Study H-854 November 10, 2004

Memorandum 2004-49

Preemption of CID Architectural Decisions (Comments on Tentative Recommendation)

This fall, the Commission circulated a tentative recommendation on *Preemption of CID Architectural Restrictions* (September 2004) (available at www.clrc.ca.gov). We received two letters commenting on the tentative recommendation. The first, from Jeff Aran, expresses general support for the proposed law. See Exhibit p. 1. The second, from Michael Doyle, describes problems he has had with his association's architectural review process. See Exhibit p. 2. Attachments to Mr. Doyle's letter that relate to the specifics of his dispute have not been reproduced.

BACKGROUND

The governing documents of many common interest developments require approval of the community association before a homeowner can make a physical change to the homeowner's property. The proposed law would make clear that an association decision on whether to approve a proposed change must be consistent with land use and public safety law, notwithstanding any contrary provision in the association's governing documents. This will help to avoid disputes and uncertainty that can result when an association's architectural restrictions conflict with the law.

SCOPE OF PREEMPTION

Mr. Doyle's letter describes the lengthy and costly difficulties he has faced in trying to obtain association approval for the construction of a new home. The association disapproved his home construction plans and sued him for grading his lot without prior association approval. Mr. Doyle believes that this is an illustration of the problem that the proposed law is intended to address. Local government *required* that Mr. Doyle grade and reinforce his lot before building, but the association *refused* to allow him to do so.

However, it is not clear from Mr. Doyle's letter whether his association has a rule against grading as such, or instead disapproved of the grading for other reasons (e.g., because it had not yet approved the house design and wanted to preserve the status quo until design problems had been worked out).

This raises an important point. An association's architectural rule should only be preempted to the extent that it conflicts with governing law. For example, if the law *requires* grading and an association rule *prohibits* grading, there is a direct conflict and the association rule must yield. However, if the law requires grading and the association *allows* grading, subject to some specified condition, the law and the association's rule may be compatible. For example, suppose that an association rule provides that "permission to grade shall be granted only after approval of a construction plan consistent with architectural guidelines." Such a rule would not appear to conflict with a law requiring grading as a prerequisite to new construction.

It might be helpful to expand the discussion in the Comment to make clear that an association rule can impose requirements that are different from what the law imposes, so long as the difference does not create a conflict:

> **Comment**. Subdivision (a)(3) of Section 1378 is amended to make clear that a decision on a proposed change must be consistent with building codes and other laws relating to land use and public safety. A restriction that requires violation of such a law is against public policy and is unenforceable. See Nahrstedt v. Lakeside Village Condominium Ass'n, 8 Cal. 4th 361, 382, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994). An association restriction may impose requirements beyond what is required by the law, so long as those additional requirements do not conflict with the law. For example, an association restriction requiring that a fence be five feet in height would be consistent with a municipal ordinance providing that a fence may not exceed six feet in height. An association restriction requiring that the fence be seven feet in height would conflict with the ordinance and would be unenforceable. The term "law" is intended to be construed broadly and includes a constitutional provision, statute, regulation, local ordinance, and court decision.
>
> Subdivision (a)(3) is consistent with other laws that subordinate an association restriction to important public policies. See, e.g., Sections 712 (restraint on display of sign advertising real property is void), 714 (prohibition of solar energy system is void), 782 (racially restrictive covenant is void), 1353.6 (prohibition on display of certain noncommercial signs is unenforceable), 1376 (prohibition on installation of television antenna or satellite dish is void); Health & Safety Code §§ 1597.40 (restriction on use of home for family day care is void), 13132.7(*l*) (rules governing roofing material in very

high fire hazard severity zone supersede conflicting provision of common interest development's governing documents).

Is the proposed Comment revision acceptable?

