

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

## **Common Interest Development Law: Procedural Fairness in Association Rulemaking and Decisionmaking**

December 2002

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Common Interest Development Law: Procedural Fairness in Association Rulemaking and Decisionmaking*, 33 Cal. L. Revision Comm'n Reports 81 (2003). This is part of publication #215 [2002-2003 Recommendations].

STATE OF CALIFORNIA

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CALIFORNIA LAW REVISION COMMISSION

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December 13, 2002

To: The Honorable Gray Davis  
*Governor of California*, and  
The Legislature of California

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 recommends that fair and reasonable procedures be required when a community association board adopts operating rules or reviews a member's request to make changes to the member's separate interest property.

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

Respectfully submitted,

David Huebner  
*Chairperson*



## COMMON INTEREST DEVELOPMENT LAW

### BACKGROUND

The main body of law governing common interest developments is the Davis-Stirling Common Interest Development Act.<sup>1</sup> Other key statutes include the Subdivision Map Act, the Subdivided Lands Act, the Local Planning Law, and the Non-profit 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.<sup>2</sup> The complexities and inconsistencies of this statutory arrangement have been criticized by homeowners and practitioners, among others.<sup>3</sup>

The Law Revision Commission is reviewing the statutes affecting common interest developments with the goal of setting a clear, consistent, and unified policy with regard to their formation and management and the transfer of real property interests located within them. The objective of the review is to clarify the law and eliminate unnecessary or obsolete provisions, to consolidate existing statutes in one place in the codes, and to 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. A previous recommendation addressed the organization of the Davis-Stirling Common Interest Develop-

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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 & Sher) (Apr. 10, 1997); California Research Bureau, *Residential Common Interest Developments: An Overview* (Mar. 1998) <<http://www.library.ca.gov>>.

ment Act.<sup>4</sup> The organization of this recommendation is premised on enactment of that prior recommendation.

### PROCEDURAL FAIRNESS IN ASSOCIATION RULEMAKING AND DECISIONMAKING

The Commission is examining ways in which to minimize reliance on the courts to resolve disputes between a community association<sup>5</sup> and its members. One approach is to reduce the number of disputes that arise by ensuring that decision-making procedures used by a community association are fair and reasonable. A decision made under a fair and reasonable procedure is more likely to be a just decision, and is more likely to be accepted by a homeowner who would dispute a decision reached under a procedure that is perceived to be unfair.

Fair and reasonable procedures are already required by case law<sup>6</sup> and reflect good public policy. The Commission rec-

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4. See *Organization of Davis-Stirling Common Interest Development Act*, 33 Cal. L. Revision Comm'n Reports 1 (2003).

5. A "community association" is the body that governs a common interest development. See Civ. Code § 1363(a).

6. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (1986) ("When a homeowners' association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious."); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209 (1983) ("The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.") (citation omitted). There may also be circumstances where decisionmaking by a private community association is subject to the due process requirements of the United States or California Constitutions. See Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private*

ommends that fair and reasonable procedures be required when a community association adopts operating rules or reviews a member's request to make changes to the member's separate interest property.<sup>7</sup> Other types of association decisionmaking are already the subject of statutory or regulatory procedures.<sup>8</sup>

### SAFE HARBOR APPROACH

Common interest developments come in a variety of types and sizes. Some are large, professionally managed communities, resembling small cities. Others include fewer than ten units and are managed entirely by owner-volunteers.

Because common interest developments vary so much in size and character, it is not possible to craft a single procedure that is appropriate for every association in every circumstance. For that reason, the proposed law would add general provisions requiring fairness and member participation, without mandating the specific procedure to be followed. Instead, the proposed law would add optional statutory procedures that are deemed to satisfy the general requirements. A community association that follows these "safe harbor" procedures would be sure that its decision could not be challenged on procedural grounds.

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*Residential Communities Fifty Years After Marsh v. Alabama*, 6 Wm. & Mary Bill Rts. J. 461, 493-94 (1998); Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives, and Planned Developments*, 19 Real Prop., Prob. & Tr. J. 1 (1984).

7. See Civ. Code § 1351(l) ("separate interest" defined).

8. These include procedures for member discipline (see Civ. Code § 1363(g)-(h); Corp. Code § 7341; 10 Cal. Code Regs. § 2792.26(b)), amendment of governing documents (see Civ. Code §§ 1355, 1355.5, 1356; 10 Cal. Code Regs. § 2792.24), and levying and collection of assessments (see Civ. Code §§ 1366-1367).

A safe harbor approach is efficient and preserves flexibility. It also avoids disputes over purely procedural matters that might arise if strict statutory procedures were imposed.

