#H-854

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Preprint RECOMMENDATION

Preemption of CID Architectural Restrictions

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California Law Revision Commission
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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

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. For example, a homeowner might be required to obtain approval before replacing a roof or making changes to landscaping. In deciding whether to approve a proposed change, the association is bound by restrictions in the association's governing documents.

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

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

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

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

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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., 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.

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

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

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5. See Civ. Code § 1378(a)(3).

PROPOSED LEGISLATION

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

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

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

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

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

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

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

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

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

Comment. Subdivision (a)(3) of Section 1378 is amended to make clear that a decision on a proposed change must be consistent with building codes and other laws relating to land use and public safety. A restriction that requires violation of such a law is against public policy and is unenforceable. See Nahrstedt v. Lakeside Village Condominium Ass'n, 8 Cal. 4th 361, 382, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994). An association restriction may impose requirements beyond what is required by the law, so long as those additional requirements do not conflict with the law. For example, an association restriction requiring that a fence be five feet in height would be consistent with a municipal ordinance providing that a fence may not exceed six feet in height. An association restriction requiring that the fence be seven feet in height would conflict with the ordinance and would be unenforceable. The term "law" is intended to be construed broadly and includes a constitutional provision, statute, regulation, local ordinance, and court decision.

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