OTHER PROBLEMS

Mr. Doyle also asserts that there were other problems relating to his application to improve his lot: decisions were not provided on a timely basis, appeal rights were ignored, and decisionmakers may have had their own economic interests in mind in denying his application. We have heard similar sorts of concerns before. Violation of decisionmaking procedure presents an enforcement problem, which would be addressed in part by our proposal relating to *State Assistance to Common Interest Developments* (September 2004) — although in this case Mr. Doyle did litigate the matter and was still dissatisfied with the result.

Conflict of interest in association decisionmaking is a significant issue that the Commission should eventually address.

Mr. Doyle also recommends a significant narrowing of association discretion in making architectural decisions. He suggests that an association's architectural restrictions should be "strictly construed against the homeowners association." See Exhibit pp. 8-9. "This simple statement would take the wind out of 'vast discretion' that allows unreasonable, arbitrary, and capricious decisions by Architectural Committees or the Board of Directors." *Id*.

It is true that many associations have considerable discretion when making architectural decisions. The question of whether that discretion should be narrowed is beyond the scope of the current phase of the CID study. The issue is on our list of CID topics for future consideration.

RECOMMENDATION

The staff recommends that the Commission adopt the tentative recommendation as its final recommendation, with or without the proposed Comment revision.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

EMAIL FROM JEFF ARAN (OCTOBER 3, 2004)

I support the tentative recommendation on preemption of archtictureal HOA restrictions. We want to put on a new roof to eliminate wood shake, but the CC&R's says wood only. The HOA will not allow the new dimensional roofing product, even though it's safer (and looks better). So now we're faced with having to change the CC&R's, which is practically impossible.

As much as I detest more bureaucracy, I also think that a new state agency to oversee HOA's and help in dispute resolution is a great idea, but it would have to be well-funded!! Unless it has enforcement powers, it will flop. The state would be better perhaps just privatizing and funding such programs, following the lead of Kaiser's arbitration program, or the State Bar's arbitration dispute process available in each county.

Jeff Aran
Sacramento

Michael Doyle
26061 Buena Vista
Laguna Hills, CA 92653

October 14, 2004

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

Re: Lawsuit with my association for Architectural Approval.

Dear California Law Revision Commission,

I am writing this letter to you so that you might better understand the lawsuit between my association and me. I need your help as a legislature to make laws that protect property owners, that live in homeowners associations, with a Board of Directors that act wrongful.

Introduction

I have tried to work my matter out with the Board of Directors, but unfortunately we have not reached a compromise. There was a trial on this matter in Superior Court and, basically, the court has ruled that I must get an architectural approval before I can do grading. I don't believe that is what my governing documents state. The court would not give a ruling on the issue that I believe is the most important; "the building envelope for my house". According to the governing documents I believe that I followed those guidelines but the Court ruled that he could not make sense of the final clause as stated in the architectural regulations. I filed an appeal with my Board of Directors and the Court ruled I did not make an appeal even though my appeal was in writing and I had an acknowledgement letter from the property management company. I did not get a meeting, to discuss my project, at anytime with the Board of Directors even though the law and our CC&R's state this must be done. I believe that my building plans conform to all City ordinances and have been approved by the City of San Clemente's Planning, Engineering and Building Divisions. My plans sit at the City's Building Division, plan check approved, waiting for my HOA approval before my permit can be issued.

The Board members have used the general funds and all the road reserve funds (approximately $100,000.00) to pay attorneys for this litigation. As a Board member I do not agree with their action because these reserve funds should be kept separate, and if these funds are used for anything other than the reserve they were set up for, then I believe a vote from every member should be taken to decide if it is in the best interest of the community. The Board has already collected a special assessment of $2,500.00 from each of the 21 members in our association. Another

special assessment is eminent to replace the road reserve fund and continue with an appeal that could last a few years.

The attorney fees, on the association side, exceed $500,000.00. My attorney fees exceed $100,000.00 to defend this action. The court has awarded the association with over $400,000.00 in attorney fees and required me to remove return my lot to its previous condition. An appeal has been filed (4th Civil G034081). I believe that you, as a lawmaker, should know what is happening with this lawsuit and why your help is needed.