### OPERATING RULES

Existing law recognizes that the board of directors of a community association may adopt “operating rules” to govern the operation of a common interest development.<sup>9</sup> However, there is no procedure for doing so.

An association’s declaration or bylaws can only be changed with member approval,<sup>10</sup> but an operating rule can be adopted without advance notice to members or member involvement. This is problematic because operating rules can have a significant effect on member interests (e.g., an operating rule could restrict use of common facilities or regulate the appearance of one’s home).

The proposed law would require that the board of directors provide advance notice and an opportunity to comment before adopting or changing an operating rule. The power to adopt and change rules would remain exclusively in the board of directors, but members would have a chance to express their views before a decision is made and would not be surprised by enforcement of a rule that was never announced. An optional “safe harbor” procedure would satisfy the general requirements of notice and an opportunity to comment.

In addition, the proposed law would add a procedure for member reversal of a problematic rule change. Reversal could

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9. See Civ. Code §§ 1351(j) (“governing documents” includes “operating rules”), 1360.5 (restriction on rules governing pets), 1363(g) (monetary penalty for violation of “governing documents or rules”); 10 Cal. Code Regs. § 2792.21(a) (association may formulate “rules of operation of the common areas and facilities owned or controlled by the Association”).

10. Civ. Code § 1355 (amendment of declaration); 10 Cal. Code Regs. § 2792.24 (amendment of bylaws).



only be initiated within the first 30 days after a rule change is announced and would only occur if approved by a majority vote at a member meeting at which a quorum is established. This would provide a limited member veto, similar to the power to remove board members that members of an incorporated association enjoy under existing law.<sup>11</sup>

The proposed law would also make clear that an operating rule is invalid if it contradicts or is unauthorized by law or the association's governing documents.<sup>12</sup>

#### REVIEW OF PROPOSED ALTERATION OF SEPARATE INTEREST PROPERTY

The governing documents of many common interest developments require approval of the community association before a member can alter separate interest property. For example, a homeowner might be required to obtain association approval before adding a room, choosing a color of exterior paint, or planting flowers in a front yard. Existing case law requires that such a decision be made in good faith and in a fair and reasonable manner.<sup>13</sup> The proposed law would codify that general requirement and add an optional "safe harbor" procedure.

The optional procedure would provide a two-tiered process. The first level begins with submission of a written application. All members would receive notice of the application and could comment on the proposed alteration. The "reviewing

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11. See Corp. Code §§ 7222(a) (director may be removed by members, without cause), 7510(e) (members may call special meeting for any lawful purpose).

12. See *MaJor v. Miraverde Homeowners Ass'n, Inc.*, 7 Cal. App. 4th 618, 628, 9 Cal. Rptr. 2d 237, 243 (1992) ("Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a 'reasonable' response to a particular circumstance.").

13. See *supra* note 6.

body” then makes its decision.<sup>14</sup> If the reviewing body fails to act, the proposal is deemed disapproved.

A decision by the reviewing body (including a deemed disapproval) could be appealed to the board of directors. Appeals would be heard *de novo* by the board, and any member would be free to testify. The board’s written decision would state the basis for decision, including reference to facts, standards, or provisions of the association’s governing documents that support the decision.

The two-tiered process would conserve association resources by providing a relatively streamlined procedure for noncontroversial proposals. Only applications that are actually in dispute would proceed to the more formal level of a hearing before the board of directors. A member who wishes to seek judicial review of the association’s decision would be required to exhaust the internal appeal process first.

The proposed law would also make clear that judicial review of a decision on a proposed alteration of a member’s separate interest is subject to existing ADR requirements, even if the relief sought is a writ of mandate.<sup>15</sup>

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14. The “reviewing body” is the person or group authorized by an association’s governing documents to approve or disapprove a proposed alteration of a separate interest. See proposed Civ. Code § 1378.060(c).

15. Civil Code Section 1354 requires that before filing a civil action to enforce an association’s governing documents, a party must endeavor to submit the dispute to a form of alternative dispute resolution. However, Section 1354 appears not to apply to an action for writ of mandate.

