leisure World development in Laguna Woods, California ("Leisure World"). Leisure World is a very large development with a combined total of over 12,000 units.

The committee approved the bill with the express understanding that the author and the Commission would continue to work with the interested groups.

Current Status

The Assembly approved the bill with a vote of 77-0. It is now in the Senate Rules Committee, awaiting assignment to a policy committee.

Hoping to resolve any remaining issues quickly, the staff circulated a "discussion draft" of possible amendments to each of the interested groups. In preparing the discussion draft, the staff attempted to address the principal concerns of the various groups, without provoking new opposition or distorting the basic policies reflected in the Commission's recommendation. Unfortunately, responses to the discussion draft were somewhat slow in coming and we have not yet received responses from all groups.

A copy of the discussion draft is attached as part of the Exhibit. The remainder of this memorandum discusses the various proposals that have been made.

NON-RESIDENTIAL DEVELOPMENTS

CAI suggested that the AB 512 should not apply to commercial or industrial developments. They correctly noted that the Commission's emphasis in

developing its recommendation was on residential developments. CAI is concerned that AB 512 could have unintended consequences as applied to non-residential developments.

Note that Section 1373 already exempts non-residential developments from a number of provisions of the Davis-Stirling Common Interest Development Act (including provisions relating to amendment of the governing documents, budgeting, disclosure of financial information, board member duties, assessments, and provision of information to a prospective buyer).

CAI's argument is persuasive, especially considering that existing law already treats residential and nonresidential developments differently. The discussion draft included the following amendment:

> 1373. ~~Sections 1356, 1365, 1365.5, 1366.1, and 1368, and subdivision (b) of Section 1363, and subdivision (b) of Section 1366~~ (a) The following provisions are not applicable to common interest developments that are expressly zoned as industrial developments and limited in use to industrial purposes or expressly zoned as commercial developments and limited in use to commercial ~~purposes.~~ purposes:
>
> (1) Section 1356.
>
> (2) Article 4 (commencing with Section 1357.100) of Chapter 2 of Title 6 of Part 4 of Division 2 of the Civil Code.
>
> (3) Subdivision (b) of Section 1363.
>
> (4) Section 1365.
>
> (5) Section 1365.5.
>
> (6) Subdivision (b) of Section 1366.
>
> (7) Section 1366.1.
>
> (8) Section 1368.
>
> (9) Article 2 (commending with Section 1378.010) of Chapter 10 of Title 6 of Part 4 of Division 2 of the Civil Code.
>
> (10) Article 3 (commending with Section 1378.050) of Chapter 10 of Title 6 of Part 4 of Division 2 of the Civil Code.
>
> (b) The Legislature finds that ~~those aforementioned~~ t h e provisions listed in subdivision (a) ~~may be~~ are appropriate to protect purchasers in residential common interest developments, however, the provisions ~~are~~ m a y not be necessary to protect purchasers in commercial or industrial developments since the application of those provisions ~~results~~ could result in unnecessary burdens and costs for these types of developments.
>
> **Comment**. Section 1373 is amended to exempt exclusively industrial and exclusively commercial common interest developments from application of the specified provisions

> governing rulemaking and association review of proposed alterations of a member's separate interest property.

The staff recommends that an amendment along these lines be made.

CAI now suggests that an additional adjustment be made to Section 1373. The "expressly zoned" language in the first sentence was modeled closely on language in Business and Professions Code Section 11010.3 (which exempted such property from application of provisions regulating development of subdivided lands). Some practitioners found the "expressly zoned" language confusing. Section 11010.3 was amended in 2000 to eliminate that language, but the need for a parallel change to Section 1373 was overlooked. CAI would like to take the opportunity to correct that oversight. This could be done by revising Section 1373(a) to read as follows:

> The following provisions do not apply to a common interest development which is limited to industrial or commercial uses by zoning or by its declaration:

This change appears to be harmless, but it has not been thoroughly reviewed by staff or subjected to public review and comment. The Commission may want to defer action on this issue and take it up as part of its future clean-up of the Davis-Stirling Act.

MANDATORY V. SAFE HARBOR PROCEDURES

General Issue

As introduced, AB 512 imposes minimum requirements of procedural fairness, but does not dictate specific procedures that must be followed. Instead, the statutory procedures provide optional safe harbors, that by statute are declared to satisfy the minimum standards.

ECHO has consistently opposed the optional safe harbor approach. Before AB 512 was heard in the Judiciary Committee, ECHO informed the staff that it would actively oppose the bill unless the statutory procedures were made mandatory. As the staff understands them, ECHO's arguments for mandatory procedures are as follows:

(1) Any statutory override of recorded declarations should be unambiguous. A statutory override that gives boards discretion to choose what procedures they use will create the appearance that

boards may simply disregard recorded governing documents. This sets a bad example, is confusing, and will lead to disputes.

(2) Many boards will see the grant of discretion as permission to continue doing whatever they have been doing. Their procedures won't improve, but new disputes will arise over whether the procedures used meet the statutory standard of being fair and reasonable. Such disputes will be sharpened by the likelihood that courts will see the safe harbor procedure as establishing a de facto standard of care. The burden will then be on any board that uses other procedures to justify why it has deviated from the statutory procedure.

The Commission's position has been that there are too many different sizes and types of common interest development for a one-size-fits-all solution. The safe harbor approach establishes a floor and provides guidance, without imposing procedures that might be a poor fit in many cases.

Rather than accept mandatory procedures, the staff suggested a possible compromise: the statutory procedures would be recast as default procedures, but associations could affirmatively opt out by adopting an operating rule that establishes an alternative procedure. This would preserve essential procedural flexibility but shift the consequence of inaction — an association that does nothing would be subject to the statutory procedures. The discussion draft included the following amendments to implement this "opt-out" approach:

~~1357.140. The board of directors of an association shall provide members with notice and an opportunity to comment before making a rule change.~~

~~1357.150. (a) Use of the procedure described in this section satisfies the requirements of Section 1357.140. An association is not required to use this procedure.~~

1357.140. (a) Except as provided in Sections 1357.150 and 1357.160, the procedure provided in this section shall be used when making a rule change.

…

Comment. Section 1357.140 provides the procedure for adoption, amendment, or repeal of an operating rule. This procedure applies unless an association has affirmatively opted out by adopting an alternative procedure under Section 1357.160.

…

~~1357.160. (a) Use of the procedure described in this section satisfies the requirements of Section 1357.140. An association is not required to use this procedure. If~~

~~(b)~~

1357.150. (a) If the board of directors of an association determines that an immediate rule change is necessary to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, it may make the rule change immediately.

…

Comment. Section 1357.150 provides an alternative procedure for emergency adoption, amendment, or repeal of an operating rule.

…

1357.160. An association may adopt, by operating rule, a rulemaking procedure to be used instead of the procedure provided in Section 1357.140. A procedure adopted under this section shall provide for member notice and an opportunity to comment before making a rule change.

Comment. Section 1357.160 provides a method for an association to opt out of the statutory rulemaking procedure by adopting an alternative procedure. Any procedure adopted under this section must satisfy the general standards for validity of an operating rule, including consistency with the governing documents. See Section 1357.130.

…

1378.020. ~~(a)~~ A decision to approve or disapprove a proposed alteration of a member's separate interest, an exclusive use common area, or part of the common area, shall be made in good faith ~~and in a fair and reasonable manner~~.

~~(b) The procedure provided in Article 3 (commencing with Section 1378.050) is fair and reasonable. Other procedures may also be fair and reasonable under the circumstances.~~

Comment. Section 1378.020 is consistent with case law requiring that an association enforce its governing documents in good faith and in a fair and reasonable manner. See Ironwood Owners Ass'n IX v. Solomon, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (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.").

…

1378.040. An association may adopt, by operating rule, a fair and reasonable review procedure to be used instead of the procedure provided in Article 3 (commencing with Section 1378.050). If the procedure only applies to certain types of alterations, the operating rule shall clearly identify the types of alterations that are subject to the procedure.

Comment. Section 1378.040 provides a method for an association to opt out of the statutory review procedure by adopting a fair and reasonable alternative procedure. The requirement that the alternative procedure be fair and reasonable is consistent with case law requiring that an association enforce its governing documents in good faith and in a fair and reasonable manner. See Ironwood Owners Ass'n IX v. Solomon, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (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, 191 Cal. Rptr. 209 (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.'") (citation omitted).

Any procedure adopted under this section must satisfy the general standards for validity of an operating rule, including consistency with the governing documents. See Section 1357.130.

Nothing in this section precludes an association from using the procedure set out in Article 3 to review some types of alterations, while using one or more alternative procedures, adopted by operating rule, to review other specifically identified types of alterations. For example, an association might opt to use the statutory review procedure for structural alterations but adopt a more streamlined procedure for review of landscaping alterations. The streamlined procedure would need to be fair and reasonable and clearly state the scope of its application.

…

Article 3. ~~Optional~~ Review Procedure

1378.050. ~~This~~ Except as provided in Section 1378.040, this article provides ~~a fair and reasonable~~ the procedure ~~that an association may use~~ to be used in reviewing a member's proposed alteration of a separate interest, an exclusive use common area, or part of the common area. ~~Use of the procedure is not mandatory.~~

…

Initial ECHO reactions to the opt-out approach were favorable, though we do not yet have an official response to the discussion draft language.

Should the "Opt-Out" Approach Be Adopted?

As a preliminary matter, the Commission needs to decide whether to adopt the opt-out approach or preserve the existing safe harbor approach. Likely consequences of adopting the opt-out approach include the following:

(1) The need to affirmatively opt out would increase the likelihood that associations will take a hard look at the adequacy of their existing procedures, rather than coasting on existing procedures until sued.

(2) Requiring that alternative procedures be adopted by operating rule will avoid any ambiguity about what procedures apply.

(3) An additional burden would be placed on associations that wish to continue using their existing procedures. (CAI-affiliated attorney Duncan McPherson objects to the burden this places on problem-free associations).

(4) Associations that are unaware of AB 512 and that have not adopted procedures by operating rule, will be in violation of the default procedures. Under the safe harbor approach, those associations would not be in violation of the law, so long as their procedures are fair and reasonable.

Should the opt-out approach be adopted?

Additional Issues

If the Commission decides to adopt the opt-out approach, there are a handful of related issues that need to be addressed.

(1) ECHO thinks that the implementing language in the discussion draft places the wrong emphasis. ECHO would like to see the emphasis placed more strongly on the default procedures, with less emphasis on the opt-out alternative. This is purely a drafting issue. **If the Commission agrees, the staff will work**

with ECHO to see what *nonsubstantive* changes might be made to shift the emphasis.

(2) ECHO would like Section 1378.040 revised to expressly require that any alternative architectural review procedure adopted by an association be consistent with the association's governing documents. That is already the substantive effect of requiring that the procedure be adopted by operating rule. The second paragraph of the Comment to Section 1378.040, as revised in the discussion draft, provides:

> Any procedure adopted under this section must satisfy the general standards for validity of an operating rule, including consistency with the governing documents. See Section 1357.130.

Should this Comment language be moved to the statutory text?

(3) ECHO would like Section 1378.040 revised to require that any alternative procedure provide some degree of neighbor notice. This would go beyond the policy expressed in the Commission's recommendation, which required only fairness, reasonableness, and good faith as a minimum standard.

The staff questions whether it makes sense to require neighbor involvement in all types of review. For example, suppose that a condominium association requires approval before an interior ceiling fan can be installed. On receipt of an application, the association sends a maintenance worker to inspect and make sure that the electrical box that would support the fan is braced well enough to handle the weight and torque. No other members can see, hear, or otherwise detect the fan. In such a case, why not allow the association to adopt a minimal inspection procedure that does not provide for neighbor involvement?

It also seems likely that requiring neighbor involvement in all architectural review procedures would provoke opposition from groups that are already concerned about imposing new costs on problem-free associations.

The staff recommends against requiring neighbor involvement as an element of any alternative procedure.

(4) The Seniors suggest that any alternative procedures should be adopted under the statutory rulemaking procedure. The staff had intended that result, as a consequence of requiring that alternative procedures be adopted as operating rules.

However, the current language governing what rules are subject to the operating rule provisions may need some tweaking to make clear that the operating rule provisions apply to operating rules that adopt alternative procedures. **The staff recommends that Section 1357.110 be amended as follows:**

> 1357.110. This article applies to an operating rule relating to any of the following subjects:
>
> (a) Use of the common area or of an exclusive use common area.
>
> (b) Use of a separate interest, including any aesthetic or architectural standards that govern alteration of a separate interest.
>
> (c) Member discipline, including any schedule of monetary penalties for violation of the governing documents and any procedure for the imposition of penalties.
>
> (d) Assessment collection procedures.
>
> (e) Procedures adopted under Section 1357.160 or Section 1378.040.

(5) The Seniors suggest that the option to adopt alternative procedures should be temporary. After some fixed period of time (the Seniors suggest six months), it would no longer be available. Under this proposal, any association created after the cut-off date would be locked into the default procedures. The proposal would also prevent associations from making changes in the future to adjust to changed circumstances or different management policies. **The staff recommends against this proposal.**

METHODS OF NOTICE DELIVERY

Low-Cost Alternative Methods

The Commission recognizes the need to minimize any procedural costs that might result from the proposed law. To that end, the Commission has attempted to control notice costs by expressly authorizing low-cost alternative forms of delivery (such as electronic mail). See proposed Section 1350.7.

Leisure World has pointed out that it employs a number of effective methods of information distribution that are not authorized by Section 1350.7. For example, Leisure World maintains a cable television station dedicated to association news. A special edition of the Orange County Register newspaper is prepared for residents of Leisure World. It features articles and notices relating to association business. Although these methods won't guarantee actual notice to all homeowners, they are very broad and probably quite effective. The discussion

draft includes changes to Section 1350.7 that would authorize notice delivery methods of the type used by Leisure World (and presumably by other large and sophisticated associations):

> 1350.7. (a) This section applies to delivery of a document to the extent the section is made applicable by another provision of this title.
>
> (b) A document shall be delivered by one or more of the following methods:
>
> (1) Personal delivery.
>
> (2) First class mail, postage prepaid, addressed to a member at the address last shown on the books of the association or otherwise provided by the member. Delivery is deemed to be complete on the fifth day after deposit into the United States Mail.
>
> (3) E-mail, facsimile, or other electronic means, if the ~~sender and recipient have~~ recipient has agreed to that method of delivery. ~~A provision of the governing documents providing for electronic delivery does not constitute agreement by a member of an association to that form of delivery.~~ If a document is delivered by electronic means, delivery is complete at the time of transmission.
>
> (4) By publication in a periodical that is circulated primarily to members of the association.
>
> (5) If the association broadcasts television programming for the purpose of distributing information on association business to its members, by inclusion in the programming.
>
> (6) Any other method of delivery, provided that the recipient has agreed to that method of delivery.
>
> (c) A document 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 (b).
>
> (d) For the purposes of this section, a provision of the governing documents providing for a particular method of delivery does not constitute agreement by a member of the association to that method of delivery.