Below is a summary of my lawsuit and early events.

BY DEFINITION

Jim Bochniarz is, the secretary of the association, a member of the Board, the Architectural Committee chairman, and my next door neighbor. Gary Greenberg is the president of the association, member of the Board, Architectural Committee member and works for the daughter who is now building a home on the other side of my next door neighbor (Jim Bochniarz). When I refer to the "City" it is the City of San Clemente. When I refer to the "association" it is the Forster Ranch Estates C.A.

HISTORY

On or about February 26, 2002 my wife and I purchased lot 7 at 3015 Eminencia Del Norte in San Clemente , California, where we wanted to build our dream home. Before we purchased this property I had a meeting with the City to review the building envelope. I also reviewed the 1994 Guidelines for Architectural Style and April 1995 Architectural Regulations along with my CC&R's that I received through escrow. The City had required me to do extensive grading work to my lot before a house could be built because it was unstable and a potential hazard to the community. The City's engineering division required me to remove organic material and stabilize the soil conditions that the previous developer did not do correctly. The grading included excavating down to the original bedrock, installing a sub-drain, and grading in a keyway. During the grading process the topography of my lot was improved so that I would get a better ocean view and be able to build my house further back on my lot so that it did not interfere with my neighbor's (the Bochniarz's) ocean view as required in the 1994 Guidelines for Architectural Style. My first submittal of grading plans to the architectural committee was on or about April 1, 2002. There were 'concerns' about my proposed grading, but I could not get a meeting with the architectural committee to discuss their concerns. Finally the architectural committee requested, in a letter, for me to complete my house plans and submit them with the appropriate fees. My complete architectural submittal was on or about August 29, 2002. On or about September 25, 2002, the architectural committee officially denied my plans. I did not get a meeting with the architectural committee as required in the April 1995 Architectural Regulations. I appealed to the Board on September 30, 2002. The

first meeting with the architectural committee to discuss my plans was not until November 14, 2002. I did not get a decision from the Board as required by the CC&R's on an appeal. I believed that I was deemed approved according to the CC&R's in our association and the time limit set forth in the Forster Ranch Master Association CC&R's for the Board to answer an appeal. I then started to import good soils needed for my grading and stockpiled these soils on my lot on or about November 22, 2002. When the Board still would not meet with me, which I believe is required by the CC&R's and state law, or render a decision from my appeal, I finally started my grading on or about January 24, 2003. I obtained all the permits necessary from the City for Grading. The grading project was very expensive because of the extensive underground repairs that were required by the City. The City's engineering division will issue grading permits without HOA approval, but HOA approval is required before an improvement (house, etc.) is constructed.

On or about January 31, 2003 the association sued me for starting the grading without architectural committee approval. Both the association and myself agreed to attend mediation, a form of ADR (alternate dispute resolution), as required by state law. I asked that a quorum of the Board be present to make a decision. Instead it was Gary Greenberg, Jim Bochniarz, Jim Bochniarz's attorney, Jim Bochniarz's architect, and an attorney for the association that attended the mediation on or about February 21, 2003. We did not reach a compromise at this ADR. The lawsuit by the association escalated to Superior Court where the court ordered a $500,000. bond to be posted, by the association, to stop the grading. This was not done. Therefore, the grading continued and was completed in April 2003.