## Contents

Civ. Code § 1350.7 (added). Document delivery . . . . .	93
Civ. Code §§ 1357.100-1357.180 (added). Operating rules . . . . .	94
Article 4. Operating Rules . . . . .	94
§ 1357.100. “Rule change” defined . . . . .	94
§ 1357.110. Types of operating rules affected . . . . .	94
§ 1357.120. Exempt actions . . . . .	95
§ 1357.130. Validity of operating rule . . . . .	95
§ 1357.140. Required procedure . . . . .	96
§ 1357.150. Optional rulemaking procedure . . . . .	96
§ 1357.160. Optional emergency rulemaking procedure . . . . .	97
§ 1357.170. Rule change reversal . . . . .	99
§ 1357.180. Prospective application . . . . .	100
Civ. Code § 1363 (amended). Management by association . . . . .	100
Civ. Code § 1368 (amended). Owner’s disclosure . . . . .	102
Civ. Code § 1376 (article heading added). Video or Television	
Antenna . . . . .	105
Civ. Code §§ 1378.010-1378.030 (added). Review of proposed	
alteration of separate interest . . . . .	105
Article 2. Review of Proposed Alteration of Separate Interest . . . . .	106
§ 1378.010. Application of article . . . . .	106
§ 1378.020. Good faith, fair and reasonable procedure required . . . . .	106
§ 1378.030. Alternative dispute resolution . . . . .	107
Civ. Code §§ 1378.050-1378.120 (added). Review of proposed	
alteration of separate interest . . . . .	107
Article 3. Optional Procedure . . . . .	107
§ 1378.050. Nature of procedure . . . . .	107
§ 1378.060. Definitions . . . . .	108
§ 1378.070. Approval process . . . . .	108
§ 1378.080. Commencement of approved alteration . . . . .	110
§ 1378.090. Appeal to board . . . . .	110
§ 1378.100. Judicial review . . . . .	111
§ 1378.110. Scope of inquiry . . . . .	112
§ 1378.120. Delivery of document . . . . .	112

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## PROPOSED LEGISLATION

Ⓢ **Note.** The placement of article headings in the following provisions is premised on enactment of the Commission's recommendation on *Organization of Davis-Stirling Common Interest Development Act*, 33 Cal. L. Revision Comm'n Reports 1 (2003).

### **Civ. Code § 1350.7 (added). Document delivery**

SEC. \_\_\_\_ . Section 1350.7 is added to the Civil Code, to read:

1350.7. (a) This section applies to delivery of a document to the extent the section is made applicable by another provision of this title.

(b) A document shall be delivered by one of the following methods:

(1) Personal delivery.

(2) First class mail, postage prepaid, addressed to a member at the address last shown on the books of the association or otherwise provided by the member. Delivery is deemed to be complete on the fifth day after deposit into the United States Mail.

(3) E-mail, facsimile, or other electronic means, if the sender and recipient have agreed to that method of delivery. A provision of the governing documents providing for electronic delivery does not constitute agreement by a member of an association to that form of delivery. If a document is delivered by electronic means, delivery is complete at the time of transmission.

(c) A document may be included in or delivered with a billing statement, newsletter, or other document that is delivered by one of the methods provided in subdivision (b).

**Comment.** Section 1350.7 is new. It provides general document delivery rules that apply where this section is incorporated by reference in this title. For provisions incorporating this section by reference, see

Sections 1357.150 (rulemaking), 1357.160 (emergency rulemaking), 1378.120 (review of proposed alteration of separate interest).

Subdivision (b)(2) provides that delivery by mail is subject to the procedure for service of notice by mail. See Code Civ. Proc. § 1013(a). Under that procedure, delivery is complete on deposit in the mail, except that any period of notice and any right or duty to do an act or make any response within any period or on a date certain after the service of the document that is prescribed by statute or rule of court is extended by five calendar days (if the delivery address is within California).

See also Sections 1351(a) (“association” defined), 1351(j) (“governing documents” defined).

**Civ. Code §§ 1357.100-1357.180 (added). Operating rules**

SEC. \_\_\_\_ . Article 4 (commencing with Section 1357.100) is added to Chapter 2 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 4. Operating Rules

**§ 1357.100. “Rule change” defined**

1357.100. As used in this article, “rule change” means the adoption, amendment, or repeal of an operating rule by the board of directors of the association.

**Comment.** Section 1357.100 is new. See also Section 1351(a) (“association” defined).

**§ 1357.110. Types of operating rules affected**

1357.110. This article applies to an operating rule relating to any of the following subjects:

(a) Use of the common area or of an exclusive use common area.

(b) Use of a separate interest, including any aesthetic or architectural standards that govern alteration of a separate interest.

(c) Member discipline, including any schedule of monetary penalties for violation of the governing documents and any procedure for the imposition of penalties.

(d) Assessment collection procedures.

**Comment.** Section 1357.110 specifies which types of operating rules are governed by this article.

See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(j) (“governing documents” defined), 1351(l) (“separate interest” defined).

**§ 1357.120. Exempt actions**

1357.120. This article does not apply to the following actions by the board of directors of an association:

(a) A decision in a specific case that is not intended to apply generally.

(b) A decision setting the amount of a regular or special assessment.

