Study H-851 November 5, 2003

Memorandum 2003-36

Common Interest Development Law: Architectural Review Procedure

The Commission's recommendation on *Procedural Fairness in CID Rulemaking and Decisionmaking*, 33 Cal. L. Revision Comm'n Reports 81 (2003), proposed that a homeowners association be required to use a fair and reasonable procedure, in good faith, when reviewing an owner's request for approval of a proposed change to the owner's separate interest property. The proposed law also provided a model procedure for such "architectural review." Though optional, the model procedure would provide a safe harbor for any association that follows it. The Commission's recommendation was introduced in AB 512 (Bates).

The architectural review portion of AB 512 proved controversial. The Executive Council of Homeowners ("ECHO") opposed the optional safe harbor approach, preferring that any procedure for architectural review be mandatory. Both ECHO and the Congress of California Seniors ("Seniors") felt that the optional procedure was too detailed and cumbersome.

In order to preserve the less controversial provisions of AB 512, the architectural review provisions were removed. At the September meeting the Commission directed the staff to prepare a scaled back architectural review proposal and discuss it with the groups that had expressed concerns about AB 512. The hope was that the staff could develop a proposal that would be acceptable to the interested groups, for consideration by the Commission.

A draft of proposed language was provided to representatives of ECHO, the Seniors, and the Community Associations Institute. In response, we received written comments from the Seniors and the Community Associations Institute representatives, and have heard informally from representatives of ECHO. The written comments are included in an Exhibit, as follows:

Exhibit p.

1. Email from Duncan R. McPherson, Stockton (Oct. 3, 2003) 1
2 Samuel Dolnick, La Mesa (Oct. 20, 2003) 3
3. William Powers & Marjorie Murray, Congress of California Seniors (Nov. 5, 2003) 4

A staff draft recommendation is attached following the Exhibit. After considering the issues discussed in this memorandum, the Commission will need to decide whether to (1) approve the attached staff draft, with any necessary changes, as its recommendation on architectural review with the intent of legislative implementation in 2004, (2) approve the attached staff draft, with any necessary changes, as a tentative recommendation to be circulated for further public comment, or (3) set the issue of architectural review aside.

PROPOSED LAW

On October 1, the staff asked the interested groups to comment on the following proposed addition to the Davis-Stirling Common Interest Development Act. The proposed addition would require that associations follow a fair and reasonable procedure and would provide basic default rules that apply unless an association's declaration provides otherwise:

> **Civ. Code § 1378 (added). Review of proposed change to separate interest or common area property**
>
> 1378. (a) If an association's governing documents require association approval before a member may make changes to the member's separate interest property or the common area, the association shall provide a fair, reasonable, and expeditious procedure for making a decision on a proposed change.
>
> (b) Unless otherwise provided by an association's declaration, the procedure for making a decision on a proposed change shall satisfy all of the following requirements:
>
> (1) The procedure shall be included in the association's governing documents.
>
> (2) If a proposed change would require a variance from standards provided in the association's governing documents, or would result in a change to the common area, the decision shall be made by the board of directors.
>
> (3) The association's decision shall be in writing. If a proposed change is disapproved, the written decision shall include an explanation of why the proposed change is disapproved.
>
> (4) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors.
>
> (c) A decision made in good faith and in substantial compliance with the requirements of this section is not subject to judicial review on grounds of procedural unfairness.
>
> **Comment.** Subdivision (a) of Section 1378 requires that an association provide a fair, reasonable, and expeditious procedure for review of a proposed change to a member's separate interest property or the common area. This requirement is consistent with

existing case law. 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.").

Subdivision (b) provides default rules governing review of a proposed change to a member's separate interest property or the common area. To the extent that these rules conflict with the association's declaration, the terms of the declaration control.

Subdivision (c) provides a partial safe harbor — a decision made in good faith and in substantial compliance with the requirements of this section may not be challenged in court on grounds of procedural unfairness. This does not preclude judicial review of a decision on substantive grounds (e.g., on the grounds that a decision would violate a restriction in the association's declaration).