This revision seems sensible and would resolve an important point of opposition to the bill. **The staff recommends that it be adopted.**

Member Access to Association Media

The Seniors have suggested that members should have an unrestricted right to publish or broadcast "uncensored" information regarding a proposed rule change, by any of the methods listed in Section 1350.7. This would apparently include unlimited time on an association television station and unlimited space on an association website or in an association newspaper or newsletter.

This would provide an unregulated forum for discourse by any member, financed with association resources. **Should the proposal be adopted?**

Narrowed Notice of Architectural Review

CAI has raised three concerns about the scope of notice distributed during architectural review.

(1) As a technical matter, the existing distinction between alterations that affect "common area" and alterations that affect "exclusive use common area" is flawed. By definition, common area includes exclusive use common area. **The discussion draft included revisions to correct that defect.**

(2) Substantively, CAI objects to the provision requiring notice to all members if an association has a regular monthly mailing in which the notice can be included. In retrospect, the staff can see CAI's point. If the proposed law requires that a notice affecting only a separate interest or exclusive use common area be distributed to every property within 500', that is probably adequate notice. The fact that a low-cost vehicle for broader distribution exists (in the form of the monthly mailing) does not mean that broader distribution should be required. Including a notice in a scheduled mailing would be less expensive than a separate mailing, but it wouldn't be cost-free. Routine distribution of such unfocused notices might desensitize homeowners who would then disregard the notices as routine junk mail. The discussion draft deletes the requirement of mailing to all members if the association has a regular monthly mailing. Thus:

> 1378.070. …
> (b) Within 30 days after receipt of the application, the reviewing body shall deliver notice of the application to the following persons:
> (1) If the proposed alteration would ~~affect the common area, to all members.~~
> ~~(2) If the association delivers a newsletter, billing statement, or other document to all members at least once a month, to all members.~~
> ~~(3) If the proposed alteration would not affect the common area and the association does not deliver a newsletter, billing statement, or other document to all members at least once a month,~~ only alter separate interest or exclusive use common area property, to members owning separate interests within 500 feet of, or located within the same building as, the ~~separate interest~~ property that is the subject of the proposed alteration and to members having a

right to use any exclusive use common area property that is the subject of the proposed alteration.

(2) If the proposed alteration would alter common area property other than exclusive use common area property, to all members.

A parallel change was proposed for Section 1378.090(b). **Are these changes acceptable?**

(3) Finally, CAI objects to the 500′ radius for distribution of notices to neighbors. It proposes a 100′ radius. The staff believes that 100′ may be too small. By comparison, Government Code Section 65091, which governs notice of certain local planning hearings (e.g., zoning variance hearings) requires notice to properties within 300′. See also Gov't Code § 65905. **Should the notice distribution radius be reduced? Would 300′ be an acceptable radius?**

SCOPE OF RULEMAKING PROVISIONS

"Operating Rule" Defined

Much of Leisure World's concern about the rulemaking provisions stems from an apparent lack of clarity about which association decisions would or would not be considered operating rules. In discussions, the staff pointed out that the operating rule provisions would not apply to a "decision in a specific case that is not intended to apply generally." Proposed Section 1357.120(b). That provided some comfort, but the Leisure World representatives still feel that the dividing line between rules and non-rules is not sufficiently clear.

The discussion draft includes a proposed definition:

1357.100. As used in this article, ~~"rule~~ the following terms have the following meanings:

(a) "Operating rule" means a rule adopted by the board of directors for the management and operation of the common interest development and its association.

(b) "Rule change" means the adoption, amendment, or repeal of an operating rule by the board of directors of the association.

Admittedly, the definition is a little circular, but it is very difficult to draft a "plain English" definition that isn't. Despite the circularity, the definition does provide a little more context for readers struggling to understand the term. **Should the proposed definition of "operating rule" be added?** The staff welcomes any suggestions for refinement of the definition.

Recent correspondence from Leisure World raises a related point. Proposed Section 1347.120(b) provides that the rulemaking provisions do not apply to a "decision setting the amount of a regular or special assessment." Leisure World believes that it is unclear whether this includes rules that have a fiscal effect that ultimately affects assessment amounts. **Perhaps a clarifying sentence could be added to the Comment:** "Subdivision (b) does not apply to a rule merely because the rule has a fiscal effect that must be taken into account in setting an assessment."

Collection Procedures

In an April 3, 2003 letter to Assembly Member Bates, CAI writes:

> Assessment collection procedures are highly regulated by the Davis-Stirling Act, fair debt collection laws and associations' declarations; therefore, members' interests in protecting their property are well protected. Furthermore, Civil Code Section 1366(a) requires that associations levy, and by implication collect, assessments sufficient to perform their obligations; therefore, associations must have effective assessment collections policies. Because there is little chance that a legal assessment collection policy would be unfair, members may want the association to adopt a policy that does not comply with law, and the members may want the association to adopt a policy that is ineffective, assessment collection policies should not be considered operating rules for the purpose of this article.

CAI is right that collection procedures are already largely regulated by statute. Consequently, there won't be many operating rules about collection procedure. Those that do exist are likely to be about broad policies rather than technical details. For example, an association might consider adopting a rule permitting negotiation of payment plans for overdue assessments, or might adopt a strict rule providing for nonjudicial foreclosure at the earliest opportunity. Arguably, those are the sort of management policies that should be subject to notice and comment and an opportunity for member reversal.

Bear in mind that the procedure for member reversal wouldn't let members *create* illegal or ineffective procedures. It might be used to block improvements, but it couldn't be used to create new problems.

ECHO endorses CAI's proposal. It is primarily concerned that members might reverse a necessary collection rule, interfering with crucial collection

activity. As a reversed rule cannot be readopted for one year, this could create a serious problem.

That possibility exists, but seems remote. As discussed, the fact that collection rules are so exhaustively set out by statute reduces the need to adopt operating rules for necessary technical reasons. It seems much more likely that such rules would address overall collection policies and that member participation would be appropriate.

The staff recommends against the CAI/ECHO suggestion.

VALIDITY OF OPERATING RULES

A number of suggestions have been made for refinement of proposed Section 1357.130, establishing a standard for the validity of an operating rule.

Rule Must Be Reasonable

CAI proposes adding a new element to the standard for validity of an operating rule — that the rule be "reasonable." **The staff considers this a minor improvement and recommends that it be adopted.**

"Consistent" v. "Not Inconsistent"

As drafted, Section 1357.130(c) requires that a rule be "consistent with governing law and the declaration, articles of incorporation or association, and bylaws of the association." ECHO is concerned that this might be confusing where the governing documents are silent on a point. Is a rule "consistent" with the governing documents if the governing documents are silent? ECHO proposed replacing "consistent" with "not inconsistent."

The Seniors are concerned that this change would give associations a "blank check" to adopt unreasonable rules on any subject. This overlooks the proposed requirements that a rule be reasonable and within the authority conferred on the board by law or the governing documents.

The staff has no objection to the proposed change and recommends that it be adopted.

Constitutionality

The Seniors suggest adding language providing that an operating rule must be constitutional to be valid. Such a provision would probably not be useful. For the most part, constitutions are documents that regulate *government* action. For

example, the First Amendment to the United States Constitution provides that "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added).

What the Seniors may be suggesting is that association rules should be limited *as if the association were a government* (e.g., operating rules could not abridge the freedom of speech). That is a new substantive proposal that has not been studied by the Commission. **The staff recommends against adopting the Seniors' suggestion as part of AB 512.**

Presumption of Validity

CAI would like to add a presumption that an operating rule is valid and enforceable. CAI cites case law holding that recorded restrictions are presumptively reasonable. However, the staff could not find any case that applies such a presumption to unrecorded rules adopted by the board of directors or that addresses other possible defects that might undermine rule validity (such as ultra vires action).

On a narrower front, ECHO would like to add a presumption of good faith adoption if an operating rule satisfies all of the other requirements for validity.

Is a presumption of validity necessary? Evidence Code Section 500 already provides a general rule that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Under that standard, a homeowner contesting the validity of an operating rule in an action for declaratory relief, or as a defense against enforcement of the rule, would seem to bear the burden of proving that the rule is invalid. **The staff is reluctant to break new ground in this area without an opportunity for fuller analysis and public input.**

RULE REVERSAL

A number of concerns have been expressed about proposed Section 1357.170, providing for member reversal of a recent rule change.

Access to Membership Records

Under existing provisions of the Corporations Code a member of a nonprofit mutual benefit corporation has a right to inspect membership records, or a

reasonable alternative that accomplishes the same purpose, if the purpose for inspection is reasonably related to the member's interest as a member. Corps. Code §§ 8330-8331. However, the board of directors may petition the court for an order restricting access in order to protect the Constitutional rights of the members. Corps. Code § 8332.

The amendment to AB 512 added the following sentences to Section 1357.170(a):

> For the purposes of Section 8330 of the Corporations Code, collection of signatures to call a special meeting under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list for that purpose may not be denied.

This was intended to negate any argument that gathering signatures for a rule referendum meeting is an invalid purpose for access to the records. ECHO correctly points out that this language goes too far, in that it could be read to override other existing limits on access to membership records (e.g., limitations necessary to protect constitutional rights of members).

The discussion draft included a revised form of the second sentence:

> A member request to copy or inspect the membership list solely for that purpose may not be denied on the grounds that the purpose is not reasonably related to the member's interests as a member.

This limits the provision to the issue of purpose and does not preclude denial of access on other legitimate grounds. **The staff recommends that this amendment be adopted.**

Notice of Reversal

Leisure World points out that proposed Section 1357.170 does not require member notice when a rule is reversed at a member meeting. That does seem to be a problem. **The staff recommends adding a new subdivision to Section 1357.170, along the following lines:**

> (g) The board of directors shall provide notice of the results of a member vote held pursuant to this section to every association member. Delivery of notice under this subdivision is subject to Section 1350.7.

Delegation of Board Authority

Leisure World argues that member reversal of a rule change is bad policy because it invades the proper realm of board authority. The board of directors is subject to conflict of interest rules, a statutory standard of care, and owes a fiduciary duty to the members. See, e.g., Corp. Code §§ 7231, 7233. Individual members are not subject to such standards. While, the board of directors should be making decisions based on the good of the association as a whole, member decisions may be purely self-interested. The Commission has heard these policy arguments before. It decided that giving members a veto power over rule changes, but no power to make new rules, was an appropriate and limited check on board rulemaking power. **The staff sees no need to revisit that policy decision.**

Leisure World also raises a technical point, suggesting that the rule reversal power is inconsistent with a provision of the Corporations Code that reserves management power to the board of directors of a nonprofit mutual benefit corporation, except where member approval is expressly required by provisions of the Corporations Code or the articles or bylaws of the corporation. See Corps. Code § 7210. Read literally, the exception provided in Corporations Code Section 7210 does not included member reversal of a rule change under Section 1357.170.

A court would probably construe Section 1357.170 as prevailing over Corporations Code Section 7210, on the established interpretive principle that a specific statute controls over a general one. However, it would be fairly simple to revise Section 1357.170 to begin "Notwithstanding Section 7210 of the Corporations Code…". The staff doesn't think such a change is strictly necessary, but it might help avoid possible confusion. **Should such a change be made?**

Liability

Leisure World is also concerned that the members might reverse a rule change that is necessary to avoid possible harm to third parties resulting in liability to the association or the members who voted for reversal. Leisure World cites the following example: An association determines that stepping stone pathways across common areas pose a hazard and adopts an operating rule prohibiting use of stepping stones in the common areas. Members reverse the rule change. Someone trips on the stones, is injured, and sues. What effect would this have on the liability of the association (since it recognized the risk but failed

to act)? Would individual members who voted to reverse the rule change be liable?

The rulemaking provisions are limited in application to rules relating to use of the common area, use of separate interests, member discipline, and assessment collection procedures. Section 1357.110. A decision about the proper method for building or maintaining paths in the common area would not seem to fall within any of these categories. **Perhaps Leisure World's specific example could be partially addressed by adding another sentence to the Comment to Section 1357.110:**

> Rules of a type not listed in this section are not subject to the requirements of this article. For example, a rule relating to maintenance of the common area would not be subject to this article.

It is conceivable that member reversal of a rule change might lead to association liability that could otherwise have been avoided. For example, an association might adopt a rule prohibiting unsupervised use of pools by minors. Members reverse the rule change and an unsupervised child subsequently drowns. A jury might find that the association's lack of reasonable precautions caused the injury.

Liability of individual members who voted to reverse the rule change seems less likely. In a nonprofit mutual benefit corporation, members are not individually liable for the liabilities of the corporation. See Corp. Code § 7350. In an unincorporated nonprofit association, members are not individually liable for "liabilities … incurred by the association in the … designing, planning, architectural supervision, erection, construction, repair, or furnishing of buildings or other structures, to be used for the purposes of the association." Corp. Code § 21100. Could plaintiffs successfully argue that the vote to reverse the rule change was itself a negligent act and that members should be held liable for their own conduct, rather than being held vicariously liable for the conduct of the association? Perhaps. The staff has not had time to research this point.

The Commission should consider whether potential liability resulting from rule change reversal is a significant enough problem to warrant limiting or eliminating the rule reversal provision.

One possible limitation that might help address the liability problem would be to exempt rules made under the emergency procedure from the referendum provision. This would allow an association to adopt a temporary (120 day) rule

change necessary to avoid "an imminent threat to public health or safety." During the effective period of the emergency rule, the association could negotiate with rule change opponents to find an acceptable compromise approach. **Should this change be made?**

MEMBER INITIATED RULEMAKING

The Seniors have proposed that the procedure for member reversal of a rule change should be modified so that it also provides for member *initiation* of a rule change (using the same procedure of a petition, special member meeting, and election). The members could not directly adopt the rule change, just force the board to consider it.