(c) A rule change that is required by law, if the board of directors has no discretion as to the substantive effect of the rule change.

(d) Issuance of a document that merely repeats existing law or the governing documents.

**Comment.** Section 1357.120 exempts certain actions from application of this article. Subdivision (a) excludes decisions that are adjudicative or executive in nature. Subdivision (b) excludes the setting of generally applicable assessments. Budgeting and the setting of assessments are governed by other law. See Sections 1365-1365.5, 1366. Subdivision (c) reflects the fact that a board of directors may be legally required to make a specific rule change. Subdivision (d) recognizes that mere repetition of an existing rule is not the making of a new rule.

See also Sections 1351(a) (“association” defined), 1351(j) (“governing documents” defined), 1357.100 (“rule change” defined).

**§ 1357.130. Validity of operating rule**

1357.130. An operating rule is valid and enforceable only if all of the following requirements are satisfied:

(a) The rule is in writing.

(b) The rule is within the authority of the board of directors of the association conferred by law or by the declaration,

articles of incorporation or association, or bylaws of the association.

(c) The rule is consistent with governing law and the declaration, articles of incorporation or association, and bylaws of the association.

(d) The rule is adopted, amended, or repealed in good faith and in substantial compliance with the requirements of this article.

**Comment.** Section 1357.130 is new. Subdivisions (b) and (c) provide that an ultra vires operating rule is invalid. See *MaJor v. Miraverde Homeowners Ass'n, Inc.*, 7 Cal. App. 4th 618, 628, 9 Cal. Rptr. 2d 237, 243 (1992) (“Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a ‘reasonable’ response to a particular circumstance.”).

See also Sections 1351(a) (“association” defined), 1351(h) (“declaration” defined).

#### **§ 1357.140. Required procedure**

1357.140. The board of directors of an association shall provide members with notice and an opportunity to comment before making a rule change.

**Comment.** Section 1357.140 is new. See also Sections 1351(a) (“association” defined), 1357.100 (“rule change” defined).

#### **§ 1357.150. Optional rulemaking procedure**

1357.150. (a) Use of the procedure described in subdivision (b) satisfies the requirements of Section 1357.140. An association is not required to use this procedure.

(b) The board of directors of the association shall deliver notice of a proposed rule change to every association member. The notice shall include all of the following information:

- (1) The text of the proposed rule change.
- (2) A description of the purpose and effect of the proposed rule change.



(3) The deadline for submission of a comment on the proposed rule change.

(c) For a period of not less than 15 days following delivery of a notice of a proposed rule change, the board of directors shall accept written comments from association members on the proposed rule change.

(d) The board of directors shall consider any comments it receives and shall make a decision on a proposed rule change at a board meeting. A decision shall not be made until after the comment submission deadline.

(e) The board of directors shall deliver notice of a rule change to every association member. The notice shall set out the text of the rule change and state the date the rule change takes effect. The date the rule change takes effect shall be not less than 15 days after notice of the rule change is delivered.

(f) A document that is required to be delivered pursuant to this section is subject to Section 1350.7.

**Comment.** Section 1357.150 provides an optional procedure for adoption, amendment, or repeal of an operating rule. Subdivision (a) provides that use of the procedure satisfies the requirements of Section 1357.140. Other procedures may also satisfy the requirements of that section.

Subdivisions (b) and (e) require that notice be provided to every member. Failure to provide notice to every member will not invalidate a rule change if the failure is inadvertent. See Section 1357.130(d) (validity of operating rule).

Subdivision (d) provides that a decision on a proposed rule change shall be made at a meeting of the board of directors. See Section 1363.05 (“Common Interest Development Open Meeting Act”).

See also Sections 1351(a) (“association” defined), 1357.100 (“rule change” defined).

#### **§ 1357.160. Optional emergency rulemaking procedure**

1357.160. (a) Use of the procedure described in subdivision (b) satisfies the requirements of Section 1357.140. An association is not required to use this procedure.

(b) If the board of directors of an association determines that an immediate rule change is necessary to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, it may make the rule change immediately.

(c) As soon as possible after making a rule change under this section, but not more than 15 days after making the rule change, the board of directors shall deliver notice of the rule change to every association member. The notice shall include the text of the rule change and an explanation of why an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association.

(d) A rule change made under this section is effective for 120 days, unless the rule change provides for a shorter effective period.

(e) A rule change made under this section may not be readopted under this section.

(f) A document that is required to be delivered pursuant to this section is subject to Section 1350.7.

**Comment.** Section 1357.160 provides an optional procedure for emergency adoption, amendment, or repeal of an operating rule. Subdivision (a) provides that use of the procedure satisfies the requirements of Section 1357.140. Other procedures may also satisfy the requirements of that section.