The interested groups were more comfortable with the default rule approach than they were with the detailed safe harbor approach originally recommended. For example, Mr. McPherson writes, at Exhibit p. 1: "I find very little to fault in the proposal since for the most part it follows almost exactly the procedures I normally incorporate into CC&Rs." However, a number of specific concerns were expressed. Those concerns are discussed below.

TERMINOLOGY

Commentators raised two technical concerns regarding the terminology used in the proposed law.

Duncan McPherson suggests that the term "change" be replaced with a term like "physical change." See Exhibit p. 1. The concern seems to be that "change" is broad enough to encompass a change in legal status (e.g., a lease or sale) in addition to the sorts of physical changes we had in mind. The staff has no objection to using the term "physical change." Comment language could help clarify its intended scope.

The Seniors suggest that the term "member" be replaced with some variant of the term "owner." The terms "member" and "owner" seem to be used interchangeably in the Davis-Stirling Act. The Commission has already decided that it will examine those terms and recommend changes to clarify their usage. In

this context, where the issue is use of property, rather than participation in governance, “owner” may be the more appropriate term. The staff has no objection to using the phrase “owner of a separate interest” in place of “member.”

VARIANCES AND CHANGES TO THE COMMON AREA

All of the commentators raised concerns about subdivision (b)(2), which would require that a decision involving “a variance from standards provided in the association’s governing documents” or a “change to the common area” be made by the board of directors. The intended purpose of that paragraph was to provide for heightened procedural protection when a decision could affect the property interests of other members. A decision made at a meeting of the board of directors would be open to member observation and comment. See Civ. Code § 1363.05 (“Common Interest Development Open Meeting Act”).

Implied Authority

One common concern was that the language could imply that an association board has authority to approve changes that are inconsistent with the governing documents or that encroach on the common area in violation of the governing documents. See Exhibit pp. 1, 3-4. In drafting that provision, the staff had intended that it apply only to the extent that the governing documents allow variances from general standards or changes to the common area. For example, Mr. McPherson points out that the walls, floors, and ceilings in a condominium complex are generally common area. In such a setting, a change in wiring or plumbing may involve a change to the common area. The governing documents of the association may include easements that specifically allow such changes to be made, with association approval. See Exhibit p. 1. The Seniors correctly note that “common area” includes “exclusive use common area,” such as a patio appurtenant to a unit, or a dedicated parking space. In a large association, it might not be feasible to require that the board of directors review every proposal that affects exclusive use common area or involves a routine change to common walls, floors, or ceilings.

Both the Seniors and Mr. Dolnick suggest codifying a rule that only a vote of the membership can approve a change to the common area. Mr. Dolnick cites *Posey v. Leavitt*, 229 Cal. App. 3d 1236 (1991) for that proposition. That case held that an association lacked authority to authorize an encroachment on the

common area without the approval of the membership. However, it did so based on a careful reading of the terms of the association's declaration. The staff is not convinced that *Posey v. Leavitt* states an inflexible rule requiring member approval before any change can be made to an association's common area. Such a rule would certainly be at odds with the routine approval of changes to a condominium's walls, floors, or ceilings described by Mr. McPherson.

The attached staff draft includes a subdivision providing: "Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents." This should eliminate any implication that the proposed law overrides any restrictions on change to the common area provided in the governing documents.

Unusual Governance Structures

Raising an interesting issue, ECHO notes that there are CIDs that do not have a board of directors. In such an association, it would not be possible to require that architectural review be conducted by the board of directors. Presumably, these CIDs are unincorporated, since corporations law mandates the existence of a board. See, e.g., Corp. Code § 7210 ("Each corporation shall have a board of directors."). An unincorporated association is free to choose a less conventional governance structure.

The problem of "boardless" CIDs is an existing one. The Davis-Stirling Act contains a number of provisions governing the powers or duties of an association's board of directors. Eventually, it might be helpful to resolve the problem of the application of such provisions to a boardless CID. However, that general issue requires further study and is beyond the scope of the current proposal.

