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What is Reasonable? Invalidating Rules Restricting Marketability in Common Interest Developments

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Code Section Affected
Civil Code § 1368.1 (new).
AB 2546 (Nation); 2002 STAT. Ch. 817.

I. COMMON INTEREST DEVELOPMENTS 101: WHAT BUYERS SHOULD KNOW

Common interest developments (CIDs), including condominiums, cooperatives, and planned unit developments with homeowners' associations, have become a popular and affordable alternative to single-family housing.[1] Despite having historic roots in medieval Europe,[2] the law governing shared ownership in real property in the United States has developed slowly for lack of necessity.[3] In the last quarter century, however, over forty million Americans have moved into CIDs.[4] As California has grown, the CID has come to dominate the state's new residential housing market with at least one thousand new CIDs created each year.[5] Chapter 817 limits CID governing boards' power to enforce rules or regulations that interfere with the marketability of an owner's unit.[6]

The characteristics defining the CID scheme include restricted property use, "the ability of each co-owner to prevent the [development's] partition," and, ordinarily, each owner's membership in a homeowners' association (HOA).[7] An

1. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 3 (May 8, 2002).

2. *See* Nahrstedt v. Lakeside Vill. Condo. Ass'n, Inc., 8 Cal. 4th 361, 371, 878 P.2d 1275, 1280 (1994) (tracing the history of condominium law to European sources including the first statutory embodiment in the French Civil Code or Code Napoleon).

3. *See id* at 372, 878 P.2d at 1280-81 (attributing the slow development of CID law in the U.S. to the nation's sparse population and abundant resources enabling single family residential housing).

4. F. Frederic Deng, et al., *Private Communities, Market Institutions, and Planning* 1 (Jan. 2002), *available at* http://www-rcf.usc.edu/~pgordon/pdf/private_communities.pdf (copy on file with the *McGeorge Law Review*).

5. HELEN E. ROLAND, CAL. RESEARCH BUREAU, CAL. STATE LIBRARY, RESIDENTIAL COMMON INTEREST DEVELOPMENTS: AN OVERVIEW 1 (1998) (copy on file with the *McGeorge Law Review*).

6. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 1 (May 8, 2002); *see also* CAL. CIV. CODE § 1368.1(c) (enacted by Chapter 817).

7. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 2 (May 8, 2002).

HOA[8] is comprised of a group of elected owners charged with enforcing violations of use-regulations and enacting new rules.[9]

Use regulations, known as covenants, conditions, and restrictions (CC&Rs) are contained in the CID's "declaration" or "master deed," the document governing a project.[10] CC&Rs may relate to, among other things, the alternation of a unit's exterior, the permissible number of occupants, and the keeping of pets.[11] In contrast, HOA rules and regulations are not contained in a CID's declaration, but are promulgated by a CID's governing board and may not even require homeowner approval.[12] CC&Rs and HOA rules and regulations may restrict property use within both the common areas and privately owned units.[13]

HOAs remain a powerful force for the good or ill of their members' lives.[14] One challenge faced by HOAs is how to balance the protection of individual rights with the needs of the community.[15] Citing a Florida District Court of Appeal, the California Supreme Court in *Nahrstedt v. Lakeside Village Condominium Association, Inc.* stated:

> Inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he or she might otherwise enjoy in separate, privately owned property.[16]

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8. *See* CAL. CIV. CODE § 1351(a) (West Supp. 2002) (defining "association" as "a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development.").

9. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 2 (May 8, 2002).

10. *See* CAL. CIV. CODE §§ 1351(h), 1353 (West Supp. 2002) (defining "declaration" as the document containing a legal description of the CID, its status as a type of development, the association's name, and any usage-restrictions on any portion of the CID that are to be enforceable as equitable servitudes, and any other information parties find appropriate).

11. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 2 (May 8, 2002). A CID's declaration also describes the real property and structures thereon and delineates areas of common and private ownership. CAL. CIV. CODE §§ 1351(h), 1353; *see also Nahrstedt*, 8 Cal. 4th at 372, 878 P. 2d at 1281 (elaborating on the scope of information contained in a CID declaration).

12. JULIA LAVE JOHNSON & KIMBERLY JOHNSON-DODDS, CAL. RESEARCH BUREAU, CAL. STATE LIBRARY, COMMON INTEREST DEVELOPMENTS: HOUSING AT RISK? 6 (Aug. 2002).

13. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 2 (May 8, 2002).

14. *Nahrstedt*, 8 Cal. 4th at 374, 878 P.2d at 1282; *see also* CAL. CIV. CODE § 1351(k)(2) (West Supp. 2002) (defining an association's power to enforce an owner's obligations as to her separate interest with respect to the beneficial enjoyment of the common area by others through fines or assessments, which may lead to a lien against her separate interest).

15. *See* Richard Siegler, *Condominium Transfer Fees Revisited*, N.Y. L.J., Nov. 7, 2001, at 3 (discussing the straying of courts in condominium law from strict adherence to the common law rule against unreasonable restraints on alienation).