Subdivision (d) provides that an emergency rule change is temporary.

Subdivision (e) makes clear that the effective period of an emergency rule change may not be extended by readopting the rule change under the emergency rulemaking procedure. To readopt a rule change made under this section an association must follow the procedure provided in Section 1357.150, or some other procedure that provides for advance notice to members and an opportunity to comment before the rule change is made.

See also Sections 1351(a) (“association” defined), 1357.100 (“rule change” defined).

**§ 1357.170. Rule change reversal**

1357.170. (a) Members of an association owning 10 percent or more of the separate interests may call a special meeting to reverse a rule change.

(b) A special meeting may be called by delivering a written request on the chair or secretary of the board of directors. The written request may not be delivered more than 30 days after the members of the association are notified of the rule change. Members are deemed to have been notified of a rule change on delivery of notice of the rule change, or on enforcement of the resulting rule, whichever is sooner.

(c) The rule change may be reversed by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present (which affirmative votes also constitute a majority of the required quorum) or by written ballot in conformity with Section 7513 of the Corporations Code, or if the declaration or bylaws require a greater proportion, by the affirmative vote or written ballot of the proportion required.

(d) Unless otherwise provided in the declaration or bylaws, for the purposes of this section, a member may cast one vote per separate interest owned.

(e) A meeting called under this section is governed by Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and 7613 of, the Corporations Code.

(f) A rule change reversed under this section may not be readopted for one year after the date of the meeting reversing the rule change.

**Comment.** Section 1357.170 authorizes member reversal of a recent rule change. This authority is limited to cases where members owning 10 percent or more of the separate interests call a meeting for that purpose within the specified time. This specific provision supersedes the general provision authorizing five percent or more of the members of a nonprofit mutual benefit corporation to call a special meeting. See Corp. Code §

7510(e). The governing documents of an association may provide other additional procedures for member participation in rulemaking.

Subdivision (c) is drawn from Corporations Code Section 5034.

See also Sections 1351(a) (“association” defined), 1357.100 (“rule change” defined).

**§ 1357.180. Prospective application**

1357.180. (a) This article applies to a rule change made on or after January 1, 2004.

(b) Nothing in this article affects the validity of a rule change made before January 1, 2004.

**Comment.** Section 1357.180 governs the application of this article.

See also Section 1357.100 (“rule change” defined).

**Civ. Code § 1363 (amended). Management by association**

SEC. \_\_\_\_\_. Section 1363 of the Civil Code is amended to read:

1363. (a) A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association.

(b) An association, whether incorporated or unincorporated, shall prepare a budget pursuant to Section 1365 and disclose information, if requested, in accordance with Section 1368.

(c) Unless the governing documents provide otherwise, and regardless of whether the association is incorporated or unincorporated, the association may exercise the powers granted to a nonprofit mutual benefit corporation, as enumerated in Section 7140 of the Corporations Code, except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates in accordance with Section 7313 of the Corporations Code.

The association, whether incorporated or unincorporated, may exercise the powers granted to an association by Section 383 of the Code of Civil Procedure and the powers granted to the association in this title.

(d) Meetings of the membership of the association shall be conducted in accordance with a recognized system of parliamentary procedure or any parliamentary procedures the association may adopt.

(e) Notwithstanding any other provision of law, notice of meetings of the members shall specify those matters the board intends to present for action by the members, but, except as otherwise provided by law, any proper matter may be presented at the meeting for action.

(f) Members of the association shall have access to association records *and operating rules* in accordance with Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of Title 1 of the Corporations Code.

(g) If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents or rules of the association, including any monetary penalty relating to the activities of a guest or invitee of a member, the board of directors shall adopt and distribute to each member, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents. The board of directors shall not be required to distribute any additional schedules of monetary penalties unless there are changes from the schedule that was adopted and distributed to the members pursuant to this subdivision.

(h) When the board of directors is to meet to consider or impose discipline upon a member, the board shall notify the member in writing, by either personal delivery or first-class mail, at least 10 days prior to the meeting. The notification shall contain, at a minimum, the date, time, and place of the meeting, the nature of the alleged violation for which a

member may be disciplined, and a statement that the member has a right to attend and may address the board at the meeting. The board of directors of the association shall meet in executive session if requested by the member being disciplined.

If the board imposes discipline on a member, the board shall provide the member a written notification of the disciplinary action, by either personal delivery or first-class mail, within 15 days following the action. A disciplinary action shall not be effective against a member unless the board fulfills the requirements of this subdivision.