ECHO also points out that in some associations the architectural review committee has authority that is separate from and equal to the authority of the board of directors. Requiring that the board of directors conduct the review would violate the separation of powers anticipated by such an association's governing documents.

Ultimately, the existence of boardless CIDs and independent architectural review bodies should not be a problem so long as the proposed law is drafted to provide default rules rather than mandatory rules. To the extent that the association's declaration provides for decisionmaking by a body other than the board of directors, the declaration would control.

Recommendation

In light of the number of concerns expressed about proposed subdivision (b)(2), the staff is inclined to delete the provision. It seems likely that a provision that has drawn so much critical attention will continue to create problems in the legislative process and after enactment. The idea of providing for heightened procedures when a proposed change could affect other member's interests is good in principle. However, it has proven difficult to implement that principle in a practical and straightforward way. What's more, that principle seems less fundamental to procedural fairness than the other principles reflected in the default rules (i.e., written procedure, written decision, right to reconsideration at a hearing).

LACK OF PENALTIES

The Seniors note that the proposed law does not provide for penalties against a noncomplying association. See Exhibit p. 5. The issue of penalties is a difficult one. If a penalty is assessed against the association itself, all members share in the cost. If a penalty is assessed against an individual boardmember, there would be a significant deterrent to service on the board. Note that the Commission has decided to study whether the prevailing party should receive attorneys fees in a case enforcing the Davis-Stirling Act. That would serve much the same purpose as a penalty assessed against the association as a whole. The staff recommends against including a specific penalty in the proposed law.

MEMBER APPROVAL OF PROCEDURE

The Seniors suggest that any architectural review procedure adopted by an association to comply with proposed Section 1378 should only take effect after approval by a vote of the membership. See Exhibit p. 6. The Seniors do not explain their suggestion, but it seems to be an expression of their general preference that the homeowners have more direct control over association decisionmaking.

One potential problem with the suggested approach is owner apathy. It may be difficult for an association to muster the requisite number of votes to approve an architectural review decisionmaking procedure. This could deny homeowners the benefit of a procedure intended to protect their rights.

The staff believes that adoption of a decisionmaking procedure would be an appropriate use of the board's rulemaking power. On the Commission's recommendation, that power is now subject to procedures that require advance notice to members and an opportunity for them to comment before a final decision is made, as well as an ability for a small minority of members to call a member meeting to consider reversal of a board-adopted rule change. The staff recommends against requiring member approval of architectural review decisionmaking procedures.

TIME PERIODS

The Seniors suggest that any decisionmaking procedure should be required to include a specific timeframe for making a decision. The timeframe "must not injure the property owner's economic interests." See Exhibit p. 6.

The concern is that an association may drag its feet to the extent that time runs out on the applicant's construction financing. That could be a problem, but it isn't clear exactly how it should be addressed. The adequacy of the time period for making a decision would seem to depend on a number of facts. How many applications must the association review in a given period of time? How complex is the proposed change to the applicant's property? What is the time limit on the applicant's financing? Did the applicant wait until the last minute before applying for approval? The staff sees no easy way to draft a general rule that would address all of the relevant circumstances. The proposed standard, injury to the owner's economic interests, is too open-ended.

The proposed law would require that an association's decisionmaking procedure be expeditious. A procedure with an unduly long period for decision would not meet that standard.

Perhaps it would be sufficient to require that a time period be stated in the association's governing documents. Each association could then set a period appropriate to its own circumstances. Homeowners would have notice of the period and could plan accordingly. The staff is reluctant to add too many bells and whistles to the proposed law, which is intended to provide general principles rather than detailed procedures. However, if the Commission decides that the proposed law should require that an association's procedure specify a timeframe for decision, it would be a simple matter to add language along the following lines:

> The procedure shall state the amount of time that the association has to make a decision.

WRITTEN DECISION

The proposed law provides, as a default rule, that a decision disapproving a proposed change must be in writing, with an explanation of the basis for the disapproval. The Seniors suggest that a disapproval decision should also refer to the procedure for reconsideration by the board of directors. It seems reasonable to provide notice of an available remedy. The attached staff draft includes such language.

