

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Alternative Dispute Resolution in
Common Interest Developments

September 2003

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*.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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September 19, 2003

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

As part of its general study of common interest development law, the Commission proposes the following improvements to California's dispute resolution process for common interest developments:

- (1) The existing pre-litigation ADR requirement 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.

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

Respectfully submitted,

Frank Kaplan
Chairperson

ALTERNATIVE DISPUTE RESOLUTION IN COMMON INTEREST DEVELOPMENTS

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

A common interest development (“CID”) is governed by a board 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 CIDs. 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

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); H. Roland, Residential Common Interest Developments: An Overview (Cal. Res. Bur., Apr. 1998), available at <www.library.ca.gov>.

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 CIDs. 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.

ALTERNATIVE DISPUTE RESOLUTION

Disputes Within Common Interest Developments

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

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

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

4. See *Organization of Davis-Stirling Common Interest Development Act*, 33 Cal. L. Revision Comm’n Reports 1 (2002).

5. See *Procedural Fairness in Association Rulemaking and Decisionmaking*, 33 Cal. L. Revision Comm’n Reports 81 (2002).

- (2) Architectural controls (repairs, alterations, painting, decor, landscaping).
- (3) Pet issues (barking dogs, wandering cats, animal waste).
- (4) Use of private space (leasing/subleasing, commercial or professional use).
- (5) Personal interactions (facilities use, parking, noise, rudeness).

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

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

Litigation involving these types of disputes generally involves filing a lawsuit and securing provisional relief (temporary restraining order and preliminary injunction), followed by a trial with damages and attorney’s fees. The cost of litigation necessary to resolve these disputes is often disproportionate to the character of the dispute. Moreover, in a dispute between an individual homeowner and the association, there is an inherent inequality of position, since

6. For another effort to estimate the frequency of CID disputes, see J. Johnston & K. Johnston-Dodds, *Common Interest Developments: Housing at Risk?* 35 (Cal. Res. Bur., Aug. 2002), *available at* <www.library.ca.gov>.

the association is able to fund litigation costs from association-wide assessments, including assessment of the homeowner with whom the association is engaged in litigation. Aside from cost considerations, litigation is not a satisfactory way of resolving interactions that arise out of daily living arrangements among persons who must continue to interact with each other in the future.

The Law Revision Commission has concluded that California law governing CIDs could be substantially improved by, among other changes, providing more affordable and available means to ensure compliance with the law and resolve disputes among CID members and boards.⁷

Summary of Existing Law

The Davis-Stirling Common Interest Development Act includes a number of provisions relating to alternative dispute resolution (“ADR”). The principal ADR provision — Civil Code Section 1354 — was added in 1994 in an effort to divert the growing number of minor disputes involving CIDs out of congested courts.⁸ It was intended to encourage ADR for disputes involving relatively minor issues, such as the height of fences, color of paint, number of vehicles, outbuildings, and similar disputes that characterize contemporary life in residential neighborhoods.

The relevant provisions of existing law include:

7. See also Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 St. John’s L. Rev. 75 (1999); S. French, *Scope of Study of Laws Affecting Common Interest Developments* 8 (Nov. 2000), available at <www.clrc.ca.gov/bkstudies.html>.

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.

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

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

*ADR for assessment dispute.*¹¹ A homeowner may invoke the ADR procedure for an assessment dispute by paying under protest the amount of the assessment plus late charges, interest, and delinquency costs.¹²

ADR required by governing documents. The Davis-Stirling Act does not directly address the issue of alternative dispute resolution (e.g., mandatory arbitration) that may be required in an association’s governing documents. At least one provision of the Davis-Stirling Act suggests that such a requirement might be enforceable.¹³

9. Civ. Code § 1354(b).

10. Civ. Code § 1354(c).

11. Civ. Code § 1366.3.

12. Recent legislation has added an internal process for disputing an assessment. See Civ. Code § 1367.1(c).

13. 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 Homeowners Ass’n v. Il Davorge*, 84 Cal. App. 4th 819, 102 Cal.

*Voluntary ADR.*¹⁴ If either the association or an owner has filed an action to enforce the association's governing documents, the action may be stayed and the matter referred to ADR on written stipulation of the parties. Trial court delay reduction rules do not apply during the time the action is stayed. The parties bear the costs of the ADR.