Why not simply write a letter to the board suggesting the rule change? If the board is rational and the suggestion sound, the board will commence rulemaking. If the board is irrational or the suggestion is unsound, then the board won't commence rulemaking. The only difference under the Senior's proposal is that a board could be forced to go through the motions of considering a rule change it has already decided not to make. To what end? In some cases a board might reconsider their original decision. Couldn't that also result from persistent education and lobbying by advocates? Probably most cases would result in rejection of the rule change, in which case association resources will have been expended in a futile process.

The staff recommends against this proposal. The same result can be achieved without the additional formality and cost.

OPERATING RULE ACCESSIBILITY

Prospective Buyer

Existing Section 1368 requires that a person selling a unit in a CID provide a copy of the governing documents to the prospective buyer. The existing definition of "governing documents" includes "operating rules of the association." Section 1351(g). For educational purposes, AB 512 would amend Section 1368 to require provision of a "copy of the governing documents of the common interest development, including any operating rules …." This nonsubstantive, clarifying amendment is opposed by Leisure World.

Leisure World has repeatedly asserted that the change would impose enormous costs on the association, as it would be required to provide bound

copies of the thousands of pages of operating rules that it has adopted. The staff has attempted to explain that (1) existing law already requires that operating rules be provided, and (2) it is the seller and the not the association that bears the burden of providing the documents — nothing in the law prevents the association from charging the seller a reasonable fee to cover its copying costs. Despite these arguments, Leisure World is still opposed to the amendment. **The staff would retain the provision.**

The Seniors have argued that Section 1368 should be substantively amended to shift responsibility to disclose documents from the seller to the association. They argue that the future relationship will be between the association and the buyer, so the association should be responsible for providing information about that relationship.

The staff is not persuaded that such a fundamental shift in policy is warranted. It is the seller who knows that a transaction is pending. It is the seller who knows the prospective buyer's identity. It is the seller who benefits from the transaction.

Member

Existing Section 1363(f) provides that members "shall have access to association records in accordance with Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of title 1 of the Corporations Code." AB 512 would amend that provision to refer to "association records and operating rules." This makes clear that operating rules must be accessible to members, subject to the existing limitations set out in the Corporations Code.

The Seniors would like to add additional language, for educational purposes, that reiterates the types of records available for inspection under the Corporations Code provisions. The discussion draft included such language, revising Section 1363(f) to provide for access to "association records, including accounting books and records, membership records, and operating rules…". This seems reasonable (and nonsubstantive). **The staff recommends that it be adopted.**

The Seniors have subsequently suggested that "vendor contracts" be added to the list of records accessible to members. **The staff is reluctant to make this new change without fuller analysis and public input.**

ECHO raises a technical concern. Section 1363(f) requires access to records as provided in the referenced Corporations Code provisions. However, none of

those provisions includes language general enough to encompass operating rules. This creates some ambiguity about which elements of the referenced sections would apply.

Corporations Code Section 8333 is the appropriate provision. It provides:

> 8333. The accounting books and records and minutes of proceedings of the members and the board and committees of the board shall be open to inspection upon the written demand on the corporation of any member at any reasonable time, for a purpose reasonably related to such person's interests as a member.

Perhaps the best approach would be to revise Section 1363(f) to read as follows:

> Members of the association shall have access to association records, including accounting books and records and membership records, in accordance with Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of title 1 of the Corporations Code. The members of the association shall have the same access to the operating rules of the association as they have to the accounting books and records of the association.

This would avoid any technical incompatibility with Corporations Code Section 8333. It would also dovetail nicely with AB 104 (Lowenthal), which, if enacted, would add Section 1365.2:

> 1365.2. (a) The association shall make the books of account of the association available for inspection and copying by a member of the association, or the member's designated representative, at any reasonable time, in a location within the common interest development.
>
> (b) A member of an association may bring an action to enforce the right to inspect and copy from the books of account. If a court finds that the association unreasonably withheld access to the books of account, the court shall award the member reasonable costs and expenses, including reasonable attorney's fees, and may assess a civil penalty of up five hundred dollars ($500) for each violation.

The staff recommends that the amendment described above be adopted.

Access to Records of Third Party Agents

The Seniors propose adding language providing for member access to operating rules of third parties vendors provide services to the association (e.g.,

property managers, attorneys, debt collectors). This suggestion poses significant practical and legal questions that the staff has not had time to analyze. **The staff recommends that the suggestion not be adopted as part of AB 512.** The Commission may wish to consider this idea at a later stage of the study.

SCOPE OF ARCHITECTURAL REVIEW PROVISIONS

Routine Alterations

CAI suggests that "routine alterations" should be exempt from the architectural review procedure. CAI would define "routine alterations" as follows:

> "Routine Alterations" means alterations to a house or other structure including alterations to trim colors and roofs, as long as the colors and materials do not violate the provisions of the governing documents; landscaping changes that do not violate the provisions of the governing documents; installation of fences that do not violate provisions of the governing documents; the replacement of windows, the replacement of portions of houses or other structures where the replacement is in substantially conformity with the prior structure with the exception of changes required by law and material availability; landscaping, walkways and driveways where no material changes are made; alterations that are within guidelines subject to review, set out in the governing documents; and internal changes to separate interests which do not violate provision of the governing documents even if they involve changes to adjacent common area for attachment to electrical, gas, and other services or use of adjoining common areas for attaching fixtures as allowed by the governing documents; and the replacement or reconstruction of a damaged or destroyed structure substantially as such structure previously existed, except as required by law or material availability.

This would immunize broad classes of alterations from review so long as the alteration would not violate the governing documents or result in "material change".

The staff sees practical problems with this approach. Who would make the determination of whether a proposed alteration violates the governing documents or results in material change? The applicant? That would open the door to significant problems. An applicant might guess wrong and expend funds on an alteration only to face board sanction for a violation of the governing documents.

Also, what if the governing documents provide that an association shall review all alterations for "consistency with the aesthetic standards of the community," but do not provide specific standards? Would a homeowner be free to use any color of exterior house paint because the governing documents do not expressly limit color selections?

The staff thinks a better approach would be to put responsibility for drawing appropriate lines on the individual associations. Such an approach was implemented in the discussion draft, in Section 1357(b):

> (b) An association may, by operating rule, pre-approve specific types of alterations. A pre-approved alteration is not subject to review under this article or Article 3 (commencing with Section 1378.050).
>
> **Comment**. …
>
> Subdivision (b) permits an association board to pre-approve specific types of alterations, which would not be subject to individualized review. For example, an operating rule might pre-approve a list of exterior house paint colors. A member who wishes to paint a house one of the approved colors could do so without seeking any further association approval. An operating rule pre-approving specific types of alterations must satisfy the general standards for validity of an operating rule, including consistency with the governing documents. See Section 1357.130.

This lets the individual associations decide what types of alterations are "routine" and can be made without further approval.

Emergency Repairs

Another exemption proposed by CAI has been implemented in the discussion draft. Proposed Section 1378.010(c) provides an exemption for emergency repairs:

> (c) A repair is not subject to review under this article or Article 3 (commencing with Section 1378.050) if the board of directors of the association determines that an immediate repair is necessary to protect public health or safety or to prevent further property damage, and the repair would not significantly alter the original design of the property.

The staff thinks this is a sensible provision and recommends that it be adopted.

New Construction

CAI has also proposed the exemption of new construction by the developer or a person designated by the developer. CAI concedes that most associations' governing documents exempt such construction from association review and approval.

Proposed Section 1378.010(a) makes clear that the architectural review provisions only apply if an association's governing documents require association approval of an alteration. If an association's governing documents do not require association approval of new construction by the developer, the architectural review procedure wouldn't apply. If the governing documents do require association approval of such construction, why should AB 512 override that agreement?

Perhaps CAI's concern could be partially addressed by adding some language to the Comment:

> **Comment.** Subdivision (a) of Section 1378.010 provides that this article only applies to an alteration if association approval of such an alteration is required under the association's governing documents. For example, if the governing documents do not require association approval of new construction by the developer, this article would not apply to such construction.

ARCHITECTURAL REVIEW PROCEDURE

Procedure Too Long

Both CAI and the Seniors have commented that the architectural review procedure can take too long.

Recall that the architectural review procedure involves two levels of review — an initial decision by the reviewing body and a *possible* appeal to the board. A routine application would be decided in 20 to 75 days. See Sections 1378.070(b) & (d). If a decision is appealed the total time to a final decision would be from 23 to 195 days. See Section 1378.090.

The discussion draft included changes to trim those time periods slightly:

> 1378.070. …
>
> (d) Not less than ~~20~~ 15 days nor more than ~~45~~ 30 days after delivery of the notice of the application, the reviewing body shall deliver a written decision to the applicant and to any participating member. If the reviewing body does not deliver a written decision to the applicant within ~~45~~ 30 days after delivery of the notice of

application, the application is deemed disapproved on the ~~45th~~ 30th day.

1378.090. (a) An applicant or participating member may appeal the approval or disapproval of a proposed alteration of a separate interest, exclusive use common area, or part of the common area, to the board of directors of the association. The appeal shall be in writing and shall be delivered to the board of directors within ~~30~~ 15 days after the reviewing body's decision is delivered or the proposed alteration is deemed disapproved.

(b) ~~Within 30 days after receipt of a timely request for appeal, the~~ At least 15 days before hearing the appeal, the board of directors shall deliver notice of the appeal to the following persons:

…

(d) Within 45 days after ~~notice of the appeal is delivered,~~ receipt of a timely appeal the board of directors shall meet and review de novo the proposed alteration that is the subject of the appeal. Any association member may testify at the appeal and may submit written materials in support of or in opposition to the proposed alteration.

With these changes, a routine application would be decided in 15 to 60 days. An appealed decision would be decided in 31 to 135 days. **Should these streamlining changes be made?**

Even with the proposed changes, the Seniors are still concerned that the procedure would be too long. In particular they express concern about a member who wishes to build a new home on a vacant lot. The delay involved in architectural review could cause that person to lose their construction financing.

The staff is not experienced in real estate construction financing. However, common sense suggests that the problem the Seniors describe already exists. Under existing law, there is nothing requiring that architectural review be completed in less than six months. Faced with a project as complex as new home construction, it seems likely that some associations would take that long or longer to reach a final approval (perhaps after several amendments to the original plan).The staff suspects that home builders get around this in one of two ways: (1) by selecting from a pre-approved set of model plans, or (2) by waiting until association approval is obtained before seeking financing for construction. Either approach would work under AB 512.

If the staff's assumptions are incorrect and the delays inherent in the proposed architectural review procedure could pose significant problems for new home construction, then further streamlining may be warranted. It isn't

clear how the procedure could be made much shorter without dropping substantive elements of the process. For example, if neighbor notice and involvement were dropped, time involved in notice distribution and appeal of an approval decision would be eliminated.

Should the architectural review procedure be streamlined further, perhaps by eliminating the neighbor notice and involvement element? Note that neighbor involvement has its critics. As discussed below, CAI has suggested limiting the grounds for appeal by a neighbor. In an early letter to the author, ECHO questioned the need for neighbor involvement, though more recent communications suggest that ECHO now supports the concept.

Content of Decision

Section 1378.070(d) requires a written decision from the reviewing body. The Seniors suggest that any disapproval decision should include a statement of the basis for disapproval and an explanation of the appeal process.

The two level architectural review process is intended to provide streamlined procedures for noncontroversial applications, with fuller procedures for those that are appealed. That is why the initial decision is not required to include an explanation of the basis of the decision. A detailed statement of decision is available on appeal.

Requiring that the initial decision include a statement of the basis of the decision would impose some additional burden. However, an explanation might avoid the need for some appeals — applicants who understand the reason for a disapproval might abandon an untenable project or make necessary changes and resubmit.

Including a boilerplate description of the appeal option in the initial decision is a good suggestion.

The Commission should consider adopting the Seniors' suggested changes.

GROUNDS FOR APPEAL

CAI suggests that the grounds for appeal by a neighbor of an architectural review decision should be limited. A neighbor should only be able to appeal a decision that violates the governing documents of the association or that violates a property right held by the neighbor.

If the grounds for appeal are limited, the staff believes that they should include a right to appeal for bad faith on the part of the decisionmaker or a

substantial failure to follow required procedures. CAI has informally indicated that these additional grounds might be acceptable to them.

The staff sees practical problems with the proposed limitation on appeal. Who would decide whether the grounds for appeal exist? The reviewing body that made the decision to be appealed? It seems very likely that the reviewing body would not agree that it acted in bad faith, failed to follow the required procedures or approved a change that violates the governing documents or the legal rights of the member. If appeal is to be meaningful, the decision on whether to entertain an appeal would have to be made by the board of directors. Making such a decision would require examination of the record below and a decision on the merits (as to consistency with the governing documents).

If the board of directors is going to be required to review the record and making a substantive decision, why not just let the appeal take place? The additional burden on the association would be slight. Also, denying neighbors the right to be heard on appeal would create an entirely new class of disputes, with neighbors and boards arguing (and possibly suing) over whether proper grounds for appeal exist. Again, why not just hear the appeal?

Should the grounds for appeal by a neighbor be limited as suggested?

TECHNICAL AMENDMENTS

Bill Conflicts

AB 512 affects sections that are also affected by AB 1086 (Laird) and AB 1731 (Housing and Community Development). The latter bill includes the organizational headings that the Commission recommended be added to the Davis-Stirling Act. **When AB 512 is amended, the staff will also prepare coordinating amendments to ensure that AB 512 does not conflict with these other bills.**

"Deliver On"

Section 1357.170 includes the phrase "delivering a written request on the chair or secretary of the board of directors." **The staff would change "deliver on" to "deliver to."**

Transitional Provision

Proposed Section 1357.180 provides for prospective application of the rulemaking provisions. The staff now believes that the section could be made clearer by defining an operative term, thus:

> 1357.180. (a) This article applies to a rule change ~~made~~ commenced on or after January 1, 2004.
>
> (b) Nothing in this article affects the validity of a rule change ~~made~~ commenced before January 1, 2004.
>
> (c) For the purposes of this section, a rule change is commenced when the board of directors of the association takes its first official action leading to adoption of the rule change.
>
> **Comment**. Section 1357.180 provides for prospective application of this article. A rule change commenced before January 1, 2004 would not be subject to this article, regardless of when the rulemaking process is completed.
>
> See also Section 1357.100 ("rule change" defined).

The staff recommends that this change be adopted.