RECONSIDERATION

The proposed law provides, as a default rule, that an applicant is entitled to have a disapproval decision reconsidered by the board of directors. If the original decision was by the board of directors this provides a chance to convince the board that its first decision was wrong. If the original decision was by a subordinate body, this provides an opportunity to appeal the disapproval to the highest association authority, in an open meeting. Reconsideration by the board would also guarantee a face to face hearing, in cases where the original process was conducted in writing.

Note that the language in the draft circulated to the interested groups may not have been clear enough in requiring that reconsideration take place at an open board meeting. The attached staff draft is clearer on that point.

Unusual Governance Structures

As discussed above, ECHO is concerned about application of the proposed law to an association that does not have a board of directors or to an association in which the architectural review body is not subordinate to the board of directors. Obviously, those concerns are also relevant to the provision requiring reconsideration by the board of directors.

The staff does not recommend that the reconsideration rule be deleted. Reconsideration at an open meeting of the board guarantees a face to face hearing, a significant element of procedural fairness. This leaves two alternatives:

(1) Add qualifying language. For example, proposed (b)(4) could be revised to read as follows:

> Except as otherwise provided in this paragraph, if a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors at an open meeting of the board. If the body that disapproved the proposed change is not the board of directors and is not subordinate to the board of directors, the applicant is entitled to reconsideration by the body that disapproved the proposed change, at a meeting at which any member of the association may appear and testify.

This approach can be made to work, but runs counter to our goal of providing simple and clear default rules.

(2) Make no change. The rule providing for reconsideration is a default rule that would not apply if the declaration provides a different rule. If the declaration does not provide for a board of directors or provides that the board has no authority over the architectural review committee, then the declaration controls and the default rule is trumped. The staff prefers the simplicity of this approach.

Reconsideration by Third Party

The Seniors suggest that reconsideration should be conducted by someone other than the board of directors:

> If a proposed change is disapproved, the … property owner is entitled to reconsideration … through an alternative dispute mechanism. The parties who initially rejected the proposal may neither control nor participate in the ADR process.

See Exhibit p. 6. The staff is not sure what is meant by "an alternative dispute mechanism" in this context. Given that the Seniors would exclude the association from the process, it cannot be a form of negotiated settlement. Instead, it seems that the Seniors are suggesting that a neutral third party be called in to substitute its judgment for that of the association's decisionmaker. The staff sees a number of problems with the suggestion. Who would select the third party? How would the association's position be represented in the process? What qualifications would a third party have to overrule the association's decision?

The staff believes that it would be helpful to provide a mechanism for reconsideration by the association's board. If reconsideration resolves a dispute without recourse to the courts, then all involved have benefited. If reconsideration does not resolve the dispute, the applicant is not barred from seeking judicial review (which would trigger the pre-litigation ADR

requirements of Civil Code Section 1354, offering an opportunity for mediation prior to suit). The staff recommends against the suggested alternative.

DEFAULT APPROACH

ECHO prefers the default approach to an optional safe harbor approach. However, it would still prefer that the default rules be made mandatory.

One potential problem that mandatory rules could prevent arises where an association's declaration provides a decisionmaking procedure, but the procedure provided is not fair, reasonable, and expeditious. In such a case, the declaration would trump the proposed law's default rules, leaving the association's defective procedure in place. The association would then need to amend its declaration in order to cure the defects. Amending a declaration can be difficult and costly, and triggers certain statutory overrides that do not take effect until an association amends its declaration. See, e.g., Civ. Code § 1360.5 (pet restriction). If the proposed law were made mandatory, its rules would override the defective procedure in the association's declaration, providing a fair and reasonable process without the need to amend the declaration.

The scope of this problem is probably very small. A developer who has the foresight to include a detailed architectural review provision in a CID's declaration would probably not provide a procedure that is unfair, unreasonable, or unduly slow. There is no advantage to the developer in doing so, as typical governing documents will already provide for developer control of the association during the initial period of development.