The lawsuit with the Association continued for Breach of CC&R's and Declaratory Relief. The Board was still unwilling to sit down and try to settle the matter. On or about April 14, 2003 I finally filed a cross-complaint against the Association and Board. The court eliminated the cross-complaint against the individuals of the Board before trial. At trial my cross-complaint had been reduce to Breech of Fiduciary Duty and Declaratory Relief against the association. Then, on or about May 15, 2003, Jim Bochniarz filed a similar lawsuit against me and added his own items: Violation of CC&R's, Declaratory Relief, Nuisance, Threatened Nuisance and Damages for Removal of Lateral Support. Before trial we had a meeting set up to try and settle this matter. Again I requested that a quorum of the Board be at this meeting. Instead it was only Gary Greenberg, and Jim Bochniarz from the Board. We did not reach a settlement at this meeting. It was apparent that the issue was stuck over the building height. The matter went to trial on or about October 14, 2003. (Which is a story of its own). On or about January 7, 2004, the court ruled that I graded without architectural approval. The court did not give us a decision on the height matter (the "building envelope"), which I believe is central to settling this dispute. On or about March 8, 2004, Jim Bochniarz dismissed the Nuisance, Threatened Nuisance and Damages for Removal of Lateral Support actions pursuant to a stipulation.

I believe that I have followed the 1994 Guidelines for Architectural Style and April 1995 Architectural Regulations. I believe that I followed the CC&R's although the court ruled that I needed architectural approval before I graded. I believe that my lot is more stable and is safer for the community. The court has ordered that my lot be returned to the original state as it was before the grading, but there may be problems with the City to return my lot to its original condition.

CURRENTLY

The total fees that the Association, insurance companies, and Bochniarz was requesting is over $500,000.00. The court awarded just over $400,000.00. An appeal for these extremely high attorney fees has also been filed. Therefore, I have continued my investigation to find if there are any more facts that support my project and make an offer that will return money spent by the association for the lawsuit.

I have two (2) letters that were given to me from the City that I thought were important to help the settlement of this lawsuit. I believe that most of the home sites in our community have been graded and built with permits according to the City building envelope and other City ordinances. The association's April 1995 Architectural Regulations also provide limits on the building envelope. In my particular case I believe it is the building envelope with setbacks and height limits that are at issue here. In a letter from the City's Community Development Director to Jim Bochniarz, dated February 12, 2003, it clearly states that; "The plans show that the house Mr. Doyle is proposing will be 33 feet above the original pad." (Attached exhibit 'A'). The city height limit is 35-feet above the existing grade, before I graded, inside the set backs from the four property lines. Therefore, I believe that Jim Bochniarz had been advised by the City that my house was within the limits set forth by the City ordinance. I believe he also would know that my house was within the limits of the association's April 1995 Architectural Regulations in section 11.1.a. as stated: "The maximum building height shall not exceed 35 feet from the existing pad, or, if a new pad is redesigned and graded, then from such new pad, unless otherwise approved by the Architectural Committee and this Architectural Committee stated limit or the City maximum." It seems that did not stop Jim Bochniarz, he hired an attorney and sued me. He also pursued the matter with the City. In another letter from the City's attorneys, Rutan & Tucker, to Jim Bochniarz's attorney, D. Michael Clauss, dated September 18, 2003, it states that the City has effectively enforced the 35 foot height restriction on the Doyle's project. The final paragraph reads: "Based on the foregoing, the City has properly and effectively enforced the 35-foot height restriction on the Doyles' Project. Any action alleging otherwise would be without merit. Should you wish to discuss this matter further, please do not hesitate to contact me." (Attached exhibit 'B')

As you can see by the overhead picture of our community (Attached exhibit 'C') the location and position of my house is consistent with other homes in the

community. I have taken the time to detail the 'ocean view corridor' which most all the homes have been positioned to take advantage of. I have taken another photo from the back of my property, (Attached exhibit 'D') with the Bochniarz house on the right, to show the direction of the ocean and valley views. When you look at the drawing (Attached Exhibit "E'), of the Bochniarz lot with house and the Doyle lot with proposed house, you will notice that the Doyle main residence is pushed back to give unobstructed panoramic views to the ocean from the front and side of the Bochniarz residence. You will also notice that the Doyle residence is 30-feet away from the Bochniarz property line which is one and a half times more than the City ordinance and twice as much as the association's April 1995 Architectural Regulations state.