Note that the Seniors suggest deleting subdivision (b). They feel that the criteria for validity of a rule should be applied retroactively in order to encourage associations to cull their bad rules. The requirement that a rule be within the authority of the board of directors would codify existing case law. A requirement of consistency with the law is implicit. The fact that AB 512 does not operate retroactively would not preclude a finding that an operating rule is illegal or ultra vires and therefore invalid. **The staff is not convinced of the need to make AB 512 retroactive.**

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

May 12, 2003

PROPOSED AMENDMENTS TO AB 512 (BATES)
(AS AMENDED IN ASSEMBLY APRIL 30, 2003)

☞ **CLRC Staff Note.** This document sets out AB 512 in its entirety, with proposed amendments. Where an amendment would affect the content of a Commission Comment, a revised Comment is also set out. CLRC staff notes following proposed amendments describe the source of the proposed change and briefly summarize their rationale.

Additions are underscored, deletions are in strikeout. All statutory changes are in bold.

SECTION 1. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1350, to read:

CHAPTER 1. GENERAL PROVISIONS

SEC. 2. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1350, to read:

Article 1. Preliminary Provisions

SEC. 3. Section 1350.5 is added to the Civil Code, to read:

1350.5. Division, part, title, chapter, and section headings do not in any manner affect the scope, meaning, or intent of this title.

SEC. 4. Section 1350.7 is added to the Civil Code, to read:

1350.7. (a) This section applies to delivery of a document to the extent the section is made applicable by another provision of this title.

(b) A document shall be delivered by one **or more** of the following methods:

(1) Personal delivery.

(2) First class mail, postage prepaid, addressed to a member at the address last shown on the books of the association or otherwise provided by the member. Delivery is deemed to be complete on the fifth day after deposit into the United States Mail.

(3) E-mail, facsimile, or other electronic means, if the **~~sender and recipient have~~ recipient has** agreed to that method of delivery. **~~A provision of the governing documents providing for electronic delivery does not constitute agreement by a member of an association to that form of delivery.~~** If a document is delivered by electronic means, delivery is complete at the time of transmission.

(4) By publication in a periodical that is circulated primarily to members of the association.

(5) If the association broadcasts television programming for the purpose of distributing information on association business to its members, by inclusion in the programming.

(6) Any other method of delivery, provided that the recipient has agreed to that method of delivery

(c) A document 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 (b).

(d) For the purposes of this section, a provision of the governing documents providing for a particular method of delivery does not constitute agreement by a member of the association to that method of delivery.

Comment. Section 1350.7 provides general document delivery rules that apply where this section is incorporated by reference in this title. For provisions incorporating this section by reference, see Sections 1357.140 (rulemaking), 1357.150 (emergency rulemaking), 1378.120 (review of proposed alteration of separate interest).

See also Sections 1351(a) ("association" defined), 1351(j) ("governing documents" defined).

☞ **CLRC Staff Note.** These changes provide additional low-cost alternative methods for delivery of notice. They are added in response to Leisure World concerns about the cost of notice distribution.

SEC. 5. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1351, to read:

Article 2. Definitions

SEC. 6. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1352, to read:

CHAPTER 2. GOVERNING DOCUMENTS

SEC. 7. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1352, to read:

Article 1. Creation

SEC. 8. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1354, to read:

Article 2. Enforcement

SEC. 9. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1355, to read:

Article 3. Amendment

SEC. 10. Article 4 (commencing with Section 1357.100) is added to Title 6 of Part 4 of Division 2 of the Civil Code, immediately following Section 1357, to read:

Article 4. Operating Rules

1357.100. As used in this article, ~~"rule~~ **the following terms have the following meanings:**

(a) "Operating rule" means a rule adopted by the board of directors for the management and operation of the common interest development and its association.

(b) "Rule change" means the adoption, amendment, or repeal of an operating rule by the board of directors of the association.

Comment. Section 1357.100 is new. See also Sections 1351(a) ("association" defined), 1351(j) ("governing documents" defined), 1357.130 (validity of operating rule).

☞ **CLRC Staff Note.** The definition of "operating rule" is added to make clearer what would be an "operating rule" subject to the rulemaking provisions. It is added in response to a suggestion from Leisure World.

1357.110. This article applies to an operating rule relating to any of the following subjects:

(a) Use of the common area or of an exclusive use common area.

(b) Use of a separate interest, including any aesthetic or architectural standards that govern alteration of a separate interest.

(c) Member discipline, including any schedule of monetary penalties for violation of the governing documents and any procedure for the imposition of penalties.

(d) Assessment collection procedures.

Comment. Section 1357.110 specifies which types of operating rules are governed by this article.

See also Sections 1351(b) ("common area" defined), 1351(i) ("exclusive use common area" defined), 1351(j) ("governing documents" defined), 1351(*l*) ("separate interest" defined), 1357.100(a) ("operating rule" defined).

1357.120. This article does not apply to the following actions by the board of directors of an association:

(a) A decision in a specific case that is not intended to apply generally.

(b) A decision setting the amount of a regular or special assessment.

(c) A rule change that is required by law, if the board of directors has no discretion as to the substantive effect of the rule change.

(d) Issuance of a document that merely repeats existing law or the governing documents.

1357.130. An operating rule is valid and enforceable only if all of the following requirements are satisfied:

(a) The rule is in writing.

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

(c) The rule is ~~consistent~~ **not inconsistent** with governing law and the declaration, articles of incorporation or association, and bylaws of the association.

(d) The rule is adopted, amended, or repealed in good faith and in substantial compliance with the requirements of this article.

(e) The rule is reasonable.

Comment. Section 1357.130 is new. Subdivisions (b) and (c) provide that an ultra vires operating rule is invalid. See MaJor v. Miraverde Homeowners Ass'n, Inc., 7 Cal. App. 4th 618, 628, 9 Cal. Rptr. 2d 237, 243 (1992) ("Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a 'reasonable' response to a particular circumstance.").

See also Sections 1351(a) ("association" defined), 1351(h) ("declaration" defined), 1357.100(a) ("operating rule" defined).

☞ **CLRC Staff Note.** Both CAI and ECHO suggested adding subdivision (e) as an additional criteria for validity. ECHO suggested recasting "consistent" as "not inconsistent." This would avoid any implication that a rule on a particular point is inconsistent with the governing documents simply because the documents are silent on that point.

~~**1357.140. The board of directors of an association shall provide members with notice and an opportunity to comment before making a rule change.**~~

☞ **CLRC Staff Note.** The changes to Sections 1357.140-1357.160 implement an opt out approach developed in response to ECHO's comments on mandatory and optional procedures. Under the opt out approach implemented here, the statutory procedure applies as a default, unless an association affirmatively opts out by adopting an alternative procedure, by operating rule. Under this approach, an association that wants to continue using its existing procedure could do so easily.

~~**1357.150. (a) Use of the procedure described in this section satisfies the requirements of Section 1357.140. An association is not required to use this procedure.**~~

1357.140. (a) Except as provided in Sections 1357.150 and 1357.160, the procedure provided in this section shall be used when making a rule change.

(b) The board of directors of the association shall deliver notice of a proposed rule change to every association member. The notice shall include all of the following information:

(1) The text of the proposed rule change.

(2) A description of the purpose and effect of the proposed rule change.

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

(c) For a period of not less than 30 days following delivery of a notice of a proposed rule change, the board of directors shall accept written comments from association members on the proposed rule change.

(d) The board of directors shall consider any comments it receives and shall make a decision on a proposed rule change at a board meeting. A decision shall not be made until after the comment submission deadline.

(e) The board of directors shall deliver notice of a rule change to every association member. The notice shall set out the text of the rule change and state the date the rule change takes effect. The date the rule change takes effect shall be not less than 15 days after notice of the rule change is delivered.

(f) A document that is required to be delivered pursuant to this section is subject to Section 1350.7.

Comment. Section 1357.140 provides the procedure for adoption, amendment, or repeal of an operating rule. This procedure applies unless an association has affirmatively opted out by adopting an alternative procedure under Section 1357.160.

Subdivisions (b) and (e) require that notice be provided to every member. Failure to provide notice to every member will not invalidate a rule change if the failure is inadvertent. See Section 1357.130(d) (validity of operating rule).

Subdivision (d) provides that a decision on a proposed rule change shall be made at a meeting of the board of directors. See Section 1363.05 ("Common Interest Development Open Meeting Act").

See also Sections 1351(a) ("association" defined), 1357.100 ("rule change" defined).

~~1357.160. (a) Use of the procedure described in this section satisfies the requirements of Section 1357.140. An association is not required to use this procedure. If~~

~~(b)~~

1357.150. (a) If the board of directors of an association determines that an immediate rule change is necessary to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, it may make the rule change immediately.

~~(c)~~ (b) As soon as possible after making a rule change under this section, but not more than 15 days after making the rule change, the board of directors shall deliver notice of the rule change to every association member. The notice shall include the text of the rule change and an explanation of why an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association.

~~(d)~~ (c) A rule change made under this section is effective for 120 days, unless the rule change provides for a shorter effective period.

~~(e)~~ (d) A rule change made under this section may not be readopted under this section.

~~(f)~~ (e) A document that is required to be delivered pursuant to this section is subject to Section 1350.7.

Comment. Section 1357.160 provides an alternative procedure for emergency adoption, amendment, or repeal of an operating rule.

Subdivision (c) provides that an emergency rule change is temporary.

Subdivision (d) makes clear that the effective period of an emergency rule change may not be extended by readopting the rule change under the emergency rulemaking procedure. To readopt a rule change made under this section an association must follow the procedure provided in Section

1357.150, or some other procedure that provides for advance notice to members and an opportunity to comment before the rule change is made.

See also Sections 1351(a) ("association" defined), 1357.100 ("rule change" defined).

1357.160. An association may adopt, by operating rule, a rulemaking procedure to be used instead of the procedure provided in Section 1357.140. A procedure adopted under this section shall provide for member notice and an opportunity to comment before making a rule change.

Comment. Section 1357.160 provides a method for an association to opt out of the statutory rulemaking procedure by adopting an alternative procedure. Any procedure adopted under this section must satisfy the general standards for validity of an operating rule, including consistency with the governing documents. See Section 1357.130.

See also Sections 1351(a) ("association" defined), 1351(j) ("governing documents" defined).

1357.170. (a) Members of an association owning 5 percent or more of the separate interests may call a special meeting to reverse a rule change.

(b) A special meeting may be called by delivering a written request on the chair or secretary of the board of directors. The written request may not be delivered more than 30 days after the members of the association are notified of the rule change. Members are deemed to have been notified of a rule change on delivery of notice of the rule change, or on enforcement of the resulting rule, whichever is sooner. For the purposes of Section 8330 of the Corporations Code, collection of signatures to call a special meeting under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list **solely** for that purpose may not be denied **on the grounds that the purpose is not reasonably related to the member's interests as a member**.

(c) The rule change may be reversed by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present (which affirmative votes also constitute a majority of the required quorum) or by written ballot in conformity with Section 7513 of the Corporations Code, or if the declaration or bylaws require a greater proportion, by the affirmative vote or written ballot of the proportion required.

(d) Unless otherwise provided in the declaration or bylaws, for the purposes of this section, a member may cast one vote per separate interest owned.

(e) A meeting called under this section is governed by Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and 7613 of, the Corporations Code.

(f) A rule change reversed under this section may not be readopted for one year after the date of the meeting reversing the rule change.

Comment. Section 1357.170 authorizes member reversal of a recent rule change. This authority is limited to cases where members owning five percent or more of the separate interests call a meeting for that purpose within the specified time. The governing documents of an association may provide other additional procedures for member participation in rulemaking.

Subdivision (a) makes clear that organizing a special meeting to reverse a rule change is a proper purpose for access to an association's membership records. Nothing in subdivision (a)

affects other limitations on member access to membership records. See, e.g., Corp. Code §§ 8330(c) (board may offer reasonable alternative), 8332 (access limited to protect constitutional rights of members).

Subdivision (c) is drawn from Corporations Code Section 5034.

See also Sections 1351(a) ("association" defined), 1357.100 ("rule change" defined).

☞ **CLRC Staff Note.** The existing Corporations Code provisions governing member access to association membership lists include important qualifications: (1) the purpose of the request must be reasonably related to the requesting party's interest as a member, (2) the board may offer an alternative to inspection of the actual membership list, so long as the alternative reasonably and in a timely manner accomplishes the purpose of the request, and (3) the board may petition the court for an order restricting access in order to protect the Constitutional rights of the members.

The last two sentences of subdivision (b) were added in response to a request of the California Congress of Seniors, to address their concern that the right to reverse a rule change could be undermined by a board that unreasonably denies access to the membership list. The language was intended to make clear that organizing a rule reversal meeting is a proper purpose for access to the records.

ECHO has expressed concern that the added language could undermine other valid limitations on member access to the membership list. The changes set out above would further refine the language to make clear that we are only asserting the propriety of the *purpose* and are not affecting other existing limitations on member access (as described in numbers (2) and (3) above).

1357.180. (a) This article applies to a rule change ~~**made**~~ **commenced** on or after January 1, 2004.

(b) Nothing in this article affects the validity of a rule change ~~**made**~~ **commenced** before January 1, 2004.

(c) For the purposes of this section, a rule change is commenced when the board of directors of the association takes its first official action leading to adoption of the rule change.

Comment. Section 1357.180 provides for prospective application of this article. A rule change commenced before January 1, 2004 would not be subject to this article, regardless of when the rulemaking process is completed.

See also Section 1357.100 ("rule change" defined).

☞ **CLRC Staff Note.** These changes are intended to provide greater precision as to which rule changes would be governed by the new provisions.

SEC. 11. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1358, to read:

CHAPTER 3. OWNERSHIP RIGHTS AND INTERESTS

SEC. 12. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1363, to read:

CHAPTER 4. GOVERNANCE

SEC. 13. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1363, to read:

Article 1. Association

SEC. 14. Section 1363 of the Civil Code is amended to read:

1363. (a) A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association.

(b) An association, whether incorporated or unincorporated, shall prepare a budget pursuant to Section 1365 and disclose information, if requested, in accordance with Section 1368.

(c) Unless the governing documents provide otherwise, and regardless of whether the association is incorporated or unincorporated, the association may exercise the powers granted to a nonprofit mutual benefit corporation, as enumerated in Section 7140 of the Corporations Code, except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates in accordance with Section 7313 of the Corporations Code.

The association, whether incorporated or unincorporated, may exercise the powers granted to an association by Section 383 of the Code of Civil Procedure and the powers granted to the association in this title.