The Commission has consistently been reluctant to impose mandatory one-size-fits-all procedures, in recognition of the wide variety of circumstances affecting California's numerous CIDs. The staff recommends that the Commission stick to that approach. Commentators have informed the Commission that many associations already have detailed architectural review procedures provided in their governing documents. The staff sees no need to disrupt existing problem-free procedures.

SAFE HARBOR

The proposed law provides a partial safe harbor for an association that satisfies the requirements of Section 1378. Subdivision (c) provides:

> A decision made in good faith and in substantial compliance with the requirements of this section is not subject to judicial review on grounds of procedural unfairness.

The safe harbor is a partial one because it would not preclude judicial review of the substantive merits of a decision. For example, if the association used a fair procedure but reached a result that clearly violates the governing documents, the applicant could challenge the decision in court. In addition, a decision made under a procedure that is inconsistent with the default rules could still be challenged on the grounds of procedural unfairness.

The Seniors would delete subdivision (c). They see it as an unconstitutional deprivation of the right of access to the courts. See Exhibit p. 5.

The safe harbor was never intended as a limit on access to the courts. That intention should be made clearer. The staff recommends that the provision be revised to read:

> (c) A procedure that satisfies the requirements of paragraphs (1) and (2) of subdivision (b) is a fair and reasonable procedure for the purposes of this section. Nothing in this subdivision precludes judicial review of a decision that is unreasonable, arbitrary, capricious, or made in bad faith.
>
> **Comment**. …
>
> Subdivision (c) provides a safe harbor for an association whose decisionmaking procedure satisfies the requirements of subdivision (b)(1) and (2). The requirements of subdivision (b) do not comprise the only possible fair procedure. Other procedures may also be fair and reasonable.

The reference to the specific paragraphs in subdivision (b), rather than the section as a whole, would avoid extending the safe harbor to an association with a declaration that overrides the default rules. The fairness of such a procedure could not be guaranteed. For an example of a similar safe harbor provision, governing the procedure for discipline of a member of a nonprofit mutual benefit corporation, see Corporations Code Section 7341.

The second sentence of the revised subdivision is consistent with the case law requirement that an enforcement decision not be unreasonable, arbitrary, capricious, or made in bad faith. See Ironwood Owners Ass'n IX v. Solomon, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (1986). That requirement has also been added to the staff draft, as an affirmative standard, in subdivision (d).

WHAT'S NEXT?

The proposed law was circulated to the interested groups in hope that a consensus would emerge and that it would be possible to recommend legislation for introduction in 2004. In light of the number of suggested changes to the proposed law, there does not seem to be a consensus yet. Nonetheless, the staff believes that the proposed law is basically sound and should not be set aside.

If the Commission is comfortable with the proposed law as it is expressed in the attached staff draft (with any changes it chooses to make), it could adopt the staff draft as its final recommendation. Legislation could then be introduced next year. If, on the other hand, the Commission feels that the proposed law is not yet ready for final approval, it could adopt the staff draft as a tentative recommendation. The tentative recommendation could then be circulated for further public review and comment. That would probably preclude introduction of legislation next year.

Our experience this past year has shown how difficult it can be to promote CID reform. To the extent we can tie up loose ends before recommending legislation, we should. There is no pressing need to hurry this proposal. The staff recommends that the staff draft be adopted as a tentative recommendation and circulated for public comment.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

