

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Alternative Dispute Resolution in Common Interest Developments

December 2002

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **March 31, 2003.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

The Law Revision Commission is engaged in a general study of the law relating to common interest developments. The objective of the study is to set a clear, consistent, and unified policy with regard to their formation and management and the transaction of real property interests located within them. The study will seek to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, and determine to what extent common interest housing developments should be subject to regulation.

In this recommendation, the Commission proposes the following improvements to California's dispute resolution process for common interest developments:

(1) The existing "mandatory" ADR requirement as a prerequisite to litigation should be preserved and improvements made to various weaknesses in the process.

(2) Every association should be required to offer its residents a simple, informal, and cost-free way to have their concerns heard and addressed.

(3) A statewide dispute resolution information center should be established that is readily accessible by associations and their residents, to provide information about the governing law and about the availability of local dispute resolution mechanisms.

The Commission has also studied, but does not at this time recommend, establishment of a governmental regulatory program for dispute resolution.

This recommendation was prepared pursuant to Resolution Chapter 166 of the Statutes of 2002.

ALTERNATIVE DISPUTE RESOLUTION IN
COMMON INTEREST DEVELOPMENTS

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BACKGROUND

The main body of law governing common interest developments is the Davis-Stirling Common Interest Development Act.¹ Other key statutes include the Subdivision Map Act, the Subdivided Lands Act, the Local Planning Law, and the Nonprofit Mutual Benefit Corporation Law, as well as various environmental and land use statutes. In addition, statutes based on separate, rather than common, ownership models still control many aspects of the governing law.² The complexities and inconsistencies of this statutory arrangement have been criticized by homeowners and practitioners, among others.³

Common interest developments are governed by boards of laypeople, elected from among the unit owners. Faced with the complexity of common interest development law, many of these volunteers make mistakes and violate procedures for conducting hearings, adopting budgets, establishing reserves, enforcing parking, and collecting assessments. Housing consumers do not readily understand and cannot easily exercise their rights and obligations.

The Law Revision Commission is engaged in a general study of the law relating to common interest developments. The objective of the study is to set a clear, consistent, and unified policy with regard to their formation and management and the transaction of real property interests located within them. The study will seek to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, and determine to what extent common interest housing developments should be subject to regulation.

The Commission will make a series of recommendations proposing revision of the laws governing common interest developments. Previous recommendations have dealt with the organization of the Davis-Stirling Common Interest Development Act⁴ and with procedural fairness in association rulemaking and decisionmaking.⁵ The current recommendation addresses alternative dispute resolution.

1. Civ. Code § 1350 *et seq.*
2. See, e.g., Civ. Code §§ 1102 *et seq.*, 2079 *et seq.* (real estate disclosure).
3. See, e.g., SR 10 (Lee and Sher) (Apr. 10, 1997); California Research Bureau, *Residential Common Interest Developments: An Overview* (Mar. 1998), available at <<http://www.library.ca.gov>>.
4. See *Organization of Davis-Stirling Common Interest Development Act*, 33 Cal. L. Revision Comm'n Reports ____ (2002).
5. See *Procedural Fairness in Association Rulemaking and Decisionmaking* 33 Cal. L. Revision Comm'n Reports ____ (2002).

1 ALTERNATIVE DISPUTE RESOLUTION

2 **Disputes Within Common Interest Developments**

3 A common interest housing development is characterized by (1) separate
4 ownership of dwelling space coupled with an undivided interest in the common
5 area, (2) covenants, conditions, and restrictions that limit use of both the common
6 area and separate ownership interests, and (3) administration of common property
7 by a homeowners' association. This structure inevitably leads to conflicts within
8 the development, either between the association management and an individual
9 homeowner, or between homeowners.

10 Experience suggests that disputes typically fall into one of several categories:

11 (1) Financial disputes (maintenance, common charges, special assessments, fines
12 and penalties, restrictions on resale or transfer, access to books and records).

13 (2) Architectural controls (repairs, alterations, painting, decor, landscaping).

14 (3) Pet issues (barking dogs, wandering cats, animal waste).

15 (4) Use of private space (leasing/subleasing, commercial or professional use).

16 (5) Personal interactions (facilities use, parking, noise, rudeness).

17 Good information is not available concerning the incidence of disputes of this
18 type in California. They are not uncommon, however. Data is available from other
19 jurisdictions in which there is government oversight of CID operations. That data
20 suggests that a dispute reaches the point where it becomes serious enough to lodge
21 a complaint approximately once per 200 dwelling units per year. In California,
22 with its estimated 3.5 million CID dwelling units, that would yield about 175,000
23 "serious" disputes in common interest developments each year.⁶

24 Many of the worst disputes appear to have started as relatively minor
25 disagreements that have escalated as the parties have taken entrenched positions. If
26 the disputes could be resolved quickly and inexpensively, all concerned would be
27 better off.

28 Litigation involving these types of disputes generally involves filing a lawsuit
29 and securing provisional relief (TRO and preliminary injunction), followed by a
30 trial with damages and attorney's fees. The litigation option might cost \$5,000 to
31 \$25,000. The cost of litigation necessary to resolve these disputes is often
32 disproportionate to the character of the dispute. Moreover, in a dispute between an
33 individual homeowner and the association, there is an inherent inequality of
34 position, since the association is able to fund litigation costs from association-wide
35 assessments, including assessment of the homeowner with whom the association is
36 engaged in litigation. Litigation is not a satisfactory way of resolving interactions
37 that arise out of daily living arrangements among persons who must continue to
38 interact with each other in the future.

39 The Law Revision Commission has concluded that California law governing
40 common interest developments could be substantially improved by, among other

6. For another effort to estimate the frequency of CID disputes, see Johnston & Johnston-Dodds, *Common Interest Developments: Housing at Risk?* (Cal. Res. Bur., Aug. 2002), at 35.

1 changes, providing more affordable and available means to ensure compliance
2 with the law and resolve disputes among CID members and boards.⁷

3 **Summary of Existing Law**

4 The Davis-Stirling Common Interest Development Act includes a number of
5 provisions relating to alternative dispute resolution. The principle ADR provision
6 — Civil Code Section 1354 — was added in 1994 in an effort to divert the
7 growing number of minor disputes involving common interest developments out
8 of congested courts.⁸ It was intended to encourage ADR for disputes involving
9 relatively minor issues, such as the height of fences, color of paint, number of
10 vehicles, outbuildings, and similar disputes that characterize contemporary life in
11 residential neighborhoods.

12 The relevant provisions of existing law include:

13 “*Mandatory*” ADR.⁹ Before either the association or an owner may file an action
14 to enforce an association’s governing documents (CC&Rs, bylaws, operating
15 rules, etc.), the parties must “endeavor” to submit their dispute to a form of
16 alternative dispute resolution such as mediation or arbitration, which may be
17 binding or nonbinding at the option of the parties. The parties bear the costs of any
18 ADR they may engage in.