(d) Meetings of the membership of the association shall be conducted in accordance with a recognized system of parliamentary procedure or any parliamentary procedures the association may adopt.

(e) Notwithstanding any other provision of law, notice of meetings of the members shall specify those matters the board intends to present for action by the members, but, except as otherwise provided by law, any proper matter may be presented at the meeting for action.

(f) Members of the association shall have access to association records**,** **including accounting books and records, membership records,** and operating rules**,** in accordance with Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of Title 1 of the Corporations Code.

(g) If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents or rules of the association, including any monetary penalty relating to the activities of a guest or invitee of a member, the board of directors shall adopt and distribute to each member, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents. The board of directors shall not be required to distribute any additional schedules of monetary penalties unless there are changes

from the schedule that was adopted and distributed to the members pursuant to this subdivision.

(h) When the board of directors is to meet to consider or impose discipline upon a member, the board shall notify the member in writing, by either personal delivery or first-class mail, at least 10 days prior to the meeting. The notification shall contain, at a minimum, the date, time, and place of the meeting, the nature of the alleged violation for which a member may be disciplined, and a statement that the member has a right to attend and may address the board at the meeting. The board of directors of the association shall meet in executive session if requested by the member being disciplined.

If the board imposes discipline on a member, the board shall provide the member a written notification of the disciplinary action, by either personal delivery or first-class mail, within 15 days following the action. A disciplinary action shall not be effective against a member unless the board fulfills the requirements of this subdivision.

(i) Whenever two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association shall be entitled to attend all meetings of the joint association other than executive sessions, (1) shall be given reasonable opportunity for participation in those meetings and (2) shall be entitled to the same access to the joint association's records as they are to the participating association's records.

(j) Nothing in this section shall be construed to create, expand, or reduce the authority of the board of directors of an association to impose monetary penalties on an association member for a violation of the governing documents or rules of the association.

Comment. Subdivision (f) of Section 1363 is amended to make clear that an association's operating rules are subject to inspection by members. The subdivision is also amended to reference two other types of records that are subject to inspection under existing law.

See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development" defined), 1351(j) ("governing documents" defined).

☞ **CLRC Staff Note.** The California Congress of Seniors requested that the language incorporating the Corporations Code provisions on member inspection of records be expanded to include a reference to accounting and membership records. This is intended to be a nonsubstantive change.

SEC. 15. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1363.05, to read:

Article 2. Common Interest Development Open Meeting Act

SEC. 16. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1363.1, to read:

Article 3. Managing Agents

SEC. 17. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1363.5, to read:

Article 4. Public Information

SEC. 18. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1364, to read:

CHAPTER 5. OPERATIONS

SEC. 19. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1364, to read:

Article 1. Common Areas

SEC. 20. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1365, to read:

Article 2. Fiscal Matters

SEC. 21. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1365.7, to read:

Article 3. Insurance

SEC. 22. An article heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1366, to read:

Article 4. Assessments

SEC. 23. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1368, to read:

CHAPTER 6. TRANSFER OF OWNERSHIP INTERESTS

SEC. 24. Section 1368 of the Civil Code is amended to read:

1368. (a) The owner of a separate interest, other than an owner subject to the requirements of Section 11018.6 of the Business and Professions Code, shall, as soon as practicable before transfer of title to the separate interest or execution of a real property sales contract therefor, as defined in Section 2985, provide the following to the prospective purchaser:

(1) A copy of the governing documents of the common interest development, including any operating rules, and including a copy of the association's articles of incorporation, or, if not incorporated, a statement in writing from an authorized representative of the association that the association is not incorporated.

(2) If there is a restriction in the governing documents limiting the occupancy, residency, or use of a separate interest on the basis of age in a manner different from that provided in Section 51.3, a statement that the restriction is only enforceable to the extent permitted by Section 51.3 and a statement specifying the applicable provisions of Section 51.3.

(3) A copy of the most recent documents distributed pursuant to Section 1365.

(4) A true statement in writing obtained from an authorized representative of the association as to the amount of the association' s current regular and special assessments and fees, any assessments levied upon the owner's interest in the common interest development that are unpaid on the date of the statement, and any monetary fines or penalties levied upon the owner's interest and unpaid on the date of the statement. The statement obtained from an authorized representative shall also include true information on late charges, interest, and costs of collection which, as of the date of the statement, are or may be made a lien upon the owner's interest in a common interest development pursuant to Section 1367 or 1367.1.

(5) A copy or a summary of any notice previously sent to the owner pursuant to subdivision (h) of Section 1363 that sets forth any alleged violation of the governing documents that remains unresolved at the time of the request. The notice shall not be deemed a waiver of the association's right to enforce the governing documents against the owner or the prospective purchaser of the separate interest with respect to any violation. This paragraph shall not be construed to require an association to inspect an owner's separate interest.

(6) A copy of the preliminary list of defects provided to each member of the association pursuant to Section 1375, unless the association and the builder subsequently enter into a settlement agreement or otherwise resolve the matter and the association complies with Section 1375.1. Disclosure of the preliminary list of defects pursuant to this paragraph shall not waive any privilege attached to the document. The preliminary list of defects shall also include a statement that a final determination as to whether the list of defects is accurate and complete has not been made.

(7) A copy of the latest information provided for in Section 1375.1.

(8) Any change in the association's current regular and special assessments and fees which have been approved by the association's board of directors, but have not become due and payable as of the date disclosure is provided pursuant to this subdivision.

(b) Upon written request, an association shall, within 10 days of the mailing or delivery of the request, provide the owner of a separate interest with a copy of the requested items specified in paragraphs (1) to (8), inclusive, of subdivision (a). The association may charge a fee for this service, which shall not exceed the association's reasonable cost to prepare and reproduce the requested items.

(c) An association shall not impose or collect any assessment, penalty, or fee in connection with a transfer of title or any other interest except the association's actual costs to change its records and that authorized by subdivision (b).

(d) Any person or entity who willfully violates this section shall be liable to the purchaser of a separate interest which is subject to this section for actual damages occasioned thereby and, in addition, shall pay a civil penalty in an amount not to exceed five hundred dollars ($500). In an action to enforce this liability, the prevailing party shall be awarded reasonable attorneys' fees.

(e) Nothing in this section affects the validity of title to real property transferred in violation of this section.

(f) In addition to the requirements of this section, an owner transferring title to a separate interest shall comply with applicable requirements of Sections 1133 and 1134.

SEC. 25. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1368.4, to read:

CHAPTER 7. CIVIL ACTIONS AND LIENS

SEC. 26. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1370, to read:

CHAPTER 8. CONSTRUCTION OF INSTRUMENTS AND ZONING

SEC. 27. Section 1373 of the Civil Code is amended, to read:

1373. ~~**Sections 1356, 1365, 1365.5, 1366.1, and 1368, and subdivision (b) of Section 1363, and subdivision (b) of Section 1366**~~ **(a) The following provisions** are not applicable to common interest developments that are expressly zoned as industrial developments and limited in use to industrial purposes or expressly zoned as commercial developments and limited in use to commercial ~~**purposes.**~~ **purposes:**

(1) Section 1356.

(2) Article 4 (commencing with Section 1357.100) of Chapter 2 of Title 6 of Part 4 of Division 2 of the Civil Code.

(3) Subdivision (b) of Section 1363.

(4) Section 1365.

(5) Section 1365.5.

(6) Subdivision (b) of Section 1366.

(7) Section 1366.1.

(8) Section 1368.

(9) Article 2 (commending with Section 1378.010) of Chapter 10 of Title 6 of Part 4 of Division 2 of the Civil Code.

(10) Article 3 (commending with Section 1378.050) of Chapter 10 of Title 6 of Part 4 of Division 2 of the Civil Code.

(b) The Legislature finds that ~~**those aforementioned**~~ **the** provisions **listed in subdivision (a)** ~~**may be**~~ **are** appropriate to protect purchasers in residential

common interest developments, however, the provisions ~~are~~ **may** not **be** necessary to protect purchasers in commercial or industrial developments since the application of those provisions ~~results~~ **could result** in unnecessary burdens and costs for these types of developments.

Comment. Section 1373 is amended to exempt exclusively industrial and exclusively commercial common interest developments from application of the specified provisions governing rulemaking and association review of proposed alterations of a member's separate interest property.

☞ **CLRC Staff Note.** The Commission's study has focused on residential CIDs. The Commission did not specifically consider how industrial or commercial CIDs might differ from residential developments. Existing Section 1373 already exempts purely industrial or commercial CIDs from certain parts of the Davis-Stirling Act. The amendment would extend the exemption to include the rulemaking and architectural review provisions of AB 512. This change was made in response to a suggestion from CAI, in which ECHO concurred.

SEC. ~~27~~ **28**. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1375, to read:

CHAPTER 9. CONSTRUCTION DEFECT LITIGATION

SEC. ~~28~~ **29**. A chapter heading is added to Title 6 (commencing with Section 1350) of Part 4 of Division 2 of the Civil Code, immediately preceding Section 1376, to read:

CHAPTER 10. IMPROVEMENTS

SEC. ~~29~~ **30**. An article heading is added immediately preceding Section 1376 of the Civil Code, to read:

Article 1. Video or Television Antenna

SEC. ~~30~~ **31**. Article 2 (commencing with Section 1378.010) is added to Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 2. Review of Proposed Alteration of Separate Interest

1378.010. **(a)** If an association's governing documents require that an owner of a separate interest obtain association approval before altering a separate interest, exclusive use common area, or part of the common area, this article ~~governs~~ **and Article 3 (commencing with Section 1378.050) govern** the association's decisionmaking process.

(b) An association may, by operating rule, pre-approve specific types of alterations. A pre-approved alteration is not subject to review under this article or Article 3 (commencing with Section 1378.050).

(c) A repair is not subject to review under this article or Article 3 (commencing with Section 1378.050) if the board of directors of the association determines that an immediate repair is necessary to protect public

health or safety or to prevent further property damage, and the repair would not significantly alter the original design of the property.

(d) This article and Article 3 (commencing with Section 1378.050) do not apply to an application submitted to the reviewing body before January 1, 2004.

Comment. Subdivision (a) of Section 1378.010 provides that this article only applies to an alteration if association approval of such an alteration is required under the association's governing documents. For example, if the governing documents do not require association approval of new construction by the developer, this article would not apply to such construction.

Subdivision (b) permits an association board to pre-approve specific types of alterations, which would not be subject to individualized review. For example, an operating rule might pre-approve a list of exterior house paint colors. A member who wishes to paint a house one of the approved colors could do so without seeking any further association approval. An operating rule pre-approving specific types of alterations must satisfy the general standards for validity of an operating rule, including consistency with the governing documents. See Section 1357.130.

Subdivision (c) provides an exception for emergency repairs on approval of the board of directors. To make a determination under this subdivision, the board could call an emergency meeting (see Section 1363.05(h)) or could delegate decisionmaking authority to a single member of the board, a committee, or an agent (see Corp. Code § 7210 (delegation of management authority)).

See also Sections 1351(a) ("association" defined), 1351(b) ("common area" defined), 1351(i) ("exclusive use common area" defined), 1351(j) ("governing documents" defined), 1351(*l*) ("separate interest" defined), 1360 (modification of separate interest contained within building).

☞ **CLRC Staff Note.** Subdivisions (b) and (c) would create exceptions for pre-approved alterations and emergency repairs.

The exceptions were originally proposed by CAI and have been endorsed by ECHO and by the Assembly Judiciary Committee analysis. At the Assembly Judiciary Committee hearing on May 6, 2003, Assembly Member Bates indicated her willingness to make changes along these lines.

1378.020. **~~(a)~~** A decision to approve or disapprove a proposed alteration of a member's separate interest, an exclusive use common area, or part of the common area, shall be made in good faith **~~and in a fair and reasonable manner~~**.

~~(b) The procedure provided in Article 3 (commencing with Section 1378.050) is fair and reasonable. Other procedures may also be fair and reasonable under the circumstances.~~

Comment. Section 1378.020 is consistent with case law requiring that an association enforce its governing documents in good faith and in a fair and reasonable manner. See Ironwood Owners Ass'n IX v. Solomon, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (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.").

See also Sections 1351(b) ("common area" defined), 1351(i) ("exclusive use common area" defined), 1351(*l*) ("separate interest" defined).

☞ **CLRC Staff Note.** The changes to Sections 1378.020, 1378.040, and 1378.050 implement the opt out approach described in the staff note following Section 1357.140.

1378.030. A writ proceeding for review of a decision to approve or disapprove a proposed alteration of a member's separate interest, an exclusive use common area, or part of the common area, is subject to Section 1354.

1378.040. An association may adopt, by operating rule, a fair and reasonable review procedure to be used instead of the procedure provided in Article 3 (commencing with Section 1378.050). If the procedure only applies to certain types of alterations, the operating rule shall clearly identify the types of alterations that are subject to the procedure.

Comment. Section 1378.040 provides a method for an association to opt out of the statutory review procedure by adopting a fair and reasonable alternative procedure. The requirement that the alternative procedure be fair and reasonable is consistent with case law requiring that an association enforce its governing documents in good faith and in a fair and reasonable manner. See Ironwood Owners Ass'n IX v. Solomon, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (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, 191 Cal. Rptr. 209 (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.'") (citation omitted).

Any procedure adopted under this section must satisfy the general standards for validity of an operating rule, including consistency with the governing documents. See Section 1357.130.

Nothing in this section precludes an association from using the procedure set out in Article 3 to review some types of alterations, while using one or more alternative procedures, adopted by operating rule, to review other specifically identified types of alterations. For example, an association might opt to use the statutory review procedure for structural alterations but adopt a more streamlined procedure for review of landscaping alterations. The streamlined procedure would need to be fair and reasonable and clearly state the scope of its application.

See also Section 1351(a) ("association" defined), 1351(j) ("governing documents" defined).

SEC. ~~31~~ **32**. Article 3 (commencing with Section 1378.050) is added to Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 3. ~~Optional~~ **Review** Procedure

1378.050. ~~This~~ **Except as provided in Section 1378.040, this** article provides ~~a fair and reasonable~~ **the** procedure ~~that an association may use~~ **to be used** in reviewing a member's proposed alteration of a separate interest, an exclusive use common area, or part of the common area. ~~Use of the procedure is not mandatory.~~

Comment. Section 1378.050 is new. See also Sections 1351(a) ("association" defined), 1351(b) ("common area" defined), 1351(i) ("exclusive use common area" defined), 1351(*l*) ("separate interest" defined), 1378.040 (adoption of alternative procedure).