*Attorney's fees.*¹⁵ An incentive for the parties to agree to ADR is found in Civil Code Section 1354(f), which assesses attorney's fees against the losing party in the event of a lawsuit. The statute also gives the court discretion, in determining the amount awarded, to "consider a party's refusal to participate in alternative dispute resolution prior to the filing of an action."

*Confidentiality of ADR communications.*¹⁶ An added incentive for ADR is the confidentiality granted to ADR communications by Civil Code Section 1354(g)-(h).

*Informing homeowners.*¹⁷ The Davis-Stirling Act requires that members of an association be provided an annual summary of the ADR requirements.

*Attorney General intervention.*¹⁸ Various provisions of the Nonprofit Mutual Benefit Corporation Law govern the operations of CIDs under the Davis-Stirling Act. The Attorney General has authority under the Corporations Code to intervene on behalf of members of the association who are denied certain rights by the association, including:

Rptr. 2d 1 (2000) (clause limiting association's right to sue developer for design and construction defects).

14. Civ. Code § 1354(d).

15. Civ. Code § 1354(f).

16. Civ. Code § 1354(g)-(h).

17. Civ. Code § 1354(i).

18. Gov't Code § 8216.

- (1) Failure to hold regular meetings of members.
- (2) Failure to allow a member access to books and records of the association.
- (3) Failure to provide annual financial reports to members.
- (4) Failure on request to provide a list of names and addresses of members.

Complaints may be submitted to the Attorney General's Public Inquiry Unit. After a review, the Attorney General will send, if appropriate, a "Notice of Complaint" letter with a copy of the complaint to the association, and direct the association to respond to both the Attorney General and the member within 30 days. The Attorney General is authorized by statute to go further, but does not ordinarily get involved beyond this.¹⁹ Lack of resources appears to be a significant factor in this determination.

Critique of Existing Law

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

However, personalities can become a determinative factor in an intimate setting such as a CID. An intransigent actor on

19. 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.

either side of a dispute can effectively preclude a rational resolution.

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

The ability of the existing California alternative dispute resolution mechanisms to cope with the conflicts inherent in a CID is limited. The current statutes have a number of defects.²⁰ The Law Revision Commission recommends the following improvements to California's dispute resolution process:

- (1) Improve the existing "mandatory" ADR requirement as a prerequisite to litigation.²¹
- (2) Require every association to offer its residents a simple, informal, and cost-free way to have their concerns heard and addressed.²²

In addition to the improvements proposed in this recommendation, the Commission is currently studying the possible establishment of a governmental regulatory program for dispute resolution. That subject will be addressed in a separate recommendation.

20. 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).

21. See discussion of "Improvement of Current Statute" *infra*.

22. See discussion of "Association Procedures" *infra*.

PROPOSED IMPROVEMENTS TO THE LAW

Improvement of Current Statute

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

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

- (1) The statute only requires ADR efforts before filing suit to enforce the association's governing documents. But it may be equally important to resolve disputes involving statutory requirements of the Davis-Stirling Act or of the Nonprofit Mutual Benefit Corporation Law that are applicable to the association and its members.
- (2) The statute excuses ADR efforts if a lawsuit is filed within 120 days of the running of the statute of limitations. This facilitates manipulation by a party who may simply wait until 120 days before the statute expires, and then file suit.
- (3) The statute only requires ADR efforts before bringing an action for declaratory or injunctive relief. Writ relief is an equally important vehicle for enforcing rights in the CID context, and it is not covered.
- (4) The duty to make a good faith effort to resolve the dispute out of court is enforceable by an award of attorney's fees and costs to the prevailing party. But the statute as drawn appears to limit the award to an action to enforce covenants and restrictions, omitting an action to enforce other governing documents of the association.²³

23. *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

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

The proposed law addresses these concerns by expanding the application of the existing statute to cure these defects. The proposed law also reorganizes and recasts the existing statute for ease of use and understanding.²⁴

A significant limitation of existing law is that, while it encourages ADR efforts, it does not mandate ADR. The availability of attorney's fees and costs is an inducement for the parties to resolve their dispute out of court, but experience suggests that this type of sanction is ineffective in many CID disputes. However, it is not clear that mandatory ADR would produce better results than existing law. A party who declines to participate in ADR despite the threat of monetary sanctions may not be open to the possibility of a negotiated settlement. Requiring ADR in such a case could simply be a waste of

the availability of attorney fee awards by authorizing attorney fees in an action to enforce the governing documents rather than just the declaration.”)