EMAIL FROM DUNCAN MCPHERSON

Subject: RE: Architectural Review
Date: Fri, 3 Oct 2003

Brian, Skip Daum forwarded your message to me as well as to others connected with CLAC for review. I find very little to fault in the proposal since for the most part it follows almost exactly the procedures I normally incorporate into CC&Rs. One suggestion is that Section 1378(a) should make it clear that the "changes" are "physical alterations". I also suggest that more thought be given to Subsection (b)(2) for the following reasons: (i) There is an issue as to what "variances" can be given from the requirements of CC&Rs and other governing documents. Unless the documents provide that the review body can grant variances it is not clear that the review body can grant a right to make a alteration that violates a governing document. Often the documents provide that in certain circumstances the review body has right to depart from a given standard (for instance where the lot size or shape makes the standard inappropriate). I would think you would want to only pick up in the Subsection the type of variances not within the granted authority of the review body; (ii) changes to common area are generally beyond the authority of a review body to grant, however, in the case of condominiums any area of a wall apart from the wall finish or area of the floor beyond the floor finish is common area. Many common improvements including any change of plumbing, the inserting of a medicine cabinet in a wall or the placement of a new wall electrical outlet involves changes technically to the common area. Generally CC&Rs provide for easement or rights of the unit owners to do these things (but may require architectural approval). It would not make sense to require the Board of a large condominium to decide all of these matters. I suggest that the requirement for the Board to hear a matter be limited to changes in common area which are not provided for by the governing documents; (iii) the third problem is just the size of some associations. In a large planned development or condominium it is practically impossible for the Board to hear matters involving architectural approvals. One possible way to handle this might be to allow the Board to approve or ratify such decisions rather than making them which implies that the Board would have to make a formal review. As in all of these matters involving associations a major issue is that the nature and size of owners associations ranges from four plex Victorians to subdivisions both vertical and horizontal that contain

thousands of separate interests to shopping centers and industrial parks. Any specific rule or procedure needs to recognize that diversity. Duncan

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October 20, 2003

Mr. Brian Herbert
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
Via Fax: 650-494-1827

Re: Architectural Review, Discussion Draft of October 1, 2003

Dear Mr. Herbert:

A copy of the Discussion Draft was just received. After reviewing it I find the Architectural Review procedures to be very reasonable. However, I would like to suggest a change to paragraph (b) subparagraph (2). Currently it reads

> (2) If a proposed change would require a variance from standards provided in the association's governing documents, or would result in a change in the common area, the decision shall be made by the board of directors.

The suggested change is as follows:

> (2) If the proposed change would require a variance from standards provided in the association's governing documents, the decision may be made by the board of directors, unless the variance would result in a change in the common area, then the decision shall be made by a membership vote as specified in the governing documents.

COMMENT: Whenever a change is made in the common area, where a portion of the common area is taken from all of the owners and given to one or more owners, but less than all owners, a vote of the membership is necessary as specified in the Declaration of Covenants, Conditions and Restrictions (CC&Rs). Case law supports this as noted in *Posey v Leavitt*, 229 Cal App 3d 1236, 280 Cal. Reptr. 568 (1991) and subsequent cases. The board of directors, on its own initiative, cannot take any of the common area without a vote of the membership. It does not have that authority. The board may vote on variances from the standards as long as it does not result in the taking of the common area.

It would be appreciated if the validity of the above suggestion would be researched for accuracy.

Sincerely yours,

Samuel L. Dolnick

November 5, 2003

Brian Hebert, Esq.
Assistant Executive Secretary
California Law Revision Commission
via fax 916.739.7382 and email: bhebert@clrc.ca.gov

RE: Comments on Architectural Review Standards for CIDs (formerly AB 512)

Dear Mr. Hebert:

The Congress of California Seniors offers comments on "Architectural Review: Discussion Draft" as proposed by the California Law Revision commission and offers the following amended version of the draft legislation:

1. General comment about 1378: the legislation should establish clearly that any reference to "common area property" throughout the draft refers only to "exclusive use common areas" like attached patios, which are for the exclusive use of the parcel owner. The definition must be included upfront in this section, so it is clear that "common areas" is not construed to be those areas/assets in which all parcel owners hold shares, e.g. swimming pools, roads, landscaping, greenbelts.

   Why do we offer this comment? Because the owner of a separate interest could reasonably bring to the board a proposal for altering her/his own "exclusive use common area" – like a patio – but could not reasonably bring a proposal to alter an asset jointly owned with other parcel owners. An individual could propose that the **board** develop a proposal for altering commonly owned areas, but, obviously, a board proposal for such an alteration would be subject to the formal approval – i.e. vote -- of the other owners of the commonly-held property.