19 This requirement is limited in its application. It applies only if the action is
20 solely for declaratory or injunctive relief (or for that type of relief in conjunction
21 with a claim for damages not exceeding \$5,000). It does not apply to a claim for
22 association assessments. The court may excuse a party’s failure to seek ADR in a
23 number of circumstances.¹⁰

24 *ADR for assessment dispute.*¹¹ A homeowner may invoke the ADR procedure
25 for an assessment dispute by paying under protest the amount of the assessment
26 plus late charges, interest, and delinquency costs.

27 *ADR required by governing documents.* The Davis-Stirling Act does not directly
28 address the issue of alternative dispute resolution (e.g., mandatory arbitration) that
29 may be required in an association’s governing documents. At least one provision
30 of the Davis-Stirling Act suggests that such a requirement might be enforceable.¹²

7. See also Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 St. John’s L. Rev. 75 (1999); French, *Scope of Study of Laws Affecting Common Interest Developments* (Nov. 2000), at 8.

8. The Davis-Stirling Act also provides for a form of ADR in developer-association disputes (construction design and defect). Civ. Code § 1375 *et seq.* That is beyond the scope of the present inquiry, which relates to operational disputes.

9. Civ. Code § 1354(b).

10. Civ. Code § 1354(c).

11. Civ. Code § 1366.3.

12. Civ. Code § 1366.3(a) (association must inform owner who pays assessment under protest of “any other procedures to resolve the dispute that may be available through the association”). At least one recent case holds a mandatory arbitration clause in CC&Rs unenforceable because unconscionable. *Villa Milano*

1 *Voluntary ADR.*¹³ If either the association or an owner has filed an action to
2 enforce the association’s governing documents, the action may be stayed and the
3 matter referred to ADR on written stipulation of the parties. Trial court delay
4 reduction rules do not apply during the time the action is stayed. The parties bear
5 the costs of the ADR.

6 *Attorney’s fees.*¹⁴ An incentive for the parties to agree to ADR is found in Civil
7 Code Section 1354(f), which assesses attorney’s fees against the losing party in the
8 event of a lawsuit. The statute also gives the court discretion, in determining the
9 amount awarded, to “consider a party’s refusal to participate in alternative dispute
10 resolution prior to the filing of an action.”

11 *Confidentiality of ADR communications.*¹⁵ An added incentive for ADR is the
12 confidentiality granted to ADR communications by Civil Code Section 1354(g)-
13 (h).

14 *Informing homeowners.*¹⁶ The Davis-Stirling Act requires that members of an
15 association be provided an annual summary of the ADR requirements.

16 *Attorney General intervention.*¹⁷ Various provisions of the nonprofit mutual
17 benefit corporations law govern the operations of common interest developments
18 under the Davis-Stirling Act. The Attorney General has authority under the
19 Corporations Code to intervene on behalf of members of the association who are
20 denied certain rights by the association, including:

- 21 • Failure to hold regular meetings of members.
- 22 • Failure to allow a member access to books and records of the association.
- 23 • Failure to provide annual financial reports to members.
- 24 • Failure on request to provide a list of names and addresses of members.

25 Complaints may be submitted to the Attorney General’s Public Inquiry Unit.
26 After a review, the Attorney General will send, if appropriate, a “Notice of
27 Complaint” letter with a copy of the complaint to the association, and direct the
28 association to respond to both the Attorney General and the member within 30
29 days. The Attorney General is authorized by statute to go further, but does not
30 ordinarily get involved beyond this.¹⁸ Lack of resources appears to be a
31 significant factor in this determination.

Homeowners Ass’n v. Il Davorge, 84 Cal. App. 4th 819, 102 Cal. Rptr. 2d 1 (2000) (clause limiting association’s right to sue developer for design and construction defects).

13. Civ. Code § 1354(d).

14. Civ. Code § 1354(f).

15. Civ. Code § 1354(g)-(h).

16. Civ. Code § 1354(i).

17. Gov’t Code § 8216.

18. The Attorney General’s Public Inquiry Unit has noted that many times a “Notice of Complaint” from that office will be sufficient to prompt an otherwise recalcitrant board of directors to resolve a complaint.

1 **Critique of Existing Law**

2 Participants in alternative dispute resolution processes in common interest
3 developments report mixed results. To a large extent, success or failure will
4 depend on the good faith of the participants and their motivation to achieve a
5 mutually agreeable resolution of the dispute. Because all involved have a
6 continuing relationship with each other in a residential setting, there are strong
7 forces that favor successful dispute resolution. The dispute resolution process may
8 also be enhanced by a readily accessible local dispute resolution program, such as
9 a neighborhood mediation program.

10 However, personalities can become a determinative factor in an intimate setting
11 such as a common interest development. An intransigent actor on either side of a
12 dispute can effectively preclude a rational resolution.

13 There are also structural factors that work against effective alternative dispute
14 resolution. These include the relative inequality of bargaining position between the
15 association and an individual homeowner, and the cost of invoking a neutral
16 resolution process.

17 The ability of the existing California alternative dispute resolution mechanisms
18 to cope with the conflicts inherent in a common interest development is limited.
19 The current statutes have a number of defects.¹⁹ The Law Revision Commission
20 recommends a tripartite approach to improvement of California's dispute
21 resolution process:

22 (1) Improve the existing "mandatory" ADR requirement as a prerequisite to
23 litigation.²⁰

24 (2) Require every association to offer its residents a simple, informal, and cost-
25 free way to have their concerns heard and addressed.²¹

26 (3) Establish a statewide dispute resolution information center, readily accessible
27 by associations and their residents, to provide information about the governing law
28 and about the availability of local dispute resolution mechanisms.²²

29 The Commission has also studied, but does not at this time recommend,
30 establishment of a governmental regulatory program for dispute resolution.²³

19. There are several published critiques of the statute. See Sproul, *Alternative Dispute Resolution for Common Interest Developments: Recent Amendments to Civil Code Section 1354 Fall Short*, 12 Cal. Real Prop. J. 28 (1994); Batchelder, *Mandatory ADR in Common Interest Developments: Oxymoronic or Just Moronic?*, 23 Thom. Jeff. L. Rev. 227 (2001).

20. See discussion of "Improvement of Current Statute" below.

21. See discussion of "Association Procedures" below.

22. See discussion of "Dispute Resolution Information Center" below.

23. See discussion of "Governmental Regulatory Program" below.

1 PROPOSED IMPROVEMENTS TO THE LAW

2 **Improvement of Current Statute**

3 The Davis-Stirling Act seeks to encourage parties to a dispute within the
4 association to resolve their differences out of court. Civil Code Section 1354
5 includes a well-articulated requirement that, before filing a lawsuit, the parties
6 must engage in alternative dispute resolution.

7 The statutory procedure, while salutary, has a number of limitations that render it
8 less effective than it might otherwise be. For example:

9 • The statute only requires ADR efforts before filing suit to enforce the
10 association's governing documents. But it may be equally important to resolve
11 disputes involving statutory requirements of the Davis-Stirling Act or of the
12 Nonprofit Mutual Benefit Corporation Law that are applicable to the association
13 and its members.