24. 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 proposed law would add statutory language to Section 1354, making clear that an association may enforce its governing documents against an owner of a separate interest and vice versa.

time and resources. Pilot projects in Los Angeles County involving mandatory mediation in civil cases are currently being analyzed by the Judicial Council, but reports on experience under them are not yet available.²⁵ The Commission plans to review the results of these programs before considering whether to propose that mediation be required in the CID context.

Association Procedures

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

For this reason, the proposed law includes a requirement that every homeowners association must make available a fair, reasonable, and expeditious internal dispute resolution mechanism, at no cost to its members.²⁶ This would supplement the formal dispute resolution procedure involving use of a neutral provided in Civil Code Section 1354.

Under the proposed law, if an association fails to provide such an internal dispute resolution mechanism, a default

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

26. 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).

dispute resolution mechanism would apply. The default mechanism is a meet and confer process, in which the board is required to appoint one of its members to meet with the homeowner and hear the complaint. Any resulting agreement would be binding if it is consistent with the law, the association's governing documents, and the authority granted by the board to its representative.

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PROPOSED LEGISLATION

CIVIL CODE

Civ. Code § 1354 (amended). Enforcement of governing documents

SEC. ____ . Section 1354 of the Civil Code is amended to read:

1354. (a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

(b) *A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association.*

~~Unless the applicable time limitation for commencing the action would run within 120 days, prior to the filing of a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, not in excess of five thousand dollars (\$5,000), related to the enforcement of the governing documents, the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. The form of alternative dispute resolution chosen may be binding or nonbinding at the option of the parties. Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution. The Request for Resolution shall include (1) a brief description of the dispute~~

between the parties, (2) a request for alternative dispute resolution, and (3) a notice that the party receiving the Request for Resolution is required to respond thereto within 30 days of receipt or it will be deemed rejected. Service of the Request for Resolution shall be in the same manner as prescribed for service in a small claims action as provided in Section 116.340 of the Code of Civil Procedure. Parties receiving a Request for Resolution shall have 30 days following service of the Request for Resolution to accept or reject alternative dispute resolution and, if not accepted within the 30-day period by a party, shall be deemed rejected by that party. If alternative dispute resolution is accepted by the party upon whom the Request for Resolution is served, the alternative dispute resolution shall be completed within 90 days of receipt of the acceptance by the party initiating the Request for Resolution, unless extended by written stipulation signed by both parties. The costs of the alternative dispute resolution shall be borne by the parties.

(c) At the time of filing a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages not in excess of five thousand dollars (\$5,000), related to the enforcement of the governing documents, the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parties to the dispute refused alternative dispute resolution prior to the filing of the complaint, that preliminary or temporary

~~injunctive relief is necessary, or that alternative dispute resolution is not required by subdivision (b), because the limitation period for bringing the action would have run within the 120-day period next following the filing of the action, or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties.~~

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

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

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

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

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

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

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

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

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

Comment. Subdivision (b) of Section 1354 is added to state the authority of an association or homeowner to enforce governing documents other than the declaration. See Section 1351(j) (“governing documents” defined). It is consistent with existing law. See former Code Civ. Proc. § 383(a)(1) (association enforcement of governing documents), renumbered as Section 1368.3. See also *Kaplan v. Fairway Oaks Homeowners Ass’n*, 98 Cal. App. 4th 715, 120 Cal. Rptr. 2d 158 (2002) (owner enforcement of association bylaws). A homeowner may bring an action against an association for failure to enforce the governing documents. See, e.g., *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 1246, 280 Cal. Rptr. 568 (1991) (“Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration.”). Governing documents are enforceable under this section only if

consistent with the declaration, reasonable, and if adopted with proper authority and procedures, including any required notice. 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 *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 377, 878 P. 2d 1275, 33 Cal. Rptr. 2d 63 (1994). See also Section 1357.110 (enforceability of operating rule).