1378.060. (a) The definitions in this section govern the construction of this article.

(b) "Participating member" means an association member who, before the reviewing body makes its decision on the proposed alteration, submits to the reviewing body a comment opposed to a proposed alteration of a separate interest, exclusive use common area, or part of the common area.

(c) "Reviewing body" means the person or group authorized by an association's governing documents to approve or disapprove the alteration of a separate interest, exclusive use common area, or part of the common area.

1378.070. (a) An association member who proposes to alter a separate interest shall submit a written application to the reviewing body. The application shall be in the form specified by the association. An incomplete application may be returned to the applicant with an explanation of why the application is incomplete. No further action is required on an application that is returned as incomplete.

(b) Within 30 days after receipt of the application, the reviewing body shall deliver notice of the application to the following persons:

(1) If the proposed alteration would ~~**affect the common area, to all members.**~~

~~**(2) If the association delivers a newsletter, billing statement, or other document to all members at least once a month, to all members.**~~

~~**(3) If the proposed alteration would not affect the common area and the association does not deliver a newsletter, billing statement, or other document to all members at least once a month,**~~ **only alter separate interest or exclusive use common area property,** to members owning separate interests within 500 feet of, or located within the same building as, the ~~**separate interest**~~ **property** that is the subject of the proposed alteration **and to members having a right to use any exclusive use common area property that is the subject of the proposed alteration**.

(2) If the proposed alteration would alter common area property other than exclusive use common area property, to all members.

(c) The notice shall include the address or location of the separate interest, exclusive use common area, or part of the common area, that is the subject of the application, a description of the proposed alteration adequate to inform other members of its nature, and the date after which the reviewing body may make its decision.

(d) Not less than ~~**20**~~ **15** days nor more than ~~**45**~~ **30** days after delivery of the notice of the application, the reviewing body shall deliver a written decision to the applicant and to any participating member. If the reviewing body does not deliver a written decision to the applicant within ~~**45**~~ **30** days after delivery of the notice of application, the application is deemed disapproved on the ~~**45th**~~ **30th** day.

(e) A written decision approving a proposed alteration of a separate interest, exclusive use common area, or part of the common area, shall state whether the reviewing body received any comments opposing the alteration.

☞ **CLRC Staff Note.** Both the California Congress of Seniors and CAI have objected that the statutory architectural review procedure can be too long. The changes to subdivision (d) shorten the period for initial review to a maximum of 30 days.

The changes to the notice provisions in subdivision (b) are in response to two concerns raised by CAI:

(1) "Common area" includes "exclusive use common area." Because all exclusive use common area is common area, the current distinction between alterations that would affect the common area and alterations that would only affect exclusive use common area is flawed. The revised language corrects that problem.

(2) CAI suggests deleting the requirement of notice to all members when a monthly mailing is available as a vehicle for distribution. Given that notice to all members is already required if the alteration will affect the common area, this only has application if the alteration would affect specific separate interest or exclusive use common area property. In such a case, notice would already be provided to all properties within 500'. The additional benefit resulting from notice to all members may not justify the additional cost. Given the general pressure to reduce notice distribution costs, CAI's suggestion has been implemented.

The notice distribution changes made in this section have also been made in the parallel provision in Section 1378.090(b).

1378.080. (a) Except as provided in subdivision (b), an applicant may not commence work on an approved alteration of a separate interest, exclusive use common area, or part of the common area, until either the period for appeal passes without an appeal being filed or the approval is upheld on appeal.

(b) If a written decision approving alteration of a separate interest, exclusive use common area, or part of the common area, states that no member comments opposing the alteration were received by the reviewing body before it made its decision, the applicant may commence work on the approved alteration immediately.

1378.090. (a) An applicant or participating member may appeal the approval or disapproval of a proposed alteration of a separate interest, exclusive use common area, or part of the common area, to the board of directors of the association. The appeal shall be in writing and shall be delivered to the board of directors within **~~30~~ 15** days after the reviewing body's decision is delivered or the proposed alteration is deemed disapproved.

(b) **~~Within 30 days after receipt of a timely request for appeal, the~~ At least 15 days before hearing the appeal, the** board of directors shall deliver notice of the appeal to the following persons:

(1) If the proposed alteration would **~~affect the common area, to all members.~~**

~~(2) If the association delivers a newsletter, billing statement, or other document to all members at least once a month, to all members.~~

~~(3) If the proposed alteration would not affect the common area and the association does not deliver a newsletter, billing statement, or other document to all members at least once a month,~~ only alter separate interest or exclusive use common area property, to members owning separate interests within 500 feet of, or located within the same building as, the **~~separate interest~~ property** that

is the subject of the proposed alteration **and to members having a right to use any exclusive use common area property that is the subject of the proposed alteration**.

(2) If the proposed alteration would alter common area property other than exclusive use common area property, to all members.

(c) The notice of appeal shall state the time and place where the appeal will be heard.

(d) Within 45 days after ~~**notice of the appeal is delivered,**~~ **receipt of a timely appeal** the board of directors shall meet and review de novo the proposed alteration that is the subject of the appeal. Any association member may testify at the appeal and may submit written materials in support of or in opposition to the proposed alteration.

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

☞ **CLRC Staff Note.** The proposed changes to this section are also part of the overall effort to shorten the architectural review process.

In subdivision (a), the time for filing of an appeal is shortened from 30 to 15 days.

Subdivisions (b) and (d) are revised to shorten the maximum period between receipt of the appeal and hearing of the appeal, from a maximum of 75 days to a maximum of 45 days. Notice of the hearing would still be delivered at least 15 days before the hearing is held. This provides a minimum time period that should be sufficient for the parties to prepare.

1378.100. (a) A decision of the reviewing body made under Section 1378.070 is not subject to judicial review.

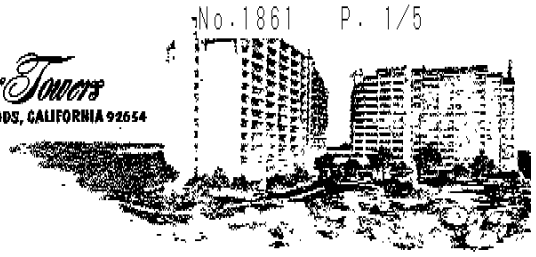
(b) Any member may seek judicial review of a decision of the board of directors of the association made under Section 1378.090. Judicial review may be by writ of administrative mandamus, pursuant to Section 1094.5 of the Code of Civil Procedure.

1378.110. In making a decision to approve or disapprove a proposed alteration of a member's separate interest, an exclusive use common area, or part of the common area, the reviewing body or board of directors may consider any relevant information. The reviewing body or board of directors is not required to consider information other than that provided to the reviewing body or board of directors.

1378.120. A document that is required to be delivered pursuant to this article is subject to Section 1350.7.

LAGUNA WOODS MUTUAL NO. FIFTY

Rossmoor Towers
LAGUNA WOODS, CALIFORNIA 92654



May 13, 2003

The Honorable Patricia Bates
California State Assembly
State Capitol, Room 6031
Sacramento, CA 95814

Dear Assembly Member Bates:

On May 15, 2003, the Board of Directors of Laguna Woods Mutual No. Fifty voted unanimously on behalf of their constituents to direct their staff to submit by way of letter to your office, support of AB 512 with amendments. The Board recognizes Assembly Member Bates' desire to work with local constituents to effect wording changes to the Bill that promises to achieve the same objectives, while minimizing the costs for compliance. On behalf of the Board of Directors, I would like to thank you in advance for this opportunity. As described in our previous correspondence, Leisure World, Laguna Woods, is comprised of four Non Profit, Mutual Benefit Corporations, all of which will be directly and impacted relative to the cost of compliance with AB 512. We trust that the following recommendations will assist in minimizing these costs.

Operating Rules—Definition

We ask for additional description in the Bill of what exactly constitutes a rule change so that ambiguity is minimized.

There is potential for conflicting purposes created in the Bill. For example, Section 1357.120 (b) indicates that the article does not apply if the rule change that ". . . (sets) the amount of a regular or special assessment." Many rule changes have both direct and indirect impacts on the amount of the regular assessment. In fact, during the business planning meetings of the Associations of Leisure World, such rule changes are commonly considered as part of the following year's operating budget; for example:

- The frequency of a service provided such as the number of times the lawns are mowed per month or the quantity of buildings painted per year,
- The operating hours or use restrictions (charging of a guest fee) of a community facility,
- The Association's investment policy,
- Reducing the temperature of the Association's pools.

All of these examples may be exempted from member notification as they "set the amount of a regular assessment," however, they are also rule changes that are subject

to the rule-reversal provision of the Bill. We suggest clarifying the definition so that these issues are reconciled.

Operating Rules—Notification, 1357.140.

AB 512 proposed changes to the means by which members are notified when changes to operating rules affecting use of the common areas, use of a separate interest, member discipline, and assessment collection procedures are contemplated. The focus is to require the Board of Directors to act in good faith and provide members with advance notice and an opportunity to comment before adopting or changing an operating rule.

Our board takes a number of measures to insure each member's ability to participate in their governing process. The following measures are currently taken to inform members prospectively of rule changes:

1. All rule changes are first considered by one or more of the Board's (up to) seven (7) advisory committees that meet to discuss the rule change's impact on the Community. Note that these committees work in an advisory capacity only to the Board of directors and thus offer recommendations for the Board's consideration.
2. Agendas for these open committee meetings, where all members are invited to attend, are promulgated via:
    a. common areas,
    b. Leisure World's daily television station (broadcast to every home in the Community),
    c. the independent newspaper (run by the Orange County Register) and,
    d. the Community's web site.
3. Minutes and/or discussion of the proceedings of the committee meetings are made available via:
    a. discussion by Leisure World's daily television station and
    b. coverage by the independent newspaper (run by the Orange County Register),
    c. minutes are available upon request at no charge to the members
    d. posting on the Community's web site, and
    e. the Board agenda packages.

In sum, prospective rule changes in Leisure World are thoroughly disseminated, noticed, publicized, and televised before they are enacted. The first-class mailing

requirement of **AB 512** (1350.7) will add unnecessary costs and redundancy to a system that is already working well.

We submit that any combination of these steps will substantiate constructive notice to the membership and achieve the same end as a mailing. These steps are tantamount to a first-class mailing since the latter is also deemed constructive notice by way of public policy.

Note that the majority of the Community's members live on a fixed income. If **AB 512** is passed as is, and since some rule change, however small, is typically made during every Board meeting, each board will be required to perform a mass mailing twice monthly to all of its members. Thus if **AB 512** were successful, mailings would be necessary before and after every board meeting and the Community would incur significant additional annual costs. This bill would force the board to offset these costs through raising the member's monthly fees, which is this community's main source of revenue.

Operating Rules—Notification to Prospective Members

AB 512 also requires providing copies of the operating rules to prospective members prior to transfer of title. Depending on the definition of operating rules, Leisure World's operating rules, in printed form, would likely be represented in multiple volumes requiring thousands of pages. The volumes would have to be revised and updated monthly to ensure that an accurate revision was available to prospective members. Considering that approximately 10% of the 12,736 memberships are transacted every year, approximately 1,300 copies would be required to meet this Bill's demands. At a cost of approximately $30 per copy, your Bill would cost the Community of Leisure World almost $40,000 for materials alone; the additional staffing necessary to manage this information would be an additional cost.

We suggest that instead of automatically making available a printed copy of the rules, a notice of the availability of the rules may instead be disclosed as part of the escrow package; and upon request by a prospective party, a copy will be made available.

We also suggest changing the language of the Bill allowing alternative access to the printed copy of the rules, by way of electronic media via CD, email, or simply access by way of the Community's web site.

Rule Reversal (1357.150)

Corporation's Code currently stipulates that a Board of directors may delegate the management of the Association, but may not delegate authority nor power to any other group. Intrinsic to this obligation, the "fiduciary duty," is the elevated duty imposed by the law and assumed by the Corporation's directors once elected to office. Fiduciary duty requires a circumspect decision making process, a due-diligence, and a high standard of care by the directors of the corporation. It requires that the Board work to

sustain if not improve the value of the Corporation. In this vein then, the Corporations that comprise Leisure World, undergo the following rigors to uphold this standard:

1. At open meetings of committees, the directors engage in review and analysis of issues by way of:
    a. reports including thorough cost and qualitative analyses,
    b. discussion of background issues surrounding the question,
    c. analysis of alternatives affecting the issue and the outcomes, and
    d. a recommendation based on principles and policies set by the Board of Directors;
2. Reasonable inquiry and discussion provided by paid professionals and staff;
3. Discussion and decision-making through a "meeting of the minds" of peers on the Board;
4. Discussion on the short and long term operating cost of the Community; and,
5. Decisions are finally made for the betterment of the Corporation, not themselves nor their friends and neighbors.

AB 512 introduces an entirely new standard and basis for authority over the management of a corporation and is in potential conflict with California Corporations Code. Section 7210 reads that:

> The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.

The Bill calls for a majority of a quorum per the Corporation's governing documents, or 15% of the membership. A majority vote of this quorum then would effectively defer management of the corporation to 7% plus one or, in our case, less than 22 members out of 311 members. This provision of management by referendum offers no requirement of fiduciary duty. The members are not required to exercise the care, due-diligence, and rigors currently required of the Corporation's directors. More importantly, this provision does not require that the members' decisions are made on behalf of the Corporation nor does it provide safeguards for preventing self-dealings. Finally, this provision seems to be in direct contradiction with Section 7210 in that it defers corporate powers to its members.

This calls into question liability of the rule-reversing members. Corporations Code 7231(c) protects from liability the board member who has followed his or her obligations as a fiduciary. The board is also covered under Directors and Officers and Errors and Omissions insurance; however, should the members responsible for rule-reversals be

named as defendants in a law suit due to their action, there would not be coverage under the corporation's existing policy.

In addition, the Bill disallows reversal to the action of the rule-reversing members for one year by the Board of Directors; however, the language does not address the Board's ability to amend the action nor does it address the ability of say, contrarian members, to reverse a rule.

Finally, we note that the fundamental purpose of this Bill is notification to members to allow for comment and to participate and/or intervene in the rule-making process; however, section 1357.170 deprives the membership of this process. For example, no notice is given before nor after the action taken by the rule-reversing members.