14 • The statute excuses ADR efforts if a lawsuit is filed within 120 days of the
15 running of the statute of limitations. This facilitates manipulation by a party who
16 may simply wait until 120 days before the statute expires, and then file suit.

17 • The statute only requires ADR efforts before bringing an action for declaratory
18 or injunctive relief. But writ relief is an equally important vehicle for enforcing
19 rights in the common interest development context, and it is not covered.

20 • The duty to make a good faith effort to resolve the dispute out of court is
21 enforceable by an award of attorney's fees and costs to the prevailing party. But
22 the statute as drawn appears to limit the award to actions to enforce covenants and
23 restrictions, omitting actions to enforce other governing documents of the
24 association or applicable laws.²⁴

25 • There are numerous other lesser defects in the statute, such as an inefficient
26 and ineffective manner of service of a request for dispute resolution, and ADR
27 confidentiality provisions that are narrower in coverage than the general mediation
28 confidentiality provisions of the Evidence Code.

29 The proposed law addresses these concerns by expanding the application of the
30 existing statute to cure these defects. The proposed law also reorganizes and
31 recasts the existing statute for ease of use and understanding.²⁵

24. Cf. *Kaplan v. Fairway Oaks Homeowners Ass'n*, 98 Cal. App. 4th 715, 120 Cal. Rptr. 2d 158 (2002) ("The Legislature obviously intended to broaden the availability of attorney fee awards by authorizing attorney fees in an action to enforce the governing documents rather than just the declaration.")

25. In conjunction with the overhaul of Civil Code Section 1354(b), the proposed law would also remedy a technical defect in the wording of Civil Code Section 1354(a), relating to enforcement of governing documents promulgated pursuant to CC&Rs. Section 1354(a) addresses enforcement of CC&Rs but not of other governing documents, creating an implication that there is no enforcement mechanism for other governing documents. See, e.g., *Sproul & Rosenberry, Advising California Condominium and Homeowners Associations*, § 7.1 (Cal. Cont. Ed. Bar 1991). The case law is reasonably clear that governing documents are enforceable if consistent with CC&Rs and unenforceable if not. See, e.g., *MaJOR v. Miraverde Homeowners Ass'n*, 7 Cal. App. 4th 626, 9 Cal. Rptr. 2d 237 (1992) (inconsistent and unenforceable); *Liebler v. Point Loma Tennis Club*, 40 Cal. App. 4th 1609, 47 Cal. Rptr. 2d 783 (1995) (consistent and enforceable). For a general discussion of relevant principles, see, e.g., *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 377, 878 P. 2d 1275, 33 Cal. Rptr. 2d 63 (1994). The

1 A significant limitation of existing law is that, while it encourages ADR efforts,
2 it does not mandate ADR. The attorney's fees and costs sanction is an inducement
3 for the parties to resolve their dispute out of court, but experience suggests that
4 this type of sanction is ineffective in many CID disputes. It may be questioned
5 whether mandatory ADR would be any more effective than the threat of monetary
6 sanctions. Pilot projects in Los Angeles County involving mandatory mediation in
7 civil cases are currently being analyzed by the Judicial Council, but reports on
8 experience under them are not yet available.²⁶ The Commission plans to review
9 the results of these programs before considering whether to require mediation in
10 the common interest development context.

11 **Association Procedures**

12 The formal alternative dispute resolution process that is prerequisite to litigation
13 under Civil Code Section 1354 contemplates use of a neutral such as a mediator or
14 arbitrator in the resolution of the dispute. While use of a neutral to help resolve a
15 dispute may be effective to avert litigation, it is nonetheless a costly remedy in the
16 context of the nonmonetary types of disputes that frequently surface in daily
17 interactions in a common interest development. A person should be able to resolve
18 a dispute involving ordinary living arrangements without having to go to the
19 extent of a formal dispute resolution process.

20 For this reason, the proposed law includes a requirement that every
21 homeowner's association must make available a fair, reasonable, and expeditious
22 internal dispute resolution mechanism, at no cost to its members.²⁷ This would
23 supplement the formal dispute resolution procedure involving use of a neutral
24 Civil Code Section 1354.

25 Under the proposed law, if an association fails to provide such an internal
26 dispute resolution mechanism, a default dispute resolution mechanism would
27 apply. The default mechanism is a meet and confer process, in which the board is
28 required to appoint one of its members to meet with the homeowner and hear the
29 complaint, and is empowered to settle the matter on the spot.

30 **Dispute Resolution Information Center**

31 A significant impediment to dispute resolution in the common interest
32 development setting is the simple fact that associations and their residents may not
33 know where to turn for help in resolving a dispute. Neighborhood dispute

proposed law would add statutory language concerning enforceability to Section 1354(a), making it unnecessary to ferret out case law on the matter.

26. See Code Civ. Proc. §§ 1730 *et seq.* (court-related alternative dispute resolution processes), 1775 *et seq.* (civil action mediation).

27. This is analogous to the New Jersey requirement that a planned real estate development "shall provide a fair and efficient procedure for the resolution of disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation." N.J.S.A. 45:22A-44(c).

1 resolution resources may be readily available, for example, but the parties may be
2 unaware of their existence or how to access them.

3 The Commission believes there is a need for a dispute resolution information
4 center that people can turn to for information about common interest development
5 dispute resolution. A statewide information center, accessible by a toll-free
6 number or on the world wide web could be inexpensively maintained and would
7 be cost effective in assisting common interest development residents in resolving
8 disputes without having to resort to litigation. Besides information about local
9 mediation programs and other dispute resolution resources, the information center
10 could provide basic information about the Davis-Stirling Common Interest
11 Development Act and other governing laws. This should reduce litigation because
12 in many instances a dispute results from a simple lack of understanding about
13 basic rights and responsibilities under the law.

14 There are a number of state agencies that might be appropriate to maintain a
15 dispute resolution information center. For example, the Department of Justice has
16 existing enforcement authority under the Nonprofit Mutual Benefit Corporation
17 Law. The Department of Consumer Affairs administers the Dispute Resolution
18 Programs Act, and maintains public information channels about local dispute
19 resolution programs. The Department of Real Estate regulates development of
20 common interest developments. The Administrative Office of the Courts
21 coordinates with court clerk's offices in each county and would be in a position to
22 help disseminate dispute resolution information to potential litigants. Beginning
23 January 1, 2003, the Secretary of State has responsibility to register biennially
24 every California CID and must make the registration data available as public
25 information.²⁸

26 Of these entities, the Commission recommends that the Secretary of State be
27 assigned responsibility to maintain the CID dispute resolution information center.
28 The Secretary of State will have ongoing contact with every association in the
29 state, and will be a repository of information about common interest developments
30 that interested persons are likely to contact. Moreover, the Secretary of State has
31 available a funding mechanism to maintain the information center — the CID
32 registration fee should be more than adequate for that purpose.²⁹ This funding
33 source is significant in an era of limited state resources.