The first sentence of former subdivision (f) is continued without substantive change in subdivision (c). See also *Kaplan*, 98 Cal. App. 4th at 719 (“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.”). The second sentence of former subdivision (f), relating to the amount of a fee award, is continued in Section 1369.580. That provision has been broadened to apply to an award of fees in an action to enforce this title or the Nonprofit Mutual Benefit Corporation Law. See Section 1369.510(b) (“enforcement action” defined).

Former subdivisions (b)-(e) and (g)-(j) relating to alternative dispute resolution, are relocated and revised as Sections 1369.510-1369.570, and 1369.590 (alternative dispute resolution). See the Comments to those sections for details of the disposition and revision of former subdivisions (b)-(e) and (g)-(j).

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

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

Article 5. Dispute Resolution Procedure

§ 1363.810. Scope of article

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

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

(c) This article does not apply to a dispute that is subject to subdivision (c) of Section 1367.1.

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

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

See Section 1351(j) (“governing documents” defined).

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

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

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

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

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

Although an association is required to provide a fair, reasonable, and expeditious dispute resolution procedure, its failure to do so is not subject to judicial mandate by writ or injunction and is not otherwise actionable. Pursuant to subdivision (c), inaction by an association is in effect

adoption of the default procedure provided in Section 1363.840 (default meet and confer procedure).

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

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

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

§ 1363.830. Minimum requirements of association procedure

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

(a) The procedure may be invoked by either party to the dispute.

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

(c) If the procedure is invoked by the association, the member may elect not to participate in the procedure. If the member participates but the dispute is resolved other than by agreement of the member, the member shall have a right of appeal to the association’s board of directors.

(d) An agreement reached pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the parties and is judicially enforceable.

(e) A member of the association shall not be charged a fee to participate in the process.

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

§ 1363.840. Default meet and confer procedure

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

(b) Either party to a dispute within the scope of this article may invoke the following procedure:

(1) The party may request the other party to meet and confer in an effort to resolve the dispute. The request shall be in writing.

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

(3) The association's board of directors shall designate a member of the board to meet and confer.

(4) The parties shall meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in an effort to resolve the dispute.

(5) A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including the board designee on behalf of the association.

(c) An agreement reached under this section binds the parties and is judicially enforceable if both of the following conditions are satisfied:

(1) The agreement is not in conflict with law or the governing documents of the common interest development or association.

(2) The agreement is either consistent with the authority granted by the board of directors to its designee or the agreement is ratified by the board of directors.

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

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

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

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

1366.3. (a) The exception for disputes related to association assessments in ~~subdivision (b) of Section 1354 shall~~ *Article 2 (commencing with Section 1369.510) of Chapter 7* does not apply if, in a dispute between the owner of a separate interest and the association regarding the assessments imposed by the association, the owner of the separate interest chooses to pay in full to the association all of the charges listed in paragraphs (1) to (4), inclusive, and states by written notice that the

amount is paid under protest, and the written notice is mailed by certified mail not more than 30 days from the recording of a notice of delinquent assessment in accordance with Section 1367 or 1367.1; and in those instances, the association shall inform the owner that the owner may resolve the dispute through alternative dispute resolution as set forth in ~~Section 1354~~ *Article 2 (commencing with Section 1369.510) of Chapter 7*, civil action, and any other procedures to resolve the dispute that may be available through the association.

(1) The amount of the assessment in dispute.

(2) Late charges.

(3) Interest.

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

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

Comment. Section 1366.3 is amended to correct cross-references.

The reference to "other procedures to resolve the dispute that may be available through the association" in subdivision (a) would include the procedure for disputing a debt provided in Section 1367.1(c).

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

Civ. Code §§ 1368.3-1368.4 (added). Miscellaneous provisions

SEC. ____ . Article 1 (commencing with Section 1368.3) is added to Chapter 7 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 1. Miscellaneous Provisions

§ 1368.3. Association standing

1368.3. An association established to manage a common interest development has standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:

- (a) Enforcement of the governing documents.
- (b) Damage to the common area.
- (c) Damage to a separate interest that the association is obligated to maintain or repair.
- (d) Damage to a separate interest that arises out of, or is integrally related to, damage to the common area or a separate interest that the association is obligated to maintain or repair.