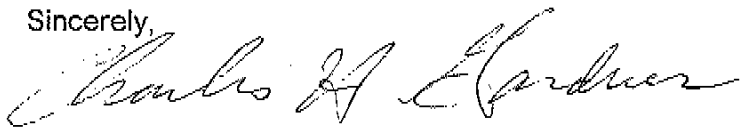
We suggest adding language to address these issues.

Alteration of a Separate Interest—1378.010

The 30 day requirement for the member to wait to commence construction will be perceived by members who are eager to alter their manors as onerous. Our community already has rigorous alteration review procedures and notification and approval from affected members is already part of the regime. We ask that you consider changes to the Bill that allow for current procedures in place.

Thank you for taking time to review our concerns on this legislation. We are available to answer questions or provide testimony on this important issue. If you have any questions or concerns, feel free to contact me at (949) 597-4262.

Sincerely,



President

Laguna Woods Mutual No. Fifty

cc: California Law Revision Commission

Third Laguna Hills Mutual

May 22, 2003

The Honorable Patricia Bates
California State Assembly
State Capitol, Room 6031
Sacramento, CA 95814

RE: **AB 512 ... Concerns and Suggested Amendments**

Dear Assembly Member Bates:

On May 12, 2003, the Third Mutual Board of Directors on behalf of its members voted unanimously to direct their staff to submit by way of letter to your office, support of AB 512 with amendments. The Board recognizes your desire to work with local constituents to effect wording changes to the Bill that retain the bill's objectives, address a number of ambiguities and inconsistencies in the current language and minimize the significant costs which will be required of the Leisure World Corporations.

On behalf of the Board of Directors, I extend our thanks in advance for the opportunity to participate in this process. As described in our previous correspondence, Leisure World, Laguna Woods, is comprised of four Non Profit, Mutual Benefit Corporations, all of which will be directly and in some instances seriously impacted relative to the cost of compliance with AB 512. We trust that the following recommendations will assist in fashioning a bill that is both workable and fair for all concerned.

1. Operating Rules Needs Clear Definition

The term "operating rule" is not defined in the bill, which creates both ambiguity and the potential for conflicting purposes.

For Example: Section 1357.120 (b) indicates that the article does not apply if the rule change that " . . . (sets) the amount of a regular or special assessment." Many decisions made by the Boards during the annual business planning process for each Association are premised upon changes made to "rules" that are utilized by our Staff and other Boards in preparing previous years' operating budgets. These changes have both direct and indirect impacts on the amount of

the regular assessment. In fact, during the business planning meetings of the Associations of Leisure World, such rule changes are commonly considered as part of the following year's operating budget, Examples include:

- The frequency of a service provided, such as the number of times the lawns are mowed per month or the quantity of buildings painted per year,
- The operating hours or use restrictions (charging of a guest fee) of a community facility,
- The Association's investment policy,
- Reducing the temperature of the Association's five pools.

While these examples, and many others, may be exempted from member notification as they are part of the "process" that "sets the amount of a regular assessment," they also can be considered operating "rules" for the daily functioning of the business of our corporations. As such they may also be subject to the notice and the rule-reversal provisions of the Bill In those instances where the use of common area or the imposition of monetary payments on members is in question. We feel confident that this is not the intent of the drafters. We suggest clarifying the definition so that these issues are reconciled.

Perhaps additional language like the following will address this concern "A decision and the criteria established and used in setting the amount of a regular or special assessment."

(b) Section 1357.120 (a) appropriately states that operating rule changes that do not have general application are exempted from AB 512. However, Section 1378.010 et. Seq., (which requires under specified circumstances all member notification for any requested alteration to a separate interest, common area or exclusive use common area), we believe, it is in direct conflict with 1357.120 (a)

An explanation of how things work in Leisure World may help explain our concern. Our recorded CC&Rs specify that the Board of Directors perform the function of an architectural committee. A procedure is specified for a resident who wishes to make alterations to the exterior of his or her manor (not part of the separate interest of that resident), or desires to utilize a portion of the common area. The procedure includes the submission of an application with plans, etc. The application, accompanied by a written report from our professional staff, is first thoroughly considered by a standing committee. The committee, always acting in an advisory role, makes a recommendation to the Board, who under the authority given in the CC&Rs makes its decision. All decisions of the Board are subject to the resident's rights to have the matter reconsidered. These decisions are made on an individual case-by-case basis and have application for the member who has requested the action. In certain instances, however, there are adopted standards in existence for alterations that if utilized by a member do not

require committee review or Board approval. Section 1357.12(a) has direct application to each of the requests of this kind that come to the Board.

The following actual situation, perhaps best illustrates the inconsistency we find in these two sections. A wheel chair bound member and her husband requested Board approval to install on a portion of the common area immediately adjacent to their manor, a concrete pathway. This would permit her wheel chair to move from the rear patio to the front of the manor without having to run over grass and dirt, which often was wet and impassable. The Board's decision addressed and dealt with that discrete situation for a single resident couple with no rule change or rule creation affecting anyone lese. It thus clearly fell within the 1357.120(a) exception. Notwithstanding this clear application of this exception to a notice requirement, it could be argued that because the request affected use of the common area, the provisions (assuming a "participating member" surfaced and objected) of 1378.010 et. Seq. applied, thereby requiring notice to all Association members. While Section 1378.050 is stated to be an "optional" procedure, thereby permitting an Association to craft an alternate procedure, it seems clear to us that the legislative intent requires that any such alternative procedure contain all the elements laid out in the legislative approved procedure, including the notice provision. We note the use of the word "shall" in the legislatively approved procedure.

In the above example, and other similar situations that regularly occur in our Third community of over 6,000 members, the Board always determines whether the proposed alteration to the use of a portion of the common area creates a permanent change to the character of the land and/or the ability of all members to use or have access to same. If the change is transitory, i.e. the alteration could be removed in the future and it does not alter the character of the land (Note: we require that a document in recordable form be signed acknowledging that the land is common area and will remain such notwithstanding the alteration), this is one of the factors we weigh. If approval is given to such a request, it is always done on an individual case-by-case basis and does not have general application. We do not, under these circumstances see any need to provide written notice as required in the Bill to all members of the community. If, however, a member's proposed alteration included converting a portion of the common area into exclusive use common area, we agree that the members should be notified. As a matter of practice we do not permit this to occur because of restrictive language in our CC&Rs; language that we are informed would required the affirmative vote of 2/3rds of our members to change.

Finally, we fail to see why the Bill includes exclusive use common area as being with the reach of Section 1378. Rather than lengthen this letter with our reasoning, we will appreciate further discussion on this issue with your staff at an appropriate time, when we may have the opportunity to acquaint you with the

background and the Association's practices and safeguards when dealing with this type of request

In summary, we feel that the 1378 sections of the Bill should be amended to bring them into harmony with 1357.120(a).

2. *Operating Rules—Notification, 1357.140.*

AB 512 proposes changes to the means by which members are notified when changes to operating rules affecting use of the common areas, use of a separate interest, member discipline, and assessment collection procedures are contemplated. The focus is to require the Board of Directors to act in good faith and provide members with advance notice and an opportunity to comment before adopting or changing an operating rule.

Our Board takes a number of measures to insure each member's ability to participate in the governing process. The following measures are currently taken to inform members prospectively of rule changes.

1. All rule changes are first considered by one of the Board's (up to) seven (7) advisory committees, who meet monthly to discuss the rule change's impact on the Community. These committees function in an advisory capacity to the Board and thus offer only recommendations for the Board's consideration.
2. Agendas for these open committee meetings, where all members are invited to attend, are promulgated via:
   a. Leisure World's daily television station,
   b. An independent newspaper, "The Leisure World News"(published weekly and delivered to subscribers' doors by the Orange County Register). 90% of the membership subscribe.
   c. The Community's web site,
   d. Posting in common areas
   e. Significant major decisions are general noticed for additional special meetings and presentations for the Community before any action is taken.
3. Minutes and/or discussion of the proceedings of the committee and Board meetings are made available via:
   a. discussion and reports by Leisure World's daily television station and
   b. coverage in the aforesaid independent newspaper

c. minutes are available upon request at no charge to the members

d. posting on the Community's web site, and

e. the Board and Committee agenda packages available at the respective meetings.

In summary, prospective rule changes in Leisure World are thoroughly disseminated, noticed, publicized, and televised before they are enacted. The first-class mailing requirement of AB 512 (1350.7) will add considerable unnecessary costs and redundancy to a system that is already working well.

We submit that any combination of these redundant steps will constitute constructive notice to the membership. These steps are tantamount to a first-class mailing since the latter is also deemed constructive notice by way of public policy.

We note that the large majority of the Community's members live on fixed incomes. If AB 512 is passed as is, and since a rule change of some sort however small, is typically made during every Board meeting, each Board will be required to perform a mass mailing twice monthly to all of its members. The community will incur significant additional annual costs. This bill will force the board to offset these costs through raising the member's monthly assessments, which is this community's only source of revenue.

To correct this inequity it is our strong recommendation that the method of and occasions requiring delivery of a document to provide membership notice be modified to address these serious concerns. With respect to the methods of giving notice we suggest a modification of this import:

(a) A document shall be delivered by one or a combination of the following methods.

(b) A document may be included in or delivered in a billing statement, newsletter, newspaper, or other document.

(c) A regularly scheduled television broadcast on a television channel operated by the Association or an affiliate of the Association.

3. Operating Rules—Notification to Prospective Members

AB 512 also requires providing copies of the operating rules to prospective members prior to transfer of title. Leisure World's operating rules, in printed form, would be represented in multiple volumes requiring thousands of pages. The volumes would have to be revised and updated monthly to ensure that an accurate revision was available to prospective members. Considering that 10% of the 12,736 memberships in the total community are transacted every year,

approximately 1,300 copies would be required to meet AB 512's demands. At a cost of approximately $30 per copy, it would cost the Community of Leisure World almost $40,000 for materials alone. The additional staffing necessary to manage this information would be an added unbudgeted cost.

We urge that instead of automatically making available a printed copy of the rules, a notice of the availability of the rules may be disclosed as part of the escrow package; perhaps with an alphabetized listing of the categories encompassed by rules; e.g. Traffic regulations, use of facilities etc., and upon request by a prospective owner, a copy will be made available.

We also suggest changing the language of the Bill to allow alternative access to the printed copy of the rules, by way of electronic media via CD, email, or simply access by way of the Community's web site.

4. Rule Reversal (1357.150)

The California Corporation Code currently stipulates that a Board of directors may delegate the management of the Association, but may not delegate authority nor power to any other group. Intrinsic to this obligation, is the elevated duty imposed by the law and assumed by the Corporation's directors. ie. their fiduciary duty. Fiduciary duty requires a circumspect decision making process, a due-diligence, and a high standard of care by the directors of the Corporations. Fiduciary duty requires that the Board work to sustain if not improve the value of the Corporation. In this vein then, the Corporations and their directors that comprise Leisure World, undergo the following rigors to uphold this standard:

1. At open meetings of committees, and then at Board meetings the directors, committee members, staff and attending community members engage in review and analysis of issues that result in "operating rules" by way of:
    a. reports by staff and outside consultants, including thorough cost and qualitative analyses,
    b. discussion of background issues surrounding the issues.
    c. analysis of alternatives affecting the issue and the outcomes, and
    d. recommendations based on principles and policies established by the law or the Board of Directors;
2. Reasonable inquiry and discussion provided by retained professionals and staff;
3. Decisions-making through a "meeting of the minds" of peers on the Board after full discussion in the various forums.
4. Discussion on the short and long term fiscal impact on the Community; and,
5. Decisions are finally made by the Board for the betterment of the Corporation, not themselves nor their friends and neighbors.

AB 512 introduces an entirely new standard and basis for authority over the management of our corporations, which we believe, is in potential conflict with California Corporations Code Section 7210, of that code reads that:

> "The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board."

AB 512 permits 5% of our membership to call a special meeting to consider repeal of an "operating rule" adopted by the Board. If a quorum is present at the special meeting (in our case 15% of the membership) one half of this number plus one or 466 people out of over 6,000 have power to overturn the rule; seven and one-half (7 1/2%) of our membership. We believe the same situation exists for our sister Mutual, United Mutual.

This provision of management by referendum offers no requirement of fiduciary duty on the part of this staggering minority of members who can wield total power with no accompanying duty to exercise the care, due-diligence, and rigors currently followed by each of the Corporation's directors. Perhaps even more important is the fact that this provision does not require that members' decisions be made for the benefit of and on behalf of the Corporation as a whole, nor does it provide any safeguards for preventing self-dealings.

This calls into question, another troubling issue, that of third party liability. What legal liability will be imposed upon these rule-reversing members: An example may bring this into focus. Suppose the Board, because of safety issues, concern for potential liability passes a rule that stepping stone pathways will not be allowed on common areas adjoining manors. Disgruntled members totaling the specified 7-½% thereafter repeal the rule through use of the current provisions of AB 512. A guest is then injured in a fall on a stepping stone pathway put in by a member following the repeal. Corporations Code 7231 (c) protects the Board members who followed their obligations as fiduciaries in "outlawing" the stone pathway from liability. The Board is also covered under Directors and Officers and Errors and Omissions insurance. If the members responsible for the rule-reversal are named as defendants in a lawsuit there would not be coverage for them under the Corporation's policy. It also seems reasonable to conclude that the Corporation, itself, by the action of those few members would have lost a defense to the suit, since it's Board had adopted a rule that would have eliminated the potential problem. It is our strong belief that if this repeal right is to remain in the Bill, it should, indeed must, include a provision requiring a substantially larger affirmative vote to reverse an action of a Board that meets the standards that will ultimately be set out in the Bill.

In addition, the Bill does not permit reversal of the action of the rule-reversing members for one year by the Board of Directors; however, the language does not address the Board's ability to amend the action nor does it address the ability of say, contrarian members, to reverse a rule.

Finally, we note that the fundamental purpose of this Bill is notification to members to allow for comment and to participate and/or intervene in the rule-making process; however, section 1357.170 deprives the total membership of this process. For example, no notice is given before nor after the action taken by the rule-reversing members.

5. Alteration of a Separate Interest—1378.010

The 30-day requirement for the member to wait to commence construction will be perceived by members who are eager to alter their manors as onerous. Our community already has rigorous alteration review procedures and notification and approval from affected members is already part of the regime. We ask that you consider changes to the Bill that allow our current procedures in place.