34 **Governmental Regulatory Program**

35 Apart from the dispute resolution information center, the Commission does not
36 recommend a governmental dispute resolution program. The Commission has
37 examined governmental regulatory programs devoted to dispute resolution in other

28. Civ. Code § 1363.6.

29. The Secretary of State is authorized to assess a registration fee of up to \$30 per filing. Civ. Code § 1363.6. The proposed legislation would authorize a portion of this fee to be allocated to maintenance of the dispute resolution information center. See proposed Civ. Code § 1363.7.

1 jurisdictions, both domestic and foreign. Such programs offer the opportunity for
2 hands-on resolution of common interest development disputes. A few of these
3 programs in the United States are summarized here.

4 *Florida*

5 For at least the past decade Florida law has mandated nonbinding arbitration or
6 mediation as a prerequisite to litigation of a CID dispute.³⁰ The Division of Florida
7 Land Sales, Condominiums and Mobile Homes employs full-time attorneys to
8 serve as arbitrators. If a mediation is successful, the parties settle the dispute on the
9 spot and share equally the expense of mediation. If the case goes to nonbinding
10 arbitration, the prevailing party is awarded the costs of arbitration and a reasonable
11 attorney's fee. Arbitration and litigation expenses are awarded to the prevailing
12 party.

13 Reports of experience with the Florida system are mixed. That may be due in
14 part to the fact that there appear to have been far more complaints than the
15 program's funding can cover.

16 *Nevada*

17 Nevada has recently created a state office of Ombudsman for Owners in
18 Common Interest Communities.³¹ It has the following responsibilities:

- 19 (1) Assist in processing claims submitted for mediation or arbitration.
- 20 (2) Assist owners to understand their rights and responsibilities, including
21 publishing materials relating to rights and responsibilities of homeowners.
- 22 (3) Assist board members to carry out their duties.
- 23 (4) Compile a registry of CID associations.

24 The Ombudsman is funded by a \$3 annual assessment on homeowners.

25 It is premature to assess the success of the program, but initial results are
26 promising.

27 *Montgomery County, Maryland*

28 Montgomery County, Maryland, has by ordinance adopted a complete scheme
29 for nonjudicial resolution of CID disputes.³² The 1991 law creates a county
30 Commission on Common Interest Communities that, among other activities, seeks
31 to reduce the number and divisiveness of disputes, provide and encourage informal
32 resolution of disputes, and (if necessary) conduct formal hearings. A dispute may
33 not be filed with the Commission until the parties have made a good faith attempt
34 to exhaust all procedures provided in the association documents. When an
35 association learns of a dispute, it must notify the parties of the right to file with the
36 Commission. The Commission will provide mediation services to the parties on

30. Fla. Stat. Ann. § 718.1255.

31. Nev. Rev. Stat. Ann. § 116.1116.

32. Mont. County Code, Ch. 10B.

1 request. If mediation fails, or is rejected by a party, the dispute goes to a hearing
2 before a balanced hearing panel or to a County hearing officer (in which case the
3 hearing officer's decision is subject to review by a hearing panel). The hearing
4 panel may resolve the dispute, award damages, and award costs and attorney's fees
5 in appropriate situations. Its decision is binding on the parties and is subject to
6 only limited judicial review. A failure to comply with the decision is a civil
7 offense, and the decision is enforceable by the full enforcement mechanisms of the
8 county, including the County Attorney.

9 This dispute resolution process has been highly successful.

10 *Evaluation*

11 Superintendence of common interest development disputes by a governmental
12 regulatory body offers an opportunity for effective dispute resolution. Expert
13 neutral personnel can effectively evaluate the resolution mechanism that appears
14 most appropriate for the particular dispute, and assist in resolution of the dispute.
15 The dispute resolution rate, and satisfaction with the process, is generally high for
16 well-established programs both in the United States and abroad.

17 Nonetheless, the Commission does not at this time recommend establishment of
18 such a program in California. The size of the bureaucracy that would be required
19 for an effective program in California is problematic, particularly in an era of
20 reduced state resources. It would be possible to fund such a program by assessing
21 all common interest development units in the state; however, such a scheme would
22 in effect tax well-run and harmonious associations for the benefit of those
23 characterized by strife.

24 The Commission believes that the steps outlined in this recommendation should
25 be taken as an initial matter to encourage dispute resolution by ordinary, non-
26 bureaucratic processes — require informal efforts within each association,
27 strengthen the existing formal ADR requirements for CIDs, and provide
28 information to the disputants about rights and procedures that may help them
29 resolve the dispute. If these measures prove to be ineffective, the Commission
30 would revisit the question of a state regulatory program.

31 If, on the other hand, a state regulatory program is established for oversight of
32 common interest developments generally, then it would be appropriate to consider
33 a dispute resolution function as part of that program. The Commission does not at
34 this time recommend creation of such a program for the sole purpose of dispute
35 resolution.

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PROPOSED LEGISLATION

1 ☞ **Note.** The chapter headings referred to in this draft assume enactment of the Commission's
2 recommendation regarding the structure of the Davis-Stirling Common Interest Development Act.
3 See *Organization of Davis-Stirling Common Interest Development Act*, 33 Cal. L. Revision
4 Comm'n Reports ____ (2002).

5 **Civ. Code § 1354 (amended). Enforcement of covenants and restrictions**

6 SECTION 1. Section 1354 of the Civil Code is amended, to read:

7 1354. (a) The covenants and restrictions in the declaration shall be enforceable
8 equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind
9 all owners of separate interests in the development. Unless the declaration states
10 otherwise, these servitudes and governing documents adopted pursuant to them
11 may be enforced by any owner of a separate interest or by the association, or by
12 both.

13 ~~(b) Unless the applicable time limitation for commencing the action would run~~
14 ~~within 120 days, prior to the filing of a civil action by either an association or an~~
15 ~~owner or a member of a common interest development solely for declaratory relief~~
16 ~~or injunctive relief, or for declaratory relief or injunctive relief in conjunction with~~
17 ~~a claim for monetary damages, other than association assessments, not in excess of~~
18 ~~five thousand dollars (\$5,000), related to the enforcement of the governing~~
19 ~~documents, the parties shall endeavor, as provided in this subdivision, to submit~~
20 ~~their dispute to a form of alternative dispute resolution such as mediation or~~
21 ~~arbitration. The form of alternative dispute resolution chosen may be binding or~~
22 ~~nonbinding at the option of the parties. Any party to such a dispute may initiate~~
23 ~~this process by serving on another party to the dispute a Request for Resolution.~~
24 ~~The Request for Resolution shall include (1) a brief description of the dispute~~
25 ~~between the parties, (2) a request for alternative dispute resolution, and (3) a notice~~
26 ~~that the party receiving the Request for Resolution is required to respond thereto~~
27 ~~within 30 days of receipt or it will be deemed rejected. Service of the Request for~~
28 ~~Resolution shall be in the same manner as prescribed for service in a small claims~~
29 ~~action as provided in Section 116.340 of the Code of Civil Procedure. Parties~~
30 ~~receiving a Request for Resolution shall have 30 days following service of the~~
31 ~~Request for Resolution to accept or reject alternative dispute resolution and, if not~~
32 ~~accepted within the 30-day period by a party, shall be deemed rejected by that~~
33 ~~party. If alternative dispute resolution is accepted by the party upon whom the~~
34 ~~Request for Resolution is served, the alternative dispute resolution shall be~~
35 ~~completed within 90 days of receipt of the acceptance by the party initiating the~~
36 ~~Request for Resolution, unless extended by written stipulation signed by both~~
37 ~~parties. The costs of the alternative dispute resolution shall be borne by the parties.~~