(i) Whenever two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association shall be entitled to attend all meetings of the joint association other than executive sessions, (1) shall be given reasonable opportunity for participation in those meetings and (2) shall be entitled to the same access to the joint association's records as they are to the participating association's records.

(j) Nothing in this section shall be construed to create, expand, or reduce the authority of the board of directors of an association to impose monetary penalties on an association member for a violation of the governing documents or rules of the association.

**Comment.** Subdivision (f) of Section 1363 is amended to make clear that an association's operating rules are subject to inspection by members.

See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development" defined), 1351(j) ("governing documents" defined).

**Civ. Code § 1368 (amended). Owner's disclosure**

SEC. \_\_\_\_\_. Section 1368 of the Civil Code is amended to read:

1368. (a) The owner of a separate interest, other than an owner subject to the requirements of Section 11018.6 of the Business and Professions Code, shall, as soon as practicable before transfer of title to the separate interest or execution of a real property sales contract therefor, as defined in Section 2985, provide the following to the prospective purchaser:

(1) A copy of the governing documents of the common interest development, *including any operating rules*, and including a copy of the association's articles of incorporation, or, if not incorporated, a statement in writing from an authorized representative of the association that the association is not incorporated.

(2) If there is a restriction in the governing documents limiting the occupancy, residency, or use of a separate interest on the basis of age in a manner different from that provided in Section 51.3, a statement that the restriction is only enforceable to the extent permitted by Section 51.3 and a statement specifying the applicable provisions of Section 51.3.

(3) A copy of the most recent documents distributed pursuant to Section 1365.

(4) A true statement in writing obtained from an authorized representative of the association as to the amount of the association's current regular and special assessments and fees, any assessments levied upon the owner's interest in the common interest development that are unpaid on the date of the statement, and any monetary fines or penalties levied upon the owner's interest and unpaid on the date of the statement. The statement obtained from an authorized representative shall also include true information on late charges, interest, and costs of collection which, as of the date of the statement, are or may be made a lien upon the owner's interest in a common interest development pursuant to Section 1367 or 1367.1.

(5) A copy or a summary of any notice previously sent to the owner pursuant to subdivision (h) of Section 1363 that sets forth any alleged violation of the governing documents that remains unresolved at the time of the request. The notice shall not be deemed a waiver of the association's right to enforce the governing documents against the owner or the prospective purchaser of the separate interest with respect to any violation. This paragraph shall not be construed to require an association to inspect an owner's separate interest.

(6) A copy of the preliminary list of defects provided to each member of the association pursuant to Section 1375, unless the association and the builder subsequently enter into a settlement agreement or otherwise resolve the matter and the association complies with Section 1375.1. Disclosure of the preliminary list of defects pursuant to this paragraph shall not waive any privilege attached to the document. The preliminary list of defects shall also include a statement that a final determination as to whether the list of defects is accurate and complete has not been made.

(7) A copy of the latest information provided for in Section 1375.1.

(8) Any change in the association's current regular and special assessments and fees which have been approved by the association's board of directors, but have not become due and payable as of the date disclosure is provided pursuant to this subdivision.

(b) Upon written request, an association shall, within 10 days of the mailing or delivery of the request, provide the owner of a separate interest with a copy of the requested items specified in paragraphs (1) to (8), inclusive, of subdivision (a). The association may charge a fee for this service, which shall not exceed the association's reasonable cost to prepare and reproduce the requested items.



(c) An association shall not impose or collect any assessment, penalty, or fee in connection with a transfer of title or any other interest except the association's actual costs to change its records and that authorized by subdivision (b).

(d) Any person or entity who willfully violates this section shall be liable to the purchaser of a separate interest which is subject to this section for actual damages occasioned thereby and, in addition, shall pay a civil penalty in an amount not to exceed five hundred dollars (\$500). In an action to enforce this liability, the prevailing party shall be awarded reasonable attorneys' fees.

(e) Nothing in this section affects the validity of title to real property transferred in violation of this section.

(f) In addition to the requirements of this section, an owner transferring title to a separate interest shall comply with applicable requirements of Sections 1133 and 1134.

**Comment.** Subdivision (a) of Section 1368 is amended to make clear that the required disclosure of the governing documents of a common interest development includes disclosure of any operating rules.

See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development" defined), 1351(j) ("governing documents" defined), 1351(l) ("separate interest" defined).

**Heading of Article 1 (commencing with Section 1376) (added)**

SEC. \_\_\_\_\_. An article heading is added immediately preceding Section 1376 of the Civil Code, to read:

Article 1. Video or Television Antenna

**Civ. Code §§ 1378.010-1378.030 (added). Review of proposed alteration of separate interest**

SEC. \_\_\_\_\_. Article 2 (commencing with Section 1378.010) is added to Chapter 10 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

## Article 2. Review of Proposed Alteration of Separate Interest

### § 1378.010. Application of article

1378.010. If an association's governing documents require that an owner of a separate interest obtain association approval before altering a separate interest, exclusive use common area, or part of the common area, this article governs the association's decisionmaking process.

