

Second Supplement to Memorandum 2004-27

2004 Legislative Program: Common Interest Development Law

There are currently two bills before the Legislature that would implement Law Revision Commission recommendations on common interest development law:

- AB 1836 (Harman) would implement the recommendation on *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003). The bill is set to be heard by the Senate Housing and Community Development Committee on June 7, 2004.
- AB 2376 (Bates) would implement the recommendation on *Common Interest Development Law: Architectural Review and Decisionmaking*, 34 Cal. L. Revision Comm'n Reports __ (2004). The bill is set to be heard by the Senate Housing and Community Development Committee on June 21, 2004.

There is a substantive issue relating to architectural review and fair housing law that the Commission should consider. It is discussed below.

In addition, there are a number of Comment revisions that are required as a result of amendments made to the bills during the legislative process. The Comment revisions are set out below, with strikeout and underscore to indicate changes. The staff does not intend to discuss the proposed Comment revisions individually at the meeting, unless specific questions are raised.

ARCHITECTURAL REVIEW AND FAIR HOUSING LAW

A number of groups (Protection and Advocacy, Inc., California Federation for Independent Living Centers, California Alliance for Retired Americans, and Congress of California Seniors) have suggested that language be added to the bill to make clear that an association must comply with fair housing law in making an architectural review decision.

Existing law prohibits housing discrimination on the basis of disability "through public or private land use practices, decisions, and authorizations." Gov't Code § 12955(l). The applicable definition of "discrimination" includes:

refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises ... and includes refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.

Gov't Code § 12927. Federal law provides an equivalent rule. See 42 U.S.C. § 3604(f)(3). See also C. Sproul & K. Rosenberry, *Advising California Common Interest Communities* § 8.53 (Cal. Cont. Ed. Bar 2003) (“Although community associations may require the disabled person to request board approval before making the changes to the common area, the board may not withhold its approval unreasonably.”)

The addition of a simple statement acknowledging the applicability of fair housing law might be helpful. However, we must be careful to avoid creating an implication that fair housing law is the only external source of law that might affect architectural review decisionmaking. We should also be careful not to characterize the requirements of governing law. In doing so we might cause an unintended change in the law.

Perhaps we could add language along the following lines:

A decision on a proposed change shall be consistent with any governing provision of law, including, but not limited to, the Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code).

Comment. An association decision on a proposed physical change must be consistent with governing law. For example, the Fair Employment and Housing Act prohibits discrimination “through public or private land use practices, decisions, and authorizations.” Gov't Code § 12955(l). See also Gov't Code § 12927(c)(1) (“Discrimination” includes “refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises ... and includes refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.”).

That would provide useful guidance by alerting association decision makers that they need to take other governing provisions of law into account. The Comment would specifically flag the issue of discrimination based on disability.

Protection and Advocacy, Inc. is also urging that a very short deadline be imposed for a decision that is governed by fair housing laws (e.g., 10 days). The Commission has been reluctant to impose fixed deadlines for architectural review decisions. As amended, the bill requires a “prompt” decision and requires that the association’s procedure include applicable timelines, but no specific deadline is mandated. Ten days may be an unworkably short period, especially if a board decision is required.

As discussed below, the staff is proposing a revision to the Comment to Section 1378 to acknowledge the need for procedural flexibility in exigent circumstances. That language could be adjusted to acknowledge the importance of expediting applications submitted to accommodate a disability, thus:

The procedure for reviewing and approving or disapproving a proposed physical change should be flexible in addressing exigent circumstances. For example, an association should expedite review of a proposed change that is necessary to accommodate a disability or to protect against an imminent threat to public health or safety. Such flexibility is implicit in the requirement that the review and decisionmaking procedure be reasonable and expeditious.

The staff recommends that the proposed Comment language be approved.

ALTERNATIVE DISPUTE RESOLUTION: COMMENT REVISIONS

Civ. Code § 1357.120 (amended). Scope of operating rule requirements

Section 1357.120 was amended to require use of the recently enacted rulemaking procedures if an association uses an operating rule to establish or change its internal dispute resolution procedure. That change was approved at the April meeting. The staff recommends approval of the following Comment to that section:

Comment. Section 1357.120 is amended to provide that the procedure for revising an association’s operating rules applies to a rule that relates to dispute resolution procedures. See Sections 1363.810-1363.850 (internal dispute resolution process). See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined).