   We urge that the legislation distinguish clearly between common areas owned by all the parcel owners and "exclusive use common areas." We further urge that the draft state that any alterations to the commonly-owned areas are subject to the approval of the parcel owners.

2. General comment: we recommend that the legislation use the term "property owner" or "parcel owner" instead of "member," because not all members of an association hold title to the property. It is unlikely that an association would entertain a proposal to alter a separate interest from someone who didn't hold title to the separate interest. Many "members" are actually not on title, but have access to association services (the spouse or children of a title holder, e.g.). Other associations have two or more classes of members, only one of which comprises

persons who hold title. Only persons who hold title have the right to propose architectural changes.

General comment about 1378 (a): Unfortunately, the proposed legislation contains no enforcement provision: that is, there are no penalties imposed on the association, whose governing documents require that procedures be developed but which, nonetheless, never develops them. Thus, the only recourse for the property owner will be to sue in state court on procedural grounds, i.e. that the association didn't comply with Civil Code 1378.

Comment on 1378 (4)(c): The draft legislation [1378 (4) (c)] states that a "decision made in good faith and in substantial compliance with the requirements of this section is not subject to judicial review on grounds of procedural unfairness." In effect, this means that, if an association has not developed any architectural review procedures, then its decision about a member's proposal is still viewed as in compliance with Sec. 1378, if the decision was "made in good faith". Such a decision is, therefore, not subject to judicial review. This is not logical: if the association has developed no procedures for architectural review, then how can a court tell a property owner that the procedures were fair and reasonable?

Comment on 1378(4)(c): Finally, the state of California cannot deprive a person of a constitutionally guaranteed right of redress through the courts. This right of redress is guaranteed by both the U.S. and the California state constitutions. If the state cannot deprive a property owner of this avenue of redress, then it cannot allow an agency it has created and continues to regulate – the common interest development -- to deprive a property owner of this right. [See ***Brentwood Academy v Tennessee Secondary School Athletic Association, et al, 121 S. Ct. 924 2001***.]

The exercise of the right to seek judicial review by the property owner is paramount in the context of the common interest development, where the property owner has few avenues of recourse to begin with. On the other hand, the association has all kinds of resources and tools for coercing the property owner into compliance with even the most unfair rules and procedures. The California courts remain the last and best hope for the property owner. The property owner's access to the courts is a right that should not be abridged in any way.

DRAFT LEGISLATION
Civ. Code Sec. 1378 (added). Review of proposed change to separate interest or *to exclusive use* common area property *and to areas owned in common by the property owners:*

1378. (a) If an association's governing documents require association approval before a ~~member~~ *property owner* may make changes to the ~~member's~~ property *owner's* separate interest property or *to the property owner's exclusive-use* common area, the association shall provide a fair, reasonable, and expeditious procedure for making a decision on a proposed change.
(b) Proposed changes to the areas owned in common by all the parcel owners is subject to the vote of those who hold shares in the commonly-owned areas, i.e. to those who own the common areas.
(~~b~~) (c) Unless otherwise provided by an association's declaration, the procedure for making a decision on a proposed change shall satisfy all of the following requirements:
(1) The procedure shall be included in the association's governing documents. *If the association develops a new procedure to comply with Civ. Code Sec. 1378, then the membership must agree to the procedure by amending the governing documents through a vote.*
(2) The procedure must include clear timeframes for the association to review and respond to a property owner's proposal to alter his/her separate interest or exclusive-use common area. Timeframes must not injure the property owner's economic interests.
~~(3) If a proposed change would require a variance from standards provided in the association's governing documents, or would result in a change to the exclusive us common area, the decision shall be made by the board of directors.~~
(3) The ~~association's~~ *board's* decision on a ~~member's~~ property *owner's* architectural proposal shall be in writing. If a proposed change is disapproved, the written decision shall include an explanation of why the proposed change is disapproved *and a description of the association's appeals process*.
(4) If a proposed change is disapproved, the ~~applicant~~ *property owner* is entitled to reconsideration ~~by the board of directors~~ *through an alternative dispute mechanism. The parties who initially rejected the proposal may neither control nor participate in the ADR process.*
© ~~A decision made in good faith and in substantial compliance with the requirements of this section is not subject to judicial review on grounds of procedural unfairness.~~

Please call if you wish to discuss any of these comments.