Comment. Section 1368.3 continues subdivision (a) of former Code of Civil Procedure Section 383 without substantive change.

§ 1368.4. Comparative fault as affirmative defense

1368.4. (a) In an action maintained by an association pursuant to subdivision (b), (c), or (d) of Section 1368.3, the amount of damages recovered by the association shall be

reduced by the amount of damages allocated to the association or its managing agents in direct proportion to their percentage of fault based upon principles of comparative fault. The comparative fault of the association or its managing agents may be raised by way of defense, but shall not be the basis for a cross-action or separate action against the association or its managing agents for contribution or implied indemnity, where the only damage was sustained by the association or its members. It is the intent of the Legislature in enacting this subdivision to require that comparative fault be pleaded as an affirmative defense, rather than a separate cause of action, where the only damage was sustained by the association or its members.

(b) In an action involving damages described in subdivision (b), (c), or (d) of Section 1368.3, the defendant or cross-defendant may allege and prove the comparative fault of the association or its managing agents as a setoff to the liability of the defendant or cross-defendant even if the association is not a party to the litigation or is no longer a party whether by reason of settlement, dismissal, or otherwise.

(c) Subdivisions (a) and (b) apply to actions commenced on or after January 1, 1993.

(d) Nothing in this section affects a person's liability under Section 1431, or the liability of the association or its managing agent for an act or omission which causes damages to another.

Comment. Section 1368.4 continues subdivisions (b)-(e) of former Code of Civil Procedure Section 383 without substantive change.

Civ. Code § 1368.4 (amended and renumbered). Notice of civil action

SEC. _____. Section 1368.4 of the Civil Code is amended and renumbered to read:

1368.4. 1368.5. (a) Not later than 30 days prior to the filing of any civil action by the association against the declarant or other developer of a common interest development for alleged

damage to the common areas, alleged damage to the separate interests that the association is obligated to maintain or repair, or alleged damage to the separate interests that arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair, the board of directors of the association shall provide written notice to each member of the association who appears on the records of the association when the notice is provided. This notice shall specify all of the following:

(1) That a meeting will take place to discuss problems that may lead to the filing of a civil action.

(2) The options, including civil actions, that are available to address the problems.

(3) The time and place of this meeting.

(b) Notwithstanding subdivision (a), if the association has reason to believe that the applicable statute of limitations will expire before the association files the civil action, the association may give the notice, as described above, within 30 days after the filing of the action.

Comment. Former Section 1368.4 is renumbered as 1368.5. Subdivision (a) is amended to correct a technical error.

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

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

Article 2. Alternative Dispute Resolution

§ 1369.510. Definitions

1369.510. As used in this article:

(a) “Alternative dispute resolution” means mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decisionmaking process. The

form of alternative dispute resolution chosen pursuant to this article may be binding or nonbinding at the option of the parties.

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

(1) Enforcement of this title.

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

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

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

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

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

§ 1369.520. ADR prerequisite to enforcement action

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

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

action for association assessments. This section does not apply to a small claims action.

Comment. Subdivision (a) of Section 1369.520 continues the substance of a portion of the first sentence of former Section 1354(b). See also Section 1369.510 (“alternative dispute resolution” and “enforcement action” defined). Subdivision (a) does not continue the clause excepting a dispute where the applicable time limitation for commencing the action would run within 120 days. Instead, action under this subdivision tolls a statute of limitations that would run within 120 days. See Section 1369.550.

Subdivision (b) expands the provision of the first sentence of former Section 1354(b) specifying the types of enforcement actions to which the section applies. As revised, the provision covers an action for writ relief, as well as an action for declaratory or injunctive relief. It makes clear that a dispute resolution effort is not a prerequisite to a small claims action. Because the alternative dispute resolution requirement is limited to an action for declaratory, injunctive, or writ relief (or those types of relief joined with a damage claim not exceeding the jurisdictional limit of the small claims division of superior court), the requirement necessarily is inapplicable to a small claims proceeding. *Cf.* Code Civ. Proc. § 116.220 (limited jurisdiction of small claims court). A small claims action itself satisfies key functions of alternative dispute resolution — it provides a quick and inexpensive means of resolving a dispute within the jurisdiction of the small claims division of the superior court.