38 (c) ~~At the time of filing a civil action by either an association or an owner or a~~
39 ~~member of a common interest development solely for declaratory relief or~~

1 ~~injunctive relief, or for declaratory relief or injunctive relief in conjunction with a~~
2 ~~claim for monetary damages not in excess of five thousand dollars (\$5,000),~~
3 ~~related to the enforcement of the governing documents, the party filing the action~~
4 ~~shall file with the complaint a certificate stating that alternative dispute resolution~~
5 ~~has been completed in compliance with subdivision (b). The failure to file a~~
6 ~~certificate as required by subdivision (b) shall be grounds for a demurrer pursuant~~
7 ~~to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to~~
8 ~~Section 435 of the Code of Civil Procedure unless the filing party certifies in~~
9 ~~writing that one of the other parties to the dispute refused alternative dispute~~
10 ~~resolution prior to the filing of the complaint, that preliminary or temporary~~
11 ~~injunctive relief is necessary, or that alternative dispute resolution is not required~~
12 ~~by subdivision (b), because the limitation period for bringing the action would~~
13 ~~have run within the 120-day period next following the filing of the action, or the~~
14 ~~court finds that dismissal of the action for failure to comply with subdivision (b)~~
15 ~~would result in substantial prejudice to one of the parties.~~

16 ~~(d) Once a civil action specified in subdivision (a) to enforce the governing~~
17 ~~documents has been filed by either an association or an owner or member of a~~
18 ~~common interest development, upon written stipulation of the parties the matter~~
19 ~~may be referred to alternative dispute resolution and stayed. The costs of the~~
20 ~~alternative dispute resolution shall be borne by the parties. During this referral, the~~
21 ~~action shall not be subject to the rules implementing subdivision (c) of Section~~
22 ~~68603 of the Government Code.~~

23 ~~(e) The requirements of subdivisions (b) and (c) shall not apply to the filing of a~~
24 ~~cross-complaint.~~

25 ~~(f) In any action specified in subdivision (a) to enforce the governing documents,~~
26 ~~the prevailing party shall be awarded reasonable attorney's fees and costs. Upon~~
27 ~~motion by any party for attorney's fees and costs to be awarded to the prevailing~~
28 ~~party in these actions, the court, in determining the amount of the award, may~~
29 ~~consider a party's refusal to participate in alternative dispute resolution prior to the~~
30 ~~filing of the action.~~

31 ~~(g) Unless consented to by both parties to alternative dispute resolution that is~~
32 ~~initiated by a Request for Resolution under subdivision (b), evidence of anything~~
33 ~~said or of admissions made in the course of the alternative dispute resolution~~
34 ~~process shall not be admissible in evidence, and testimony or disclosure of such a~~
35 ~~statement or admission may not be compelled, in any civil action in which,~~
36 ~~pursuant to law, testimony can be compelled to be given.~~

37 ~~(h) Unless consented to by both parties to alternative dispute resolution that is~~
38 ~~initiated by a Request for Resolution under subdivision (b), documents prepared~~
39 ~~for the purpose or in the course of, or pursuant to, the alternative dispute resolution~~
40 ~~shall not be admissible in evidence, and disclosure of these documents may not be~~
41 ~~compelled, in any civil action in which, pursuant to law, testimony can be~~
42 ~~compelled to be given.~~

1 (i) ~~Members of the association shall annually be provided a summary of the~~
2 ~~provisions of this section, which specifically references this section. The summary~~
3 ~~shall include the following language:~~

4 ~~“Failure by any member of the association to comply with the prefiling~~
5 ~~requirements of Section 1354 of the Civil Code may result in the loss of your~~
6 ~~rights to sue the association or another member of the association regarding~~
7 ~~enforcement of the governing documents.”~~

8 ~~The summary shall be provided either at the time the pro forma budget required~~
9 ~~by Section 1365 is distributed or in the manner specified in Section 5016 of the~~
10 ~~Corporations Code.~~

11 (j) ~~Any Request for Resolution sent to the owner of a separate interest pursuant~~
12 ~~to subdivision (b) shall include a copy of this section.~~

13 **Comment.** Subdivision (a) of Section 1354 is amended to make clear that documents
14 governing the operation of a common interest development or association, such as bylaws,
15 operating rules, and articles of incorporation or association, are enforceable to the same extent as
16 the declaration. See Section 1351(j) (“governing documents” defined). Governing documents are
17 enforceable under this section only if consistent with the declaration, if reasonable and
18 nondiscriminatory, and if adopted with proper authority and procedures, including any required
19 notice.

20 Subdivisions (b)-(j), relating to alternative dispute resolution, are relocated and revised as
21 Sections 1369.510-1369.590 (alternative dispute resolution). See the Comments to those sections
22 for details of the disposition and revision of former subdivisions (b)-(j).

23 **Civ. Code § 1363.7 (added). Common interest development information center**

24 SEC. 2. Section 1363.7 is added to the Civil Code, to read:

25 1363.7. (a) The Secretary of State shall maintain a common interest development
26 information center. The information maintained in the center shall be accessible to
27 the public by means of both an internet website and a toll-free automated
28 answering system, and by any other means the Secretary of State determines is
29 feasible and appropriate.

30 (b) The common interest development information center shall include all of the
31 following information:

32 (1) The text of, or directions for how to obtain the text of, this title, the Nonprofit
33 Mutual Benefit Corporation Act, and any other statute or regulation the Secretary
34 of State determines would be relevant to the operation of common interest
35 developments and the rights and duties of associations and members or owners.

36 (2) Information concerning nonjudicial resolution of disputes that may arise
37 within a common interest development, including contacts for locally available
38 alternative dispute resolution resources. The information may include appropriate
39 links to existing resources, such as the Dispute Resolution Programs Act.

40 (3) Any other information the Secretary of State determines would be useful to
41 common interest developments, associations, members, owners, and the public,
42 concerning common interest developments.

43 (c) The determinations made by the Secretary of State under this section are
44 within the Secretary of State’s discretion. The Secretary of State may make the

1 determinations by any procedure the Secretary of State deems appropriate; the
2 determinations are not subject to the rulemaking requirements of the
3 Administrative Procedure Act.

4 (d) The Secretary of State shall fund the cost of maintaining the common interest
5 information center from the filing fee provided for in Section 1363.6.

6 **Comment.** Section 1363.7 establishes a statewide information center for common interest
7 developments. The section builds on the Secretary of State's function to maintain a common
8 interest development registry under Section 1363.6.

9 Subdivision (a) requires that the common interest development information center be accessible
10 via the internet and by a toll-free phone response system. However, nothing precludes the
11 Secretary of State from providing a more extensive information center, including paper copies of
12 information, a response staff, etc., if feasible within funding constraints.

