Study H-851 February 3, 2004

First Supplement to Memorandum 2004-5

Common Interest Development Law: Architectural Review and Decisionmaking (Comments on Tentative Recommendation)

We have received a few comments on points made in Memorandum 2004-5. The comments are discussed below. All statutory references are to the Civil Code.

Commentator Background

Although Mr. McPherson is a delegate to the Community Association Institute's California Legislative Action Committee, he is not writing on behalf of CAI-CLAC. Rather, he is commenting based on his own experience practicing real estate law. In a January 26, 2004, email to staff he describes his background as follows:

> While I have represented HOA's since the early 1970s the majority of my business is in setting up subdivisions for developers and I am even more involved with the California Building Industry Association's DRE Committee and with the ABA's Real Property Probate and Trust Section's common interest community subsection. I have also been a board member and president of both residential and commercial owners' association. Most of my comments are just based on my views of how these entities actually work.

Open Meeting Requirement

The proposed law would require reconsideration of a disapproval decision at an "open meeting" of the board of directors. Mr. McPherson points out that all meetings of the board of directors are required to be open to members (with exceptions not relevant here). See Section 1363.05(b). Thus, the reference to an "open meeting" in the proposed law is superfluous. Should it be deleted?

This question raises a recurring issue. In some instances, it would be helpful to homeowners and boardmembers to reiterate a requirement stated elsewhere, in order to reinforce a general requirement in a specific context. Such a reference would serve an educational purpose. Education is particularly important in common interest development law because of the number of nonlawyers who are required to read, understand, and apply the law.

Redundant provisions can create problems. If the same substantive requirement is stated in more than one place, a future amendment may inadvertently affect only one of the provisions, when it should have affected them all. Selective reiteration of a general requirement may also lead to a negative implication — if the general requirement is specifically cited in one context, it must not have been intended to apply in another context where it is not specifically cited. The risk of this implication being drawn by those who are less familiar with the law may outweigh any educational benefit to be derived from reiterating a general requirement.

A compromise approach would be to move the educational content to the Comment as follows:

> 1378. …
> (4) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors at ~~an open~~ a meeting of the board. This paragraph does not require reconsideration of a decision that is made by the board of directors at ~~an open~~ a meeting of the board.
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> **Comment**. … Subdivision (a)(4) provides an applicant with the option to seek reconsideration of a disapproval decision, at ~~an open~~ a meeting of the board of directors. Any member of the association may attend a meeting of the board. Civ. Code § 1363.05(b).

Clarity of Introductory Clause

Mr. McPherson still feels that the relationship between the introductory clause of proposed Section 1378(a) and the requirements imposed in the numbered paragraphs should be clearer. To that end, the staff recommends that the introduction be revised to read as follows:

> 1378. (a) This section applies if an association's governing documents require association approval before an owner of a separate interest may make a physical change to the owner's separate interest or to the common area. In reviewing and approving or disapproving a proposed change, the association shall satisfy the following requirements:

Multiple Boards

Memorandum 2004-5 discusses the fact that a CID may have more than one association, with one or more "sub-associations" related to a "master association." Mr. McPherson suggests that the proposed law should be clear as to which association has authority to reconsider a disapproval decision. The staff recommended adding language to make clear that reconsideration would be

conducted by the board of the association that made the decision under review, thus:

> In a master planned community, an architectural review decision could be made by the master association or by a sub-association. In such a community, a disapproval decision would be reconsidered by the board of the association that made the decision (i.e., disapproval by the master association would be reviewed by the board of the master association; disapproval by a sub-association would be reviewed by the board of the sub-association).

Mr. McPherson does not think that solution is adequate. He notes that the terms "master association" and "sub-association" do not have agreed or set meanings. He renews his suggestion that the issue be addressed in the statute. This could be done by revising Section 1378(a)(4) as follows:

> (4) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors of the association that made the decision, at an open meeting of the board. …

The staff is somewhat skeptical about whether the proposed language adds enough clarity to justify the extra complexity, but does not feel strongly either way.

Consistency with Governing Documents

In Memorandum 2004-5, the staff recommends adding language to Section 1378(a)(2) to make clear that an architectural review decision must not be inconsistent with an association's governing documents:

> (2) A decision on a proposed change shall be made in good faith and shall not be unreasonable, arbitrary, ~~or~~ capricious, or inconsistent with the association's governing documents or governing law.

A legislative staffer analyzing the proposed law sees a potential trap: what if an association's governing documents are themselves unreasonable, arbitrary, or capricious? How could a decision be made that satisfies all of the elements of subdivision (a)(2)?

As a practical matter, this shouldn't be a problem. A provision of the CC&Rs is only enforceable if it is reasonable. Civ. Code § 1354(a). An operating rule must also be reasonable to be enforceable. Civ. Code § 1357.110(e). Thus, there should be no situation in which an association would be compelled to conform its decision to an unreasonable provision of the governing documents.

In some cases, an association's architectural standards might appear to be arbitrary or capricious. For example, an association's governing documents may permit one shade of red exterior house paint but prohibit a very similar shade. However, aesthetic standards are inherently subjective. It seems unlikely that a court would find a community expression of taste to be unlawfully arbitrary or capricious.

Ultimately, if an association does have a provision of its governing documents that is unreasonable, or is unlawfully arbitrary or capricious, the association should amend its governing documents to cure the problem. The fact that the proposed law would not permit a decision to be made consistent with an unlawful standard is not a defect.

Perhaps the following language should be added to the Comment, to give some guidance on the issue:

> Subdivision (a)(2) prohibits a decision that is unreasonable, arbitrary, capricious, or inconsistent with an association's governing documents or governing law. If a provision of an association's governing documents is itself unreasonable, arbitrary, or capricious, the association should amend its governing documents to cure the defect. An unreasonable provision of the association's governing documents is unenforceable. See Civ. Code §§ 1354(a), 1357.110(e).

Respectfully submitted,

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