

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Preemption of CID Architectural Restrictions

September 2004

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 **October 29, 2004.**

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 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 avoid disputes and uncertainty that can result when an association's architectural restrictions conflict with the law.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

PREEMPTION OF CID ARCHITECTURAL RESTRICTIONS

1 The governing documents of many common interest developments require
2 approval of the community association before a homeowner can make a physical
3 change to the homeowner's property. For example, a homeowner might be
4 required to obtain approval before replacing a roof or making changes to
5 landscaping. In deciding whether to approve a proposed change, the association is
6 bound by restrictions in the association's governing documents.

7 An architectural restriction may conflict with land use or public safety law. For
8 example, a restriction designed to ensure uniformity may require use of a
9 particular type of roofing material (e.g., wood shakes). Subsequent changes in fire
10 safety law may prohibit the use of wood shakes. In such a case, the association
11 may be unsure whether its restriction is preempted and may feel duty-bound to
12 enforce its restriction until a court rules on the enforceability of the restriction.¹
13 This uncertainty can lead to unnecessary litigation and expense and may result in
14 perpetuation of an unlawful and unsafe condition.²

15 The specific problem of a conflict between an association restriction on roofing
16 material and fire safety law has been addressed, by requiring that an association
17 accept at least one of the types of roofing material required by fire safety law.³
18 However, there are many other potential sources of conflict between an association
19 architectural restriction and the law. For example, fire safety law may require that
20 vegetation be cleared within a certain distance of structures in fire-prone areas.
21 Such a requirement might conflict with an association landscaping restriction.

22 As a matter of policy, an association architectural restriction should be
23 preempted by governing land use and public safety law. The fact that an
24 association chooses to restrict its own use of property should not exempt it from
25 generally applicable legal requirements.

26 As a matter of law, a restriction that conflicts with land use or public safety law
27 is probably unenforceable. A restriction is unenforceable if it conflicts with
28 fundamental public policy or if it imposes a burden on the use of affected land that
29 far outweighs any benefit.⁴ Land use and public safety laws implement important
30 public policies. They ensure that structures conform to established health and
31 safety and construction standards. The burden of an architectural restriction that
32 requires maintenance of an unsound or unsafe condition outweighs the benefit of
33 aesthetic uniformity.

1. A recorded restriction is presumed to be valid and enforceable, putting the burden on a challenger to prove in court that the restriction is unreasonable. See generally *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994).

2. See, e.g., *Lakiesha McGhee, Raising Roof in Fair Oaks*, Sac. Bee, Nov. 5, 2003, at B1.

3. See 2004 Cal. Stat. ch. 318, §§ 1-2 (Civ. Code § 1353.7; Health & Safety Code § 13132.7).

4. *Nahrstedt*, 8 Cal. 4th at 382.

1 The proposed law would eliminate any uncertainty as to whether an architectural
2 restriction that conflicts with land use or public safety law should be enforced.
3 This will provide clear guidance to association board members and help avoid the
4 need for a lawsuit to invalidate such a restriction.

5 Existing law already requires that an architectural review decision be consistent
6 with governing law.⁵ The proposed law would make clear that this rule applies to a
7 conflict between an association's governing documents and land use and public
8 safety law.

5. See Civ. Code § 1378(a)(3).

PROPOSED LEGISLATION

1 **Civ. Code § 1378 (amended). Architectural review and decisionmaking**

2 1378. (a) This section applies if an association's governing documents require
3 association approval before an owner of a separate interest may make a physical
4 change to the owner's separate interest or to the common area. In reviewing and
5 approving or disapproving a proposed change, the association shall satisfy the
6 following requirements:

7 (1) The association shall provide a fair, reasonable, and expeditious procedure
8 for making its decision. The procedure shall be included in the association's
9 governing documents. The procedure shall provide for prompt deadlines. The
10 procedure shall state the maximum time for response to an application or a request
11 for reconsideration by the board of directors.

12 (2) A decision on a proposed change shall be made in good faith and may not be
13 unreasonable, arbitrary, or capricious.

14 (3) A Notwithstanding a contrary provision of the governing documents, a
15 decision on a proposed change shall be consistent with any governing provision of
16 law, including, but not limited to, the Fair Employment and Housing Act (Part 2.8
17 (commencing with Section 12900) of Division 3 of Title 2 of the Government
18 Code Code), or a building code or other applicable law governing land use or
19 public safety.

20 (4) A decision on a proposed change shall be in writing. If a proposed change is
21 disapproved, the written decision shall include both an explanation of why the
22 proposed change is disapproved and a description of the procedure for
23 reconsideration of the decision by the board of directors.

24 (5) If a proposed change is disapproved, the applicant is entitled to
25 reconsideration by the board of directors of the association that made the decision,
26 at an open meeting of the board. This paragraph does not require reconsideration
27 of a decision that is made by the board of directors or a body that has the same
28 membership as the board of directors, at a meeting that satisfies the requirements
29 of Section 1363.05. Reconsideration by the board does not constitute dispute
30 resolution within the meaning of Section 1363.820.

31 (b) Nothing in this section authorizes a physical change to the common area in a
32 manner that is inconsistent with an association's governing documents or
33 governing law.

34 (c) An association shall annually provide its members with notice of any
35 requirements for association approval of physical changes to property. The notice
36 shall describe the types of changes that require association approval and shall
37 include a copy of the procedure used to review and approve or disapprove a
38 proposed change.

1 **Comment.** Subdivision (a)(3) of Section 1378 is amended to make clear that a decision on a
2 proposed change must be consistent with building codes and other laws relating to land use and
3 public safety. A restriction that requires violation of such a law is against public policy and is
4 unenforceable. See *Nahrstedt v. Lakeside Village Condominium Ass’n*, 8 Cal. 4th 361, 382, 878
5 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994). The term “law” is intended to be construed broadly and
6 includes a constitutional provision, statute, regulation, local ordinance, and court decision.

7 Subdivision (a)(3) is consistent with other laws that subordinate an association restriction to
8 important public policies. See, e.g., Sections 712 (restraint on display of sign advertising real
9 property is void), 714 (prohibition of solar energy system is void), 782 (racially restrictive
10 covenant is void), 1353.6 (prohibition on display of certain noncommercial signs is
11 unenforceable), 1376 (prohibition on installation of television antenna or satellite dish is void);
12 Health & Safety Code §§ 1597.40 (restriction on use of home for family day care is void),
13 13132.7(l) (rules governing roofing material in very high fire hazard severity zone supersede
14 conflicting provision of common interest development’s governing documents).

15 ☞ **Note.** Section 1378 was added by 2004 Cal. Stat. ch. 346, § 3.5. It will take effect on January
16 1, 2005.