**Comment.** Section 1378.010 is new. See also Sections 1351(a) ("association" defined), 1351(b) ("common area" defined), 1351(i) ("exclusive use common area" defined), 1351(j) ("governing documents" defined), 1351(l) ("separate interest" defined), 1360 (modification of separate interest contained within building).

### § 1378.020. Good faith, fair and reasonable procedure required

1378.020. (a) A decision to approve or disapprove a proposed alteration of a member's separate interest, an exclusive use common area, or part of the common area, shall be made in good faith and in a fair and reasonable manner.

(b) The procedure provided in Article 3 (commencing with Section 1378.050) is fair and reasonable. Other procedures may also be fair and reasonable under the circumstances.

**Comment.** Subdivision (a) of Section 1378.020 is consistent with case law requiring that an association enforce its governing documents in good faith and in a fair and reasonable manner. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (1986) ("When a homeowners' association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious."); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209 (1983) ("The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and

the requirements of due process, equal protection, and fair dealing.”) (citation omitted).

Subdivision (b) establishes the procedure provided in Article 3 as a safe harbor. An association is not required to use the statutory procedure. It may use any procedure that is fair and reasonable under the circumstances. For example, an association might decide to use the statutory procedure to review structural changes, while adopting a simpler procedure for review of minor landscaping improvements.

See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined).

#### **§ 1378.030. Alternative dispute resolution**

1378.030. A writ proceeding for review of a decision to approve or disapprove a proposed alteration of a member’s separate interest, an exclusive use common area, or part of the common area, is subject to Section 1354.

**Comment.** Section 1378.030 is new. This section supersedes language in Section 1354(b) limiting the alternative dispute resolution provisions to civil actions for declaratory or injunctive relief.

See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined).

#### **Civ. Code §§ 1378.050-1378.120 (added). Review of proposed alteration of separate interest**

SEC. \_\_\_\_ . Article 3 (commencing with Section 1378.050) is added to Chapter 10 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

### Article 3. Optional Procedure

#### **§ 1378.050. Nature of procedure**

1378.050. This article provides a fair and reasonable procedure that an association may use in reviewing a member’s proposed alteration of a separate interest, an exclusive use common area, or part of the common area. Use of the procedure is not mandatory.

**Comment.** Section 1378.050 makes clear that the procedure provided in this article is optional. However, a decision made in good faith, under the procedure provided in this article, satisfies the requirements of Section 1378.020. See Section 1378.020(b).

See also Sections 1351(a) (“association” defined), 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined).

#### § 1378.060. Definitions

1378.060. (a) The definitions in this section govern the construction of this article.

(b) “Participating member” means an association member who, before the reviewing body makes its decision on the proposed alteration, submits to the reviewing body a comment opposed to a proposed alteration of a separate interest, exclusive use common area, or part of the common area.

(c) “Reviewing body” means the person or group authorized by an association’s governing documents to approve or disapprove the alteration of a separate interest, exclusive use common area, or part of the common area.

**Comment.** Section 1378.060 is new. In some associations the reviewing body is the board of directors. In that situation, an appeal to the board of directors would result in reconsideration of the board’s decision as the reviewing body and issuance of a written decision to serve as a record in any judicial review of the decision on appeal. See Sections 1378.090 (appeal to board), 1378.100 (judicial review).

See also Sections 1351(a) (“association” defined), 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(j) (“governing documents” defined), 1351(l) (“separate interest” defined).

#### § 1378.070. Approval process

1378.070. (a) An association member who proposes to alter a separate interest shall submit a written application to the reviewing body. The application shall be in the form specified by the association. An incomplete application may be returned to the applicant with an explanation of why the

application is incomplete. No further action is required on an application that is returned as incomplete.

(b) Within 30 days after receipt of the application, the reviewing body shall deliver notice of the application to the following persons:

(1) If the proposed alteration would affect the common area, to all members.

(2) If the association delivers a newsletter, billing statement, or other document to all members at least once a month, to all members.

(3) If the proposed alteration would not affect the common area and the association does not deliver a newsletter, billing statement, or other document to all members at least once a month, to members owning separate interests within 500 feet of, or located within the same building as, the separate interest that is the subject of the proposed alteration.

(c) The notice shall include the address or location of the separate interest, exclusive use common area, or part of the common area, that is the subject of the application, a description of the proposed alteration adequate to inform other members of its nature, and the date after which the reviewing body may make its decision.