Sincerely,

William Powers
Legislative Director

Marjorie Murray
Legislative Advocate for CIDs/Housing

COMMON INTEREST DEVELOPMENT LAW: ARCHITECTURAL REVIEW AND DECISIONMAKING

The governing documents of many common interest developments require approval of the community association before a homeowner can physically change the homeowner’s separate interest property.[1] For example, a homeowner might be required to obtain association approval before adding a room, choosing a color of exterior paint, or planting flowers in a front yard. There is no statutory procedure for making such a decision.

Existing case law requires that a decision regarding a proposed change to a homeowners separate interest property be made in good faith and in a fair and reasonable manner.[2] The Commission recommends that the requirement of a fair and reasonable decisionmaking procedure be codified. This will serve to educate homeowners and association officials of their rights and duties with respect to the decisionmaking process.

The Commission also recommends that broad default procedural rules be added to the law to guarantee minimum fairness in an association that does not otherwise provide a fair and reasonable procedure. An association that complies with the statutory rules would be deemed to have satisfied the general requirement that it follow a fair and reasonable procedure.

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1. See Civ. Code § 1351(*l*) (“separate interest” defined). In some circumstances, the association’s declaration may also permit changes to the common area. See Civ. Code § 1351(b) (“common area” defined).

2. 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.”).

PROPOSED LEGISLATION

Civ. Code § 1378 (added). Procedure for decision on proposed physical change to separate interest or common area property

1378. (a) If an association's governing documents require association approval before an owner of a separate interest may make physical changes to the owner's separate interest or to the common area, the association shall satisfy the requirements of this section. The association shall provide a fair, reasonable, and expeditious procedure for making its decision. The procedure shall be included in the association's governing documents.

(b) Except as otherwise provided by an association's declaration, the association's procedure shall satisfy all of the following requirements:

(1) The association's decision shall be in writing. If a proposed change is disapproved, the written decision shall include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board of directors.

(2) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors at an open meeting of the board.

(c) A procedure that satisfies the requirements of paragraphs (1) and (2) of subdivision (b) is a fair and reasonable procedure for the purposes of this section. Nothing in this subdivision precludes judicial review of a decision that is unreasonable, arbitrary, capricious, or made in bad faith.

(d) A decision on a proposed change shall be made in good faith. A decision on a proposed change shall not be unreasonable, arbitrary, or capricious.

(e) Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents.

Comment. Section 1378 is new. Subdivisions (a) and (d) are consistent with existing case law. 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."). Physical changes that might be subject to association approval requirements include structural additions or renovations, landscaping, choice of exterior paint colors or roofing materials, etc.

Subdivision (b) provides default rules governing the process for making a decision on a proposed physical change to an owner's separate interest property or the common area. To the extent that these rules conflict with the association's declaration, the terms of the declaration control. For example, if the declaration of an unincorporated homeowners association provides that the association does not have a board of directors, subdivision (b)(2) would not apply.

Subdivision (c) provides a safe harbor for an association whose decisionmaking procedure satisfies the requirements of subdivision (b)(1) and (2). The requirements of subdivision (b) do not comprise the only possible fair procedure. Other procedures may also be fair and reasonable.

Subdivision (e) makes clear that this section does not authorize physical change to the common area in a manner that is inconsistent with an association's governing documents. In many associations the governing documents require a vote of the membership to approve a change to

1 the common area. See, e.g., *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 280 Cal. Rptr. 568 (1991).
2 In other associations, the governing documents may grant easements to make changes to certain
3 features of the common areas (such as common walls, ceilings, or floors) with the approval of the
4 association. In all cases, the requirements of the governing documents control.