13 The key information required by subdivision (b) relates to rights and duties within a common
14 interest development, and procedures for resolving disputes within a common interest
15 development. However, depending on available resources, the Secretary of State may wish to
16 expand the functions of the information center to include other relevant matters, such as contacts
17 for common interest development management, homeowner rights organizations, and the like.
18 Under subdivision (c), this decision and other determinations of the Secretary of State concerning
19 the information center, are within the discretion of the Secretary of State.

20 Subdivision (d) provides the funding mechanism for the common interest development
21 information center. The Secretary of State should set the fee authorized by Section 1363.6
22 (common interest development registry) at a level sufficient to maintain both the information
23 center and the registry.

24 **Civ. Code §§ 1363.810-1363.840 (added). Dispute resolution procedure**

25 SEC. 3. Article 5 (commencing with Section 1363.810) is added to Chapter 4 of
26 Title 6 of Part 4 of Division 2 of the Civil Code, to read:

27 Article 5. Dispute Resolution Procedure

28 **§ 1363.810. Scope of article**

29 1363.810. (a) This article applies to a dispute between an association and a
30 member, or between members of an association, involving their rights, duties, or
31 liabilities under this title, under the Nonprofit Mutual Benefit Corporation Law, or
32 under the governing documents of the common interest development or
33 association.

34 (b) This article supplements, and does not replace, Article 2 (commencing with
35 Section 1369.510) of Chapter 7, relating to alternative dispute resolution as a
36 prerequisite to an enforcement action.

37 **Comment.** Article 5 (commencing with Section 1363.810) is intended to provide a simple and
38 efficient intra-association dispute resolution procedure at no cost to the parties. This is distinct
39 from the alternative dispute resolution process involving a neutral that is required by Article 2
40 (commencing with Section 1369.510) of Chapter 7 as a prerequisite to litigation to resolve the
41 dispute.

42 The Nonprofit Mutual Benefit Corporation Law is found at Part 3 (commencing with Section
43 7110) of Division 2 of Title 1 of the Corporations Code.

1 **§ 1363.820. Fair, reasonable, and expeditious dispute resolution procedure required**

2 1363.820. (a) An association shall provide a fair, reasonable, and expeditious
3 procedure for resolving a dispute within the scope of this article.

4 (b) A dispute resolution procedure provided by an association is presumed to be
5 fair, reasonable, and expeditious. The presumption created by this subdivision is a
6 presumption affecting the burden of proof.

7 (c) If an association does not provide a fair, reasonable, and expeditious
8 procedure for resolving a dispute within the scope of this article, the procedure
9 provided in Section 1363.840 applies to the association and satisfies the
10 requirement of subdivision (a).

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

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

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

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

30 The minimum requirements for an association’s internal dispute resolution procedure are
31 prescribed in Section 1363.830. The default meet and confer procedure applicable if an
32 association fails to adopt a fair, reasonable, and expeditious procedure is prescribed in Section
33 1363.840.

34 **§ 1363.830. Minimum requirements of association procedure**

35 1363.830. A fair, reasonable, and expeditious dispute resolution procedure shall
36 at a minimum satisfy all of the following requirements:

37 (a) The procedure may be invoked by any party to the dispute, including an
38 association.

39 (b) If the procedure is invoked by a member in a dispute with the association, the
40 association shall participate in, and is bound by any resolution of the dispute
41 pursuant to, the procedure.

42 (c) If the procedure is invoked by a member in a dispute with another member,
43 or by the association in a dispute with a member, the member may elect not to
44 participate in the procedure. If the member participates but the dispute is resolved
45 other than by agreement of the member, the member shall have a right of appeal to
46 the board of directors of the association.

1 (d) An agreement reached pursuant to the procedure binds the parties and is
2 judicially enforceable.

3 (e) The procedure shall be provided by the association without cost to the
4 participants.

5 **Comment.** Section 1363.830 prescribes the standards for an association’s fair, reasonable, and
6 expeditious internal dispute resolution procedure. If an association fails to provide a fair,
7 reasonable, and expeditious procedure, the default dispute resolution procedure provided in
8 Section 1363.840 is applicable.

9 **§ 1363.840. Default meet and confer procedure**

10 1363.840. (a) This section applies in an association that does not otherwise
11 provide a fair, reasonable, and expeditious dispute resolution procedure. The
12 procedure provided in this section is fair, reasonable, and expeditious, within the
13 meaning of this article, subject to good faith implementation by an association.

14 (b) Any party to a dispute may invoke the following procedure:

15 (1) The party may request another party to meet and confer in an effort to
16 resolve the dispute. The request may be oral or written, by whatever means
17 appears to the party appropriate to communicate the request.

18 (2) A member of an association may refuse a request to meet and confer. The
19 association may not refuse a request to meet and confer.

20 (3) If the association is a party to the dispute, the board of directors shall
21 designate a member of the board to meet and confer. If the association is not a
22 party to the dispute, but the parties request participation of the association, the
23 board of directors shall designate a member of the board to participate.

24 (4) The parties shall meet promptly at a mutually convenient time and place,
25 explain their positions to each other, and confer in an effort to resolve the dispute.
26 If the association is not a party but participates on request of the parties, the board
27 designee shall seek to facilitate resolution of the dispute.

28 (5) A resolution of the dispute agreed to by the parties shall be memorialized in
29 writing and signed by the parties, including any board designee on behalf of the
30 association. An agreement that is not in conflict with law or the governing
31 documents of the common interest development or association binds the parties
32 and is judicially enforceable.

33 **Comment.** Section 1363.840 provides a default dispute resolution procedure based on a “meet
34 and confer” model. See, e.g., Gov’t Code § 3505 (“Meet and confer in good faith” means that the
35 parties have the mutual obligation personally to meet and confer promptly upon request by either
36 party and continue for a reasonable period of time in order to exchange freely information,
37 opinions, and proposals, and to endeavor to reach agreement ...”)

38 An agreement reached pursuant to the meet and confer procedure prescribed in subdivision (b)
39 binds the parties, provided it is not inconsistent with law or the governing documents. Thus, for
40 example, a dispute could not legally be resolved by an agreement to a change in operating rules;
41 operating rules may only be changed by appropriate association action. But an agreement could
42 involve a commitment to bring the proposed rule change before the board with a favorable
43 recommendation for board action.

1 **Civ. Code § 1366.3 (amended). Alternative dispute resolution for assessments**

2 SEC. 4. Section 1366.3 of the Civil Code is amended to read:

3 1366.3. (a) The exception for disputes related to association assessments in
4 ~~subdivision (b) of Section 1354~~ Article 2 (commencing with Section 1369.510) of
5 Chapter 7 shall not apply if, in a dispute between the owner of a separate interest
6 and the association regarding the assessments imposed by the association, the
7 owner of the separate interest chooses to pay in full to the association all of the
8 charges listed in paragraphs (1) to (4), inclusive, and states by written notice that
9 the amount is paid under protest, and the written notice is mailed by certified mail
10 not more than 30 days from the recording of a notice of delinquent assessment in
11 accordance with Section 1367 or 1367.1; and in those instances, the association
12 shall inform the owner that the owner may resolve the dispute through alternative
13 dispute resolution as set forth in ~~Section 1354~~ Article 2 (commencing with Section
14 1369.510) of Chapter 7, civil action, and any other procedures to resolve the
15 dispute that may be available through the association.