Thank you for taking time to review our concerns on this legislation. We are available to answer questions or provide testimony on this important issue. If you have any questions or concerns, feel free to call Milt Johns, General Manager at (949) 597-4262, or our Advocate Skip Daum, President, Capitol Communications at (916) 658-0255.

Sincerely,

George Ratner

George Ratner, President, Third Laguna Hills Mutual

Cc: Law Revision Commission

May 28, 2003

Brian Hebert, Staff Attorney
California Law Revision Commission
Via email: bhebert@clrc.ca.gov
Fax 916.739.7382

RE: April 30 amends of AB 512

Dear Brian:

The Congress of California Seniors (CCS) first of all thanks both the author's office and the California Law Revision Commission for incorporating into AB 512 three of the amendments we proposed in our last letter. The amendments stated that (1) access to the association's membership lists is reasonably related to the referendum process for challenging a proposed rule (2) the percentage of members needed to challenge a rule is 5% (and not 10%) and (3) the architectural review process was shortened.

CCS now offers comments on the April 30, 2003 proposed amendments and urges that these amendments be accepted as well, so that AB 512 may be further strengthened. As currently amended, we believe that AB 512 is a "step in the right direction," but it doesn't go far enough to equalize the balance of power between property owners and boards of directors in homeowner associations, when it comes to association rulemaking and enforcement. AB 512 still leaves the board and its vendors – e.g. property managers -- very much in control of association rulemaking and enforcement.

What do we mean…?

- In its current form, AB 512 does not deal with the "shadow players" who make up association rules for property owners. That is, property managers, lawyers, and debt collectors, who devise assessment collection and certain governance rules need to be explicitly named in AB 512 and their role in rulemaking and enforcement explicitly described – and circumscribed.

- The legislation says nothing about the right of property owners to use these procedures to initiate a rule. In its current form, AB 512, homeowners are allowed only to react to rules proposed by the board. We believe it crucial that AB 512 be amended to state that property owners can use the referendum process, not only to challenge rules, but also to initiate them. Why should property owners be passive participants in the rulemaking process?

- The referendum process (for challenging a rule) must be further strengthened. To challenge a rule, homeowners need access to the association membership list, but AB 512 does not assure access in those associations, where access is routinely denied. Because associations continue to deny access, property owners must have

access to all the media outlets listed in 1350.7. and associations must be prohibited from censoring materials that property owners want to distribute through these communication channels.

- Underlying the rulemaking procedures are the police powers of the associations, that is, the same people who have the greater authority to make the rules – the association boards and vendors – also have the power to decide whether or not the rules have been broken. They then mete out the punishments through the association's security force, imposition of fines, and foreclosure. In other words, the same people who make up the rules are the same people who decide if they've been broken – and who mete out the punishment.

- On the other hand, AB 512 contains no enforcement mechanisms for property owners to draw on. How are property owners to ensure that the board follows the procedures laid out in this new law? The only recourse for a property owner is to take the association to court, and homeowners won't do this, because they will always be outspent and outmaneuvered. The association has the association bank accounts – and association lawyers -- to draw on; the homeowner has only his private resources to draw on.

- Though the architectural review process has been shortened, the process still makes the association vulnerable to legal action, because it contains the potential to deny a property owner the full use and enjoyment of his property. Thousands of Californians purchase undeveloped lots in associations throughout California, including the California foothills and the length of the Sierras, believing they will be able to build a home on this undeveloped lot. Often they have no idea that an association operates the development, let alone that they have to get permission from it to build their home. During this lengthy review process, the property owner could still lose either construction or permanent financing.

- The April 30 amendments still do not require the architectural review committee (or board) to tell the property owner (1) why the initial application has been denied nor (2) what the appeal process is. Both steps should be taken.

- "Operating rule" needs further clarification.

- If an association chooses to adopt rulemaking procedures, which are an alternative to AB 512, then AB 512 must establish clear standards for those rules.

For the above reasons, we urge the author's office and the CLRC to accept the following amendments:

CCS comment and amendments: we concur that the definition of "operating rule" needs to be clarified and expanded. The definition must clarify that some operating rules must

not conflict with laws governing HOAs, e.g. Fair Housing laws. Some associations have been know to devise operating rules meant to constrain children, but which conflict with the familial status provisions of Fair Housing laws.

1357.100. As used in this article, ~~"rule~~ **the following terms have the following meanings:**

(a) "Operating rule" means a rule **or a procedure** adopted by the board of directors for the management and operation of the common interest development and its association.

~~(b) "Rule change" means the adoption, amendment, or repeal of an operating rule by the board of directors of the association.~~

(b) "operating rule" means a rule or a procedure adopted by the board of directors in order to implement a law governing associations, e.g. rules to ensure that the association follows Fair Housing laws.

(c) "Rule change" means the adoption, amendment or repeal of an operating rule by the board of directors of the association.

(d) Operating rules include rules proposed both by property owners and by association vendors to the board of directors for the operation and/or governance of the association.

+ CLRC Staff Note. The definition of "operating rule" is added to make clearer what would be an "operating rule" subject to the rulemaking provisions. It is added in response to a suggestion from Leisure WorId.

1357.130. An operating rule is valid and enforceable only if all of the following requirements are satisfied

(c) The rule is consistent ~~not inconsistent~~ with governing law and the declaration, articles of incorporation or association, and bylaws of the association.

CCS comment: To say a rule is "not inconsistent" is to give the association a "blank check" for writing rules. To say that a rule must conform to the association's existing governing documents is quite different from saying that a rule is "not inconsistent:"with the governing documents. Associations can come up with hundreds of unreasonable rules that are "not inconsistent" with the governing documents. Governing documents are meant to be just that: a legal framework that puts some reasonable constraints on behavior – including rulemaking.

(e) The rule is reasonable

(e) The rule complies with state and federal statutes governing homeowner association governance and operations, e.g. Fair Housing laws or Fair Debt Collection laws.

(g) Alternate procedures adopted by the association were adopted by following the rulemaking procedures of 1357.140.

(h) The rule is constitutional, e.g. the board cannot devise rules abridging constitutionally protected free speech.

~~1357.140. The board of directors of an association shall provide members with notice and an opportunity to comment before making a rule change.~~

+ CLRC Staff Note. The changes to Sections 1357.140-1357.160 implement an opt out approach developed in response to ECHO's comments on mandatory and optional procedures. Under the opt out approach implemented here, the statutory procedure applies as a default, unless an association affirmatively opts out by adopting an alternative procedure, by operating rule. Under this approach, an association that wants to continue using its existing procedure could do so easily.

CCS comment and amendment: The association may adopt alternate procedures, but only if they meet the standards of 1357.130. AB 512 must also include a timeframe for adopting "opt out" procedures. The process for adopting alternate procedures must be explicitly done, that is to say, the rulemaking procedures of 1357.140 shall be used to adopt any alternate procedures, because 1357.140 provides the association with "safe harbor" procedures.

~~1357.160. An association may adopt by operating rule a rulemaking procedure to be used instead of the procedure provided **in** Section 1357.140. A procedure adopted under this section shall provide for member notice and an opportunity to comment before making a rule change.~~

1357.160. (a) An association may adopt alternate rulemaking procedures to be used instead of the procedures laid out in Section 1357.140. However, the association shall use the rulemaking procedures of 1357.140 to adopt any alternate set of rulemaking procedures.
(b) If an association chooses to adopt alternate procedures, it must do so within six months of the effective date of this statute.
(c) Any alternate procedures adopted by the board must meet the standards of 1357.130.

1357.170.

CCS comment and amendment on 1357.170: Many California associations vote, not by assembling at a special meeting, but by written ballot. This section needs to provide for this alternate means of decision making – the written ballot method -- by association members.

Also, since associations still routinely deny members access to the membership lists, property owners need access to the association's communication channels listed in

Section 1350.7. Uncensored access must be given the property owners starting from the time of the initial comment period. "Uncensored" means that neither the board nor the property manager have the power to determine whether the material to be published is "suitable" for broadcasting to the membership at large.

Finally, property owners – because they are association shareholders -- have the right to initiate rule changes as well as to respond to rule changes proposed by the board or its vendors.

1357.170. (a) Members of an association owning 5 percent or more of the separate interests may call a special meeting to reverse a rule change **or to initiate a rule change**. **If the association decision-making is by written ballot, then the rule change may also be reversed through the balloting process.**

(b) A special meeting may be called by delivering a written request on the chair or secretary of the board of directors. The written request may not be delivered more than 30 days after the members of the association are notified of the rule change. Members are deemed to have been notified of a rule change on delivery of notice of the rule change, or on enforcement of the resulting rule, whichever is sooner. For the purposes of Section 8330 of the Corporations Code, collection of signatures to call a special meeting under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list **solely** *for* that purpose may not be denied **on the grounds that the purpose is not reasonably related to the member's interests as a member.**

(c) For purposes of communicating with the membership at large about a proposed rule, members shall also have uncensored access to the association's communication channels listed in 1350.7

~~(c)~~ (d) The rule change may be reversed by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present (which affirmative votes also constitute a majority of the required quorum) or by written ballot in conformity with Section 7513 of the Corporations Code, or if the declaration or bylaws require a greater proportion, by the affirmative vote or written ballot of the proportion required.

~~(d)~~ (e) Unless otherwise provided in the declaration or bylaws, *for* the purposes of this section, a member may cast one vote per separate interest owned.

~~(e)~~ (f) A meeting called under this section is governed by Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and 7613 of, the Corporations Code.

~~(f)~~ (g) A rule change reversed under this section may not be ~~readopted~~ **re-introduced by either the board or the membership** for one year after the date of the meeting **or of the balloting** reversing the rule change.

CCS comments on 1357.180 (b). Many associations have rules on the books, which do not meet the "valid and enforceable" criteria of 1357.130. AB 512 creates the

opportunity for associations to examine whether or not their operating rules are in fact "valid and enforceable" and meet the rulemaking criteria of 1357.130. Some associations operate under rules violating Fair Housing laws, for example. AB 512 creates the opportunity to revise/delete these operating rules from the association's books, and associations should be urged to take this step. Not to delete such rules leaves the association vulnerable to legal action.

1357.180.
(a) This article applies to a rule change ~~**made**~~ **commenced** on or after January 1,2004.
~~(b) Nothing in this article affects the validity of a rule change **made commenced** before January 1, 2004.~~
~~(c)~~ (b) For the purposes of this section. a rule change is commenced when the. board of directors of the association takes its first official action leading to adoption of the rule change **or 5% of the membership deliver a written request to the board for a rule change**.

1363.

CCS comment: members need access to association records, including contracts with vendors, because they often contain operating rules.

(f) Members of the association shall have access to association records, **including accounting books and records. membership records, vendor contracts,** and operating rules, in accordance with Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of Title 1 of the Corporations Code.

1368.

CCS comment and amendment: Again, we believe **it is the responsibility of the common interest development corporation** – and not the individual shareholder – **to ensure that the documents listed in Chapter 6, Transfer of Ownership Interests are provided to the prospective purchaser.** It is the responsibility of the corporation to ensure that it has fully disclosed to the prospective purchaser what his rights and responsibilities are as a shareholder in the common interest development. The future relationship is going to be between the CID corporation and the new owner. It is **not** going to be between the **seller** – who is relinquishing his separate interest in the corporation – and the common interest development. Sellers often have no idea that, through the CC&Rs, they are entering into a legally binding contract with an HOA.

The goal of this amendment is to provide some consumer education to the person, who is considering purchasing property in a common interest development. Too many buyers of homes in common interest developments buy in total consumer ignorance.

This amendment is consistent with the first Article of the CID Homeowner Bill of Rights delivered to the California Law Revision Commission in September 2001.

Therefore we urge that the amendment below be incorporated into AB 512.

Sec 24. Section 1368(a) ~~The owner of a separate interest, other than an owner subject to the requirements of Section 11018.6 of the Business and Professions Code, shall, as soon as practicable before transfer of title to the separate interest or execution of a real property sales contract therefore, as defined in Section 2985, provide the following to the prospective purchaser:~~

The board of directors of the association shall provide to the prospective purchaser at least ten days before the close of escrow the following documents:

(1) A copy of the Governing documents of the common interest development, [etc. through item (f) of this Section.]

Chapter 10. Improvements

CCS Comment: We concur with the idea that certain alterations may be pre-approved by operating rule, including repairs [1378.010 (a) through (d).]

We do <u>not</u> concur with the deletions of 1378.020 and urge that the "fair and reasonable" and the "good faith" language be restored.

Again, any alternate procedures must be adopted jointly by the board and the property owners through the rulemaking procedures of 1357.130.

1378.020. A decision to approve or disapprove a proposed alteration of a member's separate interest, an exclusive use common area, or part of the common area, shall be made in good faith ~~and in a fair and reasonable manner~~ <u>and in a fair and reasonable manner.</u>

CCS Comment on 1378.070: again, while the amendments strengthen AB 512 to some extent, we believe they don't go far enough. The review process still interferes with the full use and enjoyment of the owner's property. Specifically, it leaves open the possibility that this lengthy review process will interfere with the owner's ability to get financing for the development of his property – the building of a new home on an undeveloped lot, for example. He will be paying interest on a loan, though blocked by the association from using the loan proceeds to build, because (1) the board hasn't given him permission to build and (b) refuses to tell him why they have disapproved his building plans and (3) doesn't inform the property owner how to appeal. It is this kind of "review" process that leaves an association vulnerable to lawsuits, because it's a process guaranteed to anger the property owner. CCS knows that antagonizing property owners into suing the association is the opposite of the CLRC's stated goal of reducing the number of HOA lawsuits coming to the courts. Neither is the AB 512 process "fair and reasonable and done in good faith." Under the process, the adjoining property owners

appear to have more rights than the property owner applying to the board for permission to build. Therefore, CCS proposes the following amendment:

1378.070

(d) Not less than ~~**20**~~ **15** days nor more than ~~45~~ **30** days after delivery of the notice of the application, the reviewing body shall deliver a written decision to the applicant and to any participating member. **If the application is denied, the reviewing body shall state the reasons for denial and describe the appeal process, including the association's Alternative Dispute Resolution process.** ~~If the reviewing body does not deliver a written decision to the applicant within 45 **30** days after delivery of the notice of application, the application is deemed disapproved on the **45th** **30th** day.~~

Please do call if you wish to discuss any of our comments or our proposed amendments.

Sincerely,

William Powers
Legislative Director
Congress of California Seniors

cc: Marjorie Murray
Legislative Committee/Housing