Civ. Code § 1363.820. Fair, reasonable, and expeditious dispute resolution procedure required

Two changes were made to Section 1363.820, which requires that an association adopt an internal dispute resolution procedure:

(1) The presumption that an association's internal dispute resolution procedure is fair and reasonable was deleted. At the April meeting, the Commission indicated its willingness to accept that change if it proved politically necessary.

(2) Language was added requiring "maximum reasonable use" of local dispute resolution programs in an association's internal dispute resolution process. That was erroneous in part. The language agreed to by the author's office and committee staff did not include the word "maximum." An amendment is being prepared to correct that error.

The staff recommends that the Comment to Section 1363.820 be revised as follows.

Comment. Subdivision (a) of Section 1363.820 establishes the requirement, and prescribes the standard, for an association's internal dispute resolution procedure. For a description of disputes covered by the requirement, see Section 1363.810 (scope of article).

Although an association is required to provide a fair, reasonable, and expeditious dispute resolution procedure, its failure to do so is not subject to judicial mandate by writ or injunction and is not otherwise actionable. Pursuant to subdivision (c), inaction by an association is in effect adoption of the default procedure provided in Section 1363.840 (default meet and confer procedure).

The standard of "fair, reasonable, and expeditious" prescribed in Section 1363.820 is not an objective standard, and will vary from association to association, depending on such factors as size, involvement of membership, etc. A larger association might, for example, make use of a "covenants committee" composed of disinterested association members to hear and resolve disputes with binding effect on the board, whereas in a smaller association such a procedure might well be impossible because every member of the association could have an interest in the dispute.

~~Subdivision (b) implements the policy of this article to avoid squabbles over procedural details and instead focus on the substance of the dispute to be resolved. An association that has an existing internal dispute resolution procedure need not re-adopt it for the purposes of this article; the existing procedure is presumed to satisfy the requirements of this article.~~

Subdivision (b) requires that an association make reasonable use of local dispute resolution programs. In determining whether use of such a program would be reasonable, the association might consider the program's cost and availability and whether use of the program would provide a cost-effective improvement over other alternatives that are in place or being considered.

The minimum requirements for an association's internal dispute resolution procedure are prescribed in Section 1363.830. The default

meet and confer procedure applicable if an association fails to adopt a fair, reasonable, and expeditious procedure is prescribed in Section 1363.840.

Civ. Code § 1363.850. Annual notice of internal dispute resolution process

Section 1363.850 was added to require annual notice of the availability of the association's internal dispute resolution program. That change was approved at the April meeting. The staff recommends that the following Comment be added:

Comment. Section 1363.850 is new. See also Section 1369.590 (annual notice of alternative dispute resolution requirements).

Civ. Code § 1369.550. Tolling of statute of limitations

The provision for extension of the statute of limitations in some cases was recast as a tolling provision. This is more straightforward and avoids the technical timing problems raised by committee staff (and discussed at the April Commission meeting). The staff recommends that the Comment to Section 1369.550 be revised as follows:

Comment. Section 1369.550 supersedes the first clause of former Section 1354(b), which excepted a dispute where the applicable time limitation for commencing the action would run within 120 days. Under Section 1369.550, a Request for Resolution is required even if the statute of limitations would expire within 120 days of the request. Instead, if the statute of limitations would run within 120 days after service of the request, the statute is tolled until the 120th day after service of the request timely service of a Request for Resolution tolls the applicable time limitation.

Civ. Code § 1369.560. Certification of efforts to resolve dispute

Section 1369.560 was amended in two ways: (1) Language referring to "refusal" of ADR was recast to make clear that rejection of any of the offered terms for ADR constitutes refusal. (2) The section was reorganized to group similar provisions more logically. Those changes were approved at the April meeting. The staff recommends the following Comment revision:

Comment. Subdivision (a) of Section 1369.560 continues the substance of the first sentence of former Section 1354(c), but expands its application beyond an action for enforcement of the association's governing documents. See Sections 1369.510(b) ("enforcement action" defined), 1369.520 (ADR prerequisite to enforcement action).

Subdivision (b) continues the substance of the second sentence of former Section 1354(c), but with two exceptions. (1) It no longer

excuses compliance if the statute of limitations would run within 120 days after filing. Cf. Section 1369.550 & Comment (tolling of statute of limitations). (2) It eliminates an ambiguity in prior law as to whether refusal of any of the offered terms for alternative dispute resolution excuses compliance. For example, a non-filing party may agree in concept to participate in alternative dispute resolution but be unwilling to accept the form of alternative dispute resolution offered or may disagree as to other terms, such as the mediator or arbitrator selected by the filing party. Under this subdivision such a failure to accept the terms offered would excuse compliance.