Since the grading of Bochniarz's daughter's lot (which is on the other side of the Bochniarz house), during the month of May 2004, it is apparent that they too changed the topography to maximize their ocean views. After checking with the City I found that the daughter's lot had about double the amount of soils movement that my lot had. I believe that imported soils were used to raise the front of the lot similar to my lot. (Attached exhibit 'F'). When you look at the new pictures taken since the grading of the Bochniarz daughter's lot (Attached exhibit 'G') you will notice that the daughter's lot, the Bochniarz lot, and the Doyle lot have been re-graded to take advantage of the ocean views from the back of the community. Almost all the lots in our community have taken the intent in the 1994 Guidelines for Architectural Style and applied it. (Attached exhibit 'H'). As it states: "2. The Forster Ranch Estate homes should be designed in such a way so as to minimize the necessity of conforming to a set pattern on existing pads; to be considerate of neighbors' ocean views, and to establish an estate feeling as much as practicable. Specifically, homes should take up topographical fall in a lot through the use of varying or split levels when possible. Also, designs are encouraged that terrace up or down the hillside or otherwise maximize the ocean and other views and a variation in locations from one to another. Further, an architectural style should be chosen which is appropriate and lends itself to split levels and terracing of hillside development whenever possible."

I have attached a rendering of my proposed residence (Attached Exhibit 'I') to show that my proposed house will add value and would be pleasing and consistent with other homes in the community. The court has basically ruled that I must get architectural approval before grading. I have offered the Board to pay all the associations' out of pocket expenses (excluding insurance money), which has been indicated to be around $200,000.00 according to Ray Hoyle the Treasurer, if the architectural committee would review my plans again and approve them. If the architectural committee cannot approve my plans as is, then let me know what compromise we can work together on to achieve a fair resolution to this matter. Currently my plans are approved by the City and sit at the building department waiting for an approval letter from the Association before a building permit will be issued.

I believe I have preserved Bochniarz's ocean view. I believe that I have addressed all the concerns in the association's governing documents where it concerns my project.

When requesting to look at the architectural records for other homes built in our community I was told by the other Board members, at the Board meeting held on or about March 11, 2004, that all the architectural records of the community were lost.

I am currently investigating the possibility that Bochniarz threatened the Board with his own lawsuit against them if they did not follow his decision to deny me. (Attached exhibits J, K & L). I am also currently investigating the possibility that Gary Greenberg did grading on his lot without Architectural Committee approval and without City permits. Recently, the "daughter's" lot has been graded similar to my lot and I have been informed and believe that Gary Greenberg is the builder. I believe there was a conflict of interest because Bochniarz would benefit financially by stopping my house from being built on my lot. That is, Bochniarz would gain all of the views that would increase his property value significantly while my property could not be built out to get any of the views that the City's ordinances and association's governing documents state. I believe these ordinances and rules are to be administrated equally and without discrimination for all citizens of the community and members of the association.

On September 14, 2004, my association held its annual members meeting to elect 2 new board members. The attendance was 3 current Board members (including me), and 3 other members that were on the ballot; Bochniarz, his son in law, and one other member. The majority of the proxies were in the hands of Bochniarz, Greenberg, and the son in law which voted in Bochniarz and the son in law. They will probably stand firm to continue the lawsuit into the appellate court without further discussion with me. It will be an uphill battle to have a majority of the Board against me on my project for the foreseeable future.

SUMMARY

During trial the Court determined that the Board did not have to follow their governing documents because the Court admitted, in the 'statement of decision' that a vote and signed certificate from the committee was necessary but the Architectural Committee did not do this. Then the Court further noted that "Apart from the opaque statement that it may be "relied upon", the CC&R's do not make explicit ….., they also do not provide an express *remedy* for the committee's failure or neglect to issue one." During trial there was evidence shown that I requested, in writing, an appeal to the Board. (Exhibit M) There was even a response letter from the management company that acknowledged my request and said that they had forwarded it to the Board. (Exhibit N) The Court ruled that my letter was not an appeal.