16 (1) The amount of the assessment in dispute.

17 (2) Late charges.

18 (3) Interest.

19 (4) All reasonable fees and costs associated with the preparation and filing of a
20 notice of delinquent assessment, including all mailing costs, and including
21 reasonable attorney's fees not to exceed four hundred twenty-five dollars (\$425).

22 (b) The right of any owner of a separate interest to utilize alternative dispute
23 resolution under this section may not be exercised more than two times in any
24 single calendar year, and not more than three times within any five calendar years.
25 Nothing within this section shall preclude any owner of a separate interest and the
26 association, upon mutual agreement, from entering into alternative dispute
27 resolution for a number of times in excess of the limits set forth in this section.
28 The owner of a separate interest may request and be awarded through alternative
29 dispute resolution reasonable interest to be paid by the association on the total
30 amount paid under paragraphs (1) to (4), inclusive, of subdivision (a), if it is
31 determined through alternative dispute resolution that the assessment levied by the
32 association was not correctly levied.

33 **Comment.** Section 1366.3 is amended to correct section references.

34 The "other procedures to resolve the dispute that may be available through the association"
35 referred to in subdivision (a) would include the internal dispute resolution procedure required by
36 Sections 1363.810-1363.840 (dispute resolution procedure).

37 An association may elect to enforce a delinquent assessment in small claims court. Cf. Sproul
38 & Rosenberry, *Advising California Condominium and Homeowners Associations* § 4.19, at 170-
39 71 (Cal. Cont. Ed. Bar 1991) (small claims procedure preferred). In that case, alternative dispute
40 resolution provisions would be inapplicable, since the small claims procedure satisfies the same
41 functions. See Section 1369.520 & Comment (ADR prerequisite to enforcement action).

1 **Civ. Code § 1368.4-1369 (article heading). Miscellaneous provisions**

2 SEC. 5. An article heading is added immediately preceding Section 1368.4 of
3 the Civil Code, to read:

4 Article 1. Miscellaneous Provisions

5 **Civ. Code § 1369.510-1369.590 (added). Alternative dispute resolution**

6 SEC. 6. Article 2 (commencing with Section 1369.510) is added to Chapter 7 of
7 Title 6 of Part 4 of Division 2 of the Civil Code, to read:

8 Article 2. Alternative Dispute Resolution

9 **§ 1369.510. Definitions**

10 1369.510. As used in this article:

11 (a) “Alternative dispute resolution” means mediation, arbitration, conciliation, or
12 other nonjudicial procedure that involves a neutral party in the decisionmaking
13 process. The form of alternative dispute resolution chosen pursuant to this article
14 may be binding or nonbinding at the option of the parties.

15 (b) “Enforcement action” means a civil action or proceeding, other than a cross-
16 complaint, for any of the following purposes:

17 (1) Enforcement of this title.

18 (2) Enforcement of the Nonprofit Mutual Benefit Corporation Law.

19 (3) Enforcement of the governing documents of a common interest development.

20 **Comment.** The first sentence of subdivision (a) of Section 1369.510 continues the substance of
21 a portion of the first sentence of former Section 1354(b), and broadens it to include conciliation
22 and other nonjudicial processes that involve a neutral in dispute resolution. The second sentence
23 of subdivision (a) continues the substance of the second sentence of former Section 1354(b).

24 Subdivision (b) supersedes the portion of the first sentence of former Section 1354(b) that
25 limited the alternative dispute resolution process to enforcement of governing documents. Under
26 this section, an enforcement proceeding may involve enforcement of rights under this title and
27 under the Nonprofit Mutual Benefit Corporations Law as well. See also Section 1351(j)
28 (“governing documents” defined). The Nonprofit Mutual Benefit Corporations Law is found at
29 Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code.

30 Subdivision (b) continues the exemption of cross-complaints formerly found in Section
31 1354(e).

32 **§ 1369.520. ADR prerequisite to enforcement action**

33 1369.520. (a) An association or an owner or a member of a common interest
34 development may not file an enforcement action unless the parties have
35 endeavored to submit their dispute to alternative dispute resolution.

36 (b) This section applies only to an enforcement action that is solely for
37 declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim
38 for monetary damages not in excess of five thousand dollars (\$5,000). Except as
39 provided in Section 1366.3, this section does not apply to an action for association
40 assessments. This section does not apply to a small claims action.

1 **Comment.** Subdivision (a) of Section 1369.520 continues the substance of a portion of the first
2 sentence of former Section 1354(b). See also Section 1369.510 (“alternative dispute resolution”
3 and “enforcement action” defined). Subdivision (a) does not continue the exclusion for matters as
4 to which the applicable time limitation for commencing the action would run within 120 days.
5 Instead, action under this subdivision tolls a statute of limitations that would run within 120 days.
6 See Section 1369.550.

7 Subdivision (b) expands the provision of the first sentence of former Section 1354(b) governing
8 the types of enforcement actions to which the section applies, to include writ relief. It makes clear
9 that a dispute resolution effort is not a prerequisite to a small claims action. Because the
10 alternative dispute resolution requirement is limited to actions for declaratory, injunctive, or writ
11 relief (or those types of relief joined with a damage claim not exceeding the jurisdictional limit of
12 the small claims division of superior court), the requirement necessarily is inapplicable to small
13 claims proceedings. *Cf.* Code Civ. Proc. § 116.220 (limited jurisdiction of small claims court). A
14 small claims action itself satisfies key functions of alternative dispute resolution — it provides a
15 quick and inexpensive means of resolving a dispute within the jurisdiction of the small claims
16 division of the superior court.

17 Subdivision (b) also is revised to include an explicit cross-reference to Section 1366.3
18 (alternative dispute resolution for assessments). Although the alternative dispute resolution
19 requirement does not by its terms apply to assessment disputes, the requirement may be made
20 applicable pursuant to the procedure provided in Section 1366.3.

21 § 1369.530. Request for resolution

22 1369.530. (a) Any party to a dispute may initiate the process required by Section
23 1369.520 by serving on all other parties to the dispute a Request for Resolution.
24 The Request for Resolution shall include all of the following:

25 (1) A brief description of the dispute between the parties.

26 (2) A request for alternative dispute resolution.

27 (3) A notice that the party receiving the Request for Resolution is required to
28 respond within 30 days of receipt or the request will be deemed rejected.

29 (4) If the party on whom the request is served is the owner of a separate interest,
30 a copy of this article.

31 (b) Service of the Request for Resolution shall be by personal delivery, first class
32 mail, express mail, facsimile transmission, or other means reasonably calculated to
33 provide the party on whom the request is served actual notice of the request.