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

§ 1369.530. Request for resolution

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

- (1) A brief description of the dispute between the parties.
- (2) A request for alternative dispute resolution.
- (3) A notice that the party receiving the Request for Resolution is required to respond within 30 days of receipt or the request will be deemed rejected.

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

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

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

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

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

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

§ 1369.540. ADR process

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

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

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

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

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

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

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

§ 1369.550. Tolling of statute of limitations

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

Comment. Section 1369.550 supersedes the first clause of former Section 1354(b), which excepted a dispute where the applicable time limitation for commencing the action would run within 120 days. Under Section 1369.550, a Request for Resolution is required even if the statute of limitations would expire within 120 days of the request. Instead, if the statute of limitations would run within 120 days after service of the request, the statute is tolled until the 120th day after service of the request.

§ 1369.560. Certification of efforts to resolve dispute

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

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

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

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

Comment. Subdivision (a) of Section 1369.560 continues the substance of the first sentence of former Section 1354(c), but expands its application beyond an action for enforcement of the association's governing documents. See Sections 1369.510(b) ("enforcement action" defined), 1369.520 (ADR prerequisite to enforcement action).

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

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

§ 1369.570. Stay of litigation for dispute resolution

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

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

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

Comment. Section 1369.570 continues the substance of former Section 1354(d) but expands its application beyond an action for enforcement of the association's governing documents. See Section 1369.510(b) ("enforcement action" defined).

§ 1369.580. Attorney's fees

1369.580. In an enforcement action in which fees and costs may be awarded, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution before commencement of the action.

Comment. Section 1369.580 continues the substance of the second sentence of former Section 1354(f) but expands its application beyond an action for enforcement of the association's governing documents. See Section 1369.510(b) ("enforcement action" defined).

§ 1369.590. Member information

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

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

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

Comment. Subdivision (a) of Section 1369.590 continues the substance of the first and second paragraphs of former Section 1354(i). Subdivision (a) makes clear that it is the duty of the association to provide the summary.

Subdivision (b) continues the third paragraph of former Section 1354(i).

CODE OF CIVIL PROCEDURE

Code Civ. Proc. § 383 (repealed). Civil action brought by association

SEC. ____ . Section 383 of the Code of Civil Procedure is repealed.

383. (a) An association established to manage a common interest development shall have standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:

(1) Enforcement of the governing documents.

(2) Damage to the common areas.

(3) Damage to the separate interests which the association is obligated to maintain or repair.

(4) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.

(b) In any action maintained by an association pursuant to paragraph (2), (3), or (4) of subdivision (a), the amount of damages recovered by the association shall be reduced by the amount of damages allocated to the association or its managing agents in direct proportion to their percentage of fault based upon principles of comparative fault. In such an action, the comparative fault of the association or its managing agents may be raised by way of defense, but shall not be the basis for any cross-action or separate action against the association or its managing agents for contribution or implied indemnity, where the only damage was sustained by the association or its members. It is the intent of the Legislature in enacting this subdivision to require that comparative fault be plead as an affirmative defense, rather than a separate cause of action, where the only damage was sustained by the association or its members.

(c) In any action involving damages described in paragraph (2), (3), or (4) of subdivision (a), the defendant or cross-defendant may allege and prove the comparative fault of the

~~association or its managing agents as a setoff to his or her liability even if the association is not a party to the litigation or is no longer a party whether by reason of settlement, dismissal, or otherwise.~~

~~(d) Subdivisions (b) and (c) apply to actions commenced on or after January 1, 1993.~~

~~(e) Nothing in this section shall affect (1) any person's liability under Section 1431 of the Civil Code, or (2) the liability of the association or its managing agent for any act or omission which causes damages to another.~~

Comment. Subdivision (a) of former Section 383 is continued without substantive change in Civil Code Section 1368.3. Subdivisions (b)-(e) are continued without substantive change in Civil Code Section 1368.4.