I would appreciate your review of my appeal (4th Civil G034081). It will be clear to you that I am trying to show that the Architectural Committee and Board of

Directors did not follow their governing documents. Where votes were required, by the Architectural Committee to approve or deny my plans, only letters were sent from the Architectural Committee, which I believe was solely in the hands of Bochniarz and he had a conflict because he did not want a home built next door to him. When I asked for an appeal to the Board, I did not get a meeting or a written response from the Board, only another letter that stated the Architectural Committee denied my plans again. Imagine if our government did not use votes and only a letter from a committee member represented all the collected votes for everyone. Yet the court ruled it was ok for a letter even though our CC&R's explicitly required a vote and signed certificate for those who voted. Next time you have a matter that requires a vote just raise up a letter and say "I don't need your votes, I have this letter. I'm the Legislature and I say its OK".

Finally, the CC&R's were breeched by Board of Directors in that they were required to have an executive session meeting with me as set forth in Article IX, Section 16(b) in the Forster Estates CC&R's (by ignoring this important CC&R itself led to the litigation in January 2003). This requirement is reinforced with Civil Code 1363.(h). When this breech of the CC&R's was brought up during trial, the Court simply skipped over it.

Maybe the Court did not want to make law where there is no law. Maybe the Court twisted up the facts so that he complied with what he thought were the intentions of the Legislature; to hold the Association harmless at all costs. Maybe the Court just didn't want to follow the law because a side had already been decided early on. Maybe the Court didn't like my governing documents and decided that they were "opaque" and did not have enough "remedy" for him to decide what to do with an Association that went off the tracks. I don't know. All I know is that I bought property to build a custom home in San Clemente. I had a neighbor that had a conflict because he wanted all the views at my property's expense and did not want me to build next door. I appealed to the Board and received no reply. My neighbor threatened the Board with his own lawsuit against them if they did not have the Association sue me, then my next door neighbor sued me for the same reasons as the Association did. I believe that I have complied with the government ordinances; the Association's governing documents and took great care when designing my home to be pleasing in the community, not to mention designing my home in such a manner to protect Bochniarz's ocean views according to the governing documents. My plans have been approved by the City and await the association approval before a building permit for the Improvements can be issued.

How can a Court take all the government ordinances and association governing rules away from a member in an association and give an approval process to the discretion of a next door neighbor or a wrongful Board?

With your help, I am hopeful that we can prevent wrongful and costly legal entanglements by Associations in the future. I think it would be great if you could add just one simple sentence to CC1378: **"Any restriction on building in a**

homeowners association should be strictly construed against the homeowners association." This simple statement would take the wind out of "vast discretion" that allows unreasonable, arbitrary, and capricious decisions by Architectural Committees or the Board of Directors.

You can contact me anytime at (work) 949-888-3880 or (home) 949-831-8402 or (cell) 949-378-7960.

Sincerely,

Michael Doyle.

attach:

A. Letter to Jim Bochniarz from City Development Director: Feb. 12, 2004
B. Letter to Jim Bochniarz's attorney from City attorneys' Rutan & Tucker: Sep. 18, 2003
C. Picture: Overhead.
D. Picture: Rear of property views.
E. Drawing: Doyle and Bochniarz lots.
F. Picture: New grading of Bochniarz's daughter's lot.
G. Picture: Front of daughter, Bochniarz, Doyle lots today.
H. Document: 1994 Guidelines for Architectural Style
I. Picture: Doyle residence.
J. Document: Opposition by Bochniarz…. page 8, "threat".
K. Document: Time sheet by Attorney for Association…. May 18, 2003.
L. Document: Reply from Doyle attorney to "threat".
M. Document: Appeal letter to the Board of Directors.
N. Document: Acknowledgement that appeal letter was forwarded to the Board.