34 (c) A party on whom a Request for Resolution is served has 30 days following
35 service to accept or reject the request. If a party does not accept the request within
36 that period, the request is deemed rejected by the party.

37 **Comment.** Paragraphs (1)-(3) of Section 1369.530(a) continue the substance of the third and
38 fourth sentences of former Section 1354(b). Paragraph (4) continues the substance of former
39 Section 1354(j). As used in subdivision (a), “all other parties to the dispute” refers to all persons
40 intended to be named as parties to the enforcement action.

41 Subdivision (b) supersedes the fifth sentence of former Section 1354(b). It expands the
42 permissible manner of service of the Request for Resolution, consistent with general provisions
43 for notice of motion in civil proceedings.

44 Subdivision (c) continues the substance of the sixth sentence of former Section 1354(b).

45 ☞ **Note.** The Commission intends to consider the question whether ADR should be mandatory
46 rather than optional when results of pilot projects involving mandatory mediation in Los Angeles
47 County are available for evaluation.

1 **§ 1369.540. ADR process**

2 1369.540. (a) If the party on whom a Request for Resolution is served accepts
3 the request, the parties shall complete the alternative dispute resolution within 90
4 days after the party initiating the request receives the acceptance, unless extended
5 by written stipulation signed by both parties.

6 (b) Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence
7 Code applies to any form of alternative dispute resolution initiated by a Request
8 for Resolution under this article, other than arbitration.

9 (c) The costs of the alternative dispute resolution shall be borne by the parties.

10 **Comment.** Subdivision (a) of Section 1369.540 continues the substance of the seventh
11 sentence of former Section 1354(b).

12 Subdivision (b) supersedes former Section 1354(g)-(h). It replaces the former provisions with a
13 reference to the general mediation confidentiality statute, but precludes application of that statute
14 to arbitration proceedings pursuant to this article. See also Section 1269.510(a) (“alternative
15 dispute resolution” defined).

16 Subdivision (c) continues the eighth sentence of former Section 1354(b).

17 The parties to an agreement reached pursuant to alternative dispute resolution may include in
18 the agreement provisions for its enforcement in case of breach, such as a stipulation for entry of
19 judgment or for injunctive relief.

20 **§ 1369.550. Tolling of statute of limitations**

21 1369.550. If the applicable time limitation for commencing an enforcement
22 action would run within 120 days after service of a Request for Resolution, the
23 time limitation is extended to the 120th day after service. If the parties have
24 stipulated to an extension of the alternative dispute resolution period beyond the
25 120th day after service of a Request for Resolution pursuant to Section 1369.540,
26 a time limitation that would expire during the alternative dispute resolution period
27 is extended to the end of the stipulated period.

28 **Comment.** Section 1369.550 supersedes the first clause of former Section 1354(b), which
29 excepted actions in which the applicable time limitation would run within 120 days. Under
30 Section 1369.550, a Request for Resolution is required even if the statute of limitations would
31 expire within 120 days of the request. Instead, if the statute of limitations would run within 120
32 after service of the request, the statute is tolled until the 120th day after service of the request.

33 **§ 1369.560. Certification of efforts to resolve dispute**

34 1369.560. (a) At the time of commencement of an enforcement action, the party
35 commencing the action shall file with the initial pleading a certificate stating that
36 alternative dispute resolution has been completed in compliance with this article.

37 (b) Failure to file a certificate pursuant to subdivision (a) is grounds for a
38 demurrer or a motion to strike unless one of the following conditions is satisfied:

39 (1) The party commencing the action certifies in writing that one of the other
40 parties to the dispute refused alternative dispute resolution before commencement
41 of the action, or that preliminary or temporary injunctive relief is necessary.

42 (2) The court finds that dismissal of the action for failure to comply with this
43 article would result in substantial prejudice to one of the parties.

1 **Comment.** Subdivision (a) of Section 1369.560 continues the substance of the first sentence of
2 former Section 1354(c) and broadens its application to include writ proceedings and proceedings
3 for enforcement of this title and the Nonprofit Mutual Benefit Corporation Law as well as the
4 association’s governing documents. See Sections 1369.510(b) (“enforcement action” defined),
5 1369.520 (ADR prerequisite to enforcement action).

6 Subdivision (b) continues the substance of the second sentence of former Section 1354(c), but
7 no longer excuses compliance if the statute of limitations would run within 120 days after filing.
8 Cf. Section 1369.550 & Comment (tolling of statute of limitations). See also Code Civ. Proc. §§
9 430.10 (demurrer), 435 (motion to strike).

10 The requirement of this section does not apply to the filing of a cross-complaint. See Section
11 1369.510(b) (“enforcement action” defined).

12 **§ 1369.570. Stay of litigation for dispute resolution**

13 1369.570. (a) After an enforcement action is commenced, on written stipulation
14 of the parties the matter may be referred to alternative dispute resolution and
15 stayed.

16 (b) The costs of the alternative dispute resolution shall be borne by the parties.

17 (c) During a referral, the action is not subject to the rules implementing
18 subdivision (c) of Section 68603 of the Government Code.

19 **Comment.** Section 1369.570 continues the substance of former Section 1354(d) but expands its
20 application beyond actions for enforcement of covenants and restrictions. See Section
21 1369.510(b) (“enforcement action” defined).

22 **§ 1369.580. Attorney’s fees**

23 1369.580. The prevailing party in an enforcement action shall be awarded
24 reasonable attorney’s fees and costs. On motion for attorney’s fees and costs, the
25 court, in determining the amount of the award, may consider a party’s refusal to
26 participate in alternative dispute resolution before commencement of the action.

27 **Comment.** Section 1369.580 continues the substance of former Section 1354(f) but expands its
28 application beyond actions for enforcement of covenants and restrictions. See Section
29 1369.510(b) (“enforcement action” defined). This is consistent with existing law. See, e.g.,
30 *Kaplan v. Fairway Oaks Homeowners Ass’n*, 98 Cal. App. 4th 715, 120 Cal. Rptr. 2d 158 (2002)
31 (“The Legislature obviously intended to broaden the availability of attorney fee awards by
32 authorizing attorney fees in an action to enforce the governing documents rather than just the
33 declaration.”)

34 **§ 1369.590. Member information**

35 1369.590. (a) An association shall annually provide its members a summary of
36 the provisions of this article, that specifically references this article. The summary
37 shall include the following language:

38 Failure of a member of the association to comply with the prefiling
39 requirements of Section 1369.520 of the Civil Code may result in the loss
40 of your right to sue the association or another member of the association
41 regarding enforcement of the governing documents or the applicable law.

42 (b) The summary shall be provided either at the time the pro forma budget
43 required by Section 1365 is distributed or in the manner prescribed in Section
44 5016 of the Corporations Code.

- 1 **Comment.** Subdivision (a) of Section 1369.590 continues the substance of the first and second
2 paragraphs of former Section 1354(i). Subdivision (a) makes clear that it is the duty of the
3 association to provide the summary.
4 Subdivision (b) continues the third paragraph of former Section 1354(i).
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