See also Code Civ. Proc. §§ 430.10 (demurrer), 435 (motion to strike).

Civ. Code § 1369.580. Attorney's fees

Two changes were made to Section 1369.580, which allows a court to consider refusal to participate in ADR in determining the amount of fees and costs awarded to the prevailing party: (1) Language was added to make clear that the section only applies to fees and costs awarded under Section 1354. (2) Language was added allowing a court to consider whether refusal to participate in ADR was reasonable. The staff recommends that the following Comment revision be approved:

Comment. Section 1369.580 continues the substance of the second sentence of former Section 1354(f) but ~~expands its application beyond an action for enforcement of the association's governing documents. See Section 1369.510(b) ("enforcement action" defined)~~ makes clear that a court may consider the reasonableness of a party's refusal to accept an offer of alternative dispute resolution.

Civ. Code § 1369.590. Member information

Consistent with the change to Section 1363.850, Section 1369.590 was amended to require annual notice of the availability of the association's internal dispute resolution program. The staff recommends that the following Comment be added:

Comment. Subdivision (a) of Section 1369.590 continues the substance of the first and second paragraphs of former Section 1354(i). Subdivision (a) makes clear that it is the duty of the association to provide the summary.

Subdivision (b) continues the third paragraph of former Section 1354(i), except that it also requires notice of the association's internal dispute resolution process. See Section 1363.850.

Civ. Code § 1357.120 (amended). Scope of operating rule requirements

Section 1357.120 was amended to require use of the recently enacted rulemaking procedures if an association uses an operating rule to establish or change its architectural review procedure. That change was approved at the April meeting. The staff recommends approval of the following Comment to that section:

Comment. Section 1357.120 is amended to provide that the procedures for revising an association’s operating rules apply to a rule that relates to the association’s procedure for reviewing a proposed physical change to property. See Section 1378 (procedure for decision on proposed physical change to property). See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined).

Civ. Code § 1378 (added). Procedure for decision on proposed physical change to property

Committee staff proposed a number of clarifying changes to the Comment to Section 1378, which sets out the architectural review requirements. The staff recommends that the following revisions be approved:

Comment. Section 1378 is new. Paragraphs (1) and (2) of subdivision (a) are consistent with 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.”). Nothing in this section is intended to shift the existing burden of proof as to the validity of an association’s governing documents.

The procedure for reviewing and approving or disapproving a proposed physical change should be flexible in addressing exigent circumstances. For example, an association should expedite review of a proposed change that is necessary to protect against an imminent threat to public health or safety. Such flexibility is implicit in the requirement that the review and decisionmaking procedure be reasonable and expeditious.

Physical changes that might be subject to association approval requirements include additions or renovations, landscaping, choice of exterior paint colors, coverings, or roofing materials, changes to

windows and balconies, and other such changes to the structure or appearance of the property.

Subdivision (a)(5) (4) provides an applicant with the option to seek reconsideration of a disapproval decision, at an open meeting of the board of directors. If a separate interest is part of more than one association, a disapproval decision would be reconsidered by the board of the association that made the disapproval decision. Nothing in this subdivision is intended to imply that a board meeting required under another provision is not open. See Section 1363.05 (Common Interest Development Open Meeting Act). An applicant preserves other remedies whether or not the applicant seeks reconsideration. The right of reconsideration by the board only applies if the initial decision is made by an entity other with a different membership than the board of directors or is made at a meeting that does not satisfy the requirements of Section 1363.05.

The requirements of this section apply regardless of any contrary provision in an association's governing documents. Nothing in this section affects the limitation on director liability provided in Section 1367.5 or in Corporations Code Section 7231.

Subdivision (b) 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 or the governing law. In many associations the governing documents require a vote of the membership to approve a change to the common area. See, e.g., *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 280 Cal. Rptr. 568 (1991). In other associations, the governing documents may permit changes to certain features of the common areas (such as common walls, ceilings, floors, and exclusive use common areas) with the approval of the association. See Civ. Code § 1351(i) ("exclusive use common area" defined). In all cases, the requirements of the governing documents control.

Nothing in this section prevents an association from adopting an operating rule, consistent with its governing documents, that provides for automatic approval of a specifically identified type of physical change.

Respectfully submitted,

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