(d) Not less than 20 days nor more than 45 days after delivery of the notice of the application, the reviewing body shall deliver a written decision to the applicant and to any participating member. If the reviewing body does not deliver a written decision to the applicant within 45 days after delivery of the notice of application, the application is deemed disapproved on the 45th day.

(e) A written decision approving a proposed alteration of a separate interest, exclusive use common area, or part of the common area, shall state whether the reviewing body received any comments opposing the alteration.

**Comment.** Section 1378.070 is new. See also Sections 1351(a) (“association” defined), 1351(b) (“common area” defined), 1351(i)

(“exclusive use common area” defined), 1351(j) (“governing documents” defined), 1351(l) (“separate interest” defined), 1378.060(b) (“participating member” defined), 1378.060(c) (“reviewing body” defined), 1378.120 (delivery of document).

**§ 1378.080. Commencement of approved alteration**

1378.080. (a) Except as provided in subdivision (b), an applicant may not commence work on an approved alteration of a separate interest, exclusive use common area, or part of the common area, until either the period for appeal passes without an appeal being filed or the approval is upheld on appeal.

(b) If a written decision approving alteration of a separate interest, exclusive use common area, or part of the common area, states that no member comments opposing the alteration were received by the reviewing body before it made its decision, the applicant may commence work on the approved alteration immediately.

**Comment.** Section 1378.080 is new. See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined), 1378.090 (appeal to board).

**§ 1378.090. Appeal to board**

1378.090. (a) An applicant or participating member may appeal the approval or disapproval of a proposed alteration of a separate interest, exclusive use common area, or part of the common area, to the board of directors of the association. The appeal shall be in writing and shall be delivered to the board of directors within 30 days after the reviewing body’s decision is delivered or the proposed alteration is deemed disapproved.

(b) Within 30 days after receipt of a timely request for appeal, the board of directors shall deliver notice of the appeal to the following persons:

(1) If the proposed alteration would affect the common area, to all members.

(2) If the association delivers a newsletter, billing statement, or other document to all members at least once a month, to all members.

(3) If the proposed alteration would not affect the common area and the association does not deliver a newsletter, billing statement, or other document to all members at least once a month, to members owning separate interests within 500 feet of, or located within the same building as, the separate interest that is the subject of the proposed alteration.

(c) The notice of appeal shall state the time and place where the appeal will be heard.

(d) Within 45 days after notice of the appeal is delivered, the board of directors shall meet and review de novo the proposed alteration that is the subject of the appeal. Any association member may testify at the appeal and may submit written materials in support of or in opposition to the proposed alteration.

(e) Within 15 days after hearing the appeal, the board of directors shall deliver its decision to the applicant and, if the appeal is by a person other than the applicant, to that person. The decision shall be in writing and shall include a statement explaining the basis for the decision, including reference to facts, standards, or provisions of the governing documents that support the decision.

**Comment.** Section 1378.090 is new. See also sections 1351(a) (“association” defined), 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(j) (“governing documents” defined), 1351(l) (“separate interest” defined), 1378.060(b) (“participating member” defined), 1378.060(c) (“reviewing body” defined), 1378.120 (delivery of document).

#### § 1378.100. Judicial review

1378.100. (a) A decision of the reviewing body made under Section 1378.070 is not subject to judicial review.

(b) Any member may seek judicial review of a decision of the board of directors of the association made under Section 1378.090. Judicial review may be by writ of administrative mandamus, pursuant to Section 1094.5 of the Code of Civil Procedure.

**Comment.** Section 1378.100 is new. Judicial review is only available to review a decision of the board of directors on appeal. Thus, the internal appeal process must be exhausted before a member may seek judicial review of a decision on a proposed alteration.

Subdivision (b) provides that a decision on a proposed alteration of a separate interest may be reviewed under the procedure for administrative mandamus. This does not preclude other applicable forms of relief.

See also Sections 1351(a) (“association” defined), 1351(j) (“governing documents” defined), 1378.060(c) (“reviewing body” defined).

#### **§ 1378.110. Scope of inquiry**

1378.110. In making a decision to approve or disapprove a proposed alteration of a member’s separate interest, an exclusive use common area, or part of the common area, the reviewing body or board of directors may consider any relevant information. The reviewing body or board of directors is not required to consider information other than that provided to the reviewing body or board of directors.

**Comment.** Section 1378.110 is new. See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined).

#### **§ 1378.120. Delivery of document**

1378.120. A document that is required to be delivered pursuant to this article is subject to Section 1350.7.

**Comment.** Section 1378.120 is new.

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