16. *See Nahrstedt*, 8 Cal. 4th at 374, 878 P.2d at 1282 (quoting Hidden Harbour Estates, Inc. v. Norman, 309 S. 2d 180 (Fla. Dist. Ct. App. 1975)).

Thus, anyone who buys a unit in a CID with knowledge of its HOA's discretionary power takes a risk that his individual rights may be infringed upon in ways that benefit the community.[17]

The bill's author, the California Association of Realtors, and other interested organizations[18] introduced Chapter 817 to address alleged abuses by HOAs in enforcing rules and regulations relating to the sale and marketing of CID units.[19] First, supporters of Chapter 817 complain of HOA rules establishing "sweetheart" referral arrangements, requiring all sales in a development to be exclusively brokered through a particular realty office.[20] Second, gate fees of hundreds of dollars have been charged to realtors for the privilege of gaining access to units to show for their clients.[21] Third, HOA rules have severely limited the ability of owners to hold open houses.[22] Chapter 817 mitigates these abuses directly by limiting CID unit access fees to the HOA's actual costs and prohibiting "sweetheart" referrals; and indirectly by invalidating HOA rules that are arbitrary or unreasonable.[23]

II. ENFORCEABILITY OF HOA REGULATIONS AFFECTING MARKETABILITY

CIDs are regulated by the Davis-Stirling Common Interest Development Act (Davis-Stirling Act), passed in 1985.[24] The California Supreme Court, in *Nahrstedt*, interpreted section 1354(a) of the Davis-Stirling Act, which requires that CC&Rs be enforceable unless unreasonable.[25] Chapter 817 invalidates HOA rules that arbitrarily or unreasonably affect marketability of CID units.[26] Because CC&Rs and HOA rules are treated as different categories of use restrictions,[27] the reasonableness of an HOA rule has not been judicially defined,[28] and "no one

17. *Id.*

18. *See* ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 4-5 (May 8, 2002) (listing among the supporters of Chapter 817 the Community Associations Institute, the Congress of California Seniors, and the Executive Council of Homeowners).

19. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2546, at 3 (June 26, 2002).

20. *Id.*

21. *Id.*

22. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 3-4 (May 8, 2002).

23. CAL. CIV. CODE § 1368.1 (enacted by Chapter 817).

24. *Id.* §§ 1350-1376 (West Supp. 2002) (added by 1985 STAT. ch. 874, sec. 14).

25. *Nahrstedt*, 8 Cal. 4th at 378, 878 P. 2d at 1285.

26. CAL. CIV. CODE § 1368.1(a) (enacted by Chapter 817).

27. *See Nahrstedt*, 8 Cal. 4th at 376, 878 P.2d at 1283 (indicating that recorded CC&Rs are presumptively valid while HOA rules will be considered valid if "'reasonably related to the promotion of the health, happiness[,] and peace of mind' of the project owners.").

28. ROLAND, *supra* note 5, at 51-53; *see also* BARBIE L. ANDERSON, PUBLIC LAW RESEARCH INSTITUTE, COMMON INTEREST DEVELOPMENTS: A HISTORICAL OVERVIEW OF CALIFORNIA CASE LAW, *at* http://www.uchastings.edu/plri/96-97tex/california.htm (last visited Oct. 30, 2002) (copy on file with the *McGeorge Law Review*) (summarizing CID case law).

definition of the term 'reasonableness' has gained universal acceptance among courts,"[29] seeking a definition for reasonableness within Chapter 817 may best begin with considering section 1354 of the Davis-Stirling Act and the reasoning in *Nahrstedt*.[30]

A. *Creating the Loopholes: The Davis-Stirling Common Interest Development Act*

Provisions of the Davis-Stirling Act will continue to prevail as a matter of law over CC&Rs contained in a CID's declaration.[31] Curiously, a recent California Law Revision Commission background study on CID law described "[t]he Davis-Stirling Act [as] so unwieldy, disorganized, and loaded with micromanagement minutia that serious consideration should be given to [establishing] a new framework."[32]

Homeowners have complained that the Davis-Stirling Act affords them little recourse against HOAs that act improperly or fail to act at all in managing communities.[33] While the Davis-Stirling Act contains provisions applicable to disputes over enforcement of CC&Rs contained in a project's declaration,[34] it does not provide a mechanism to resolve disagreements concerning HOA rules and regulations or statutory violations.[35] Judicial recourse is both expensive and risky for homeowners seeking to challenge the enforceability of an HOA rule because the challenged HOA may have greater financial resources to access legal talent and often the unsuccessful owner will be liable for the HOA's attorney fees.

The Davis-Stirling Act allows an HOA to charge a reasonable fee for preparing and providing documents required for disclosure upon an owner's transfer of title.[36] The Act also prohibits HOAs from imposing any fee or assessment in excess of its actual costs in amending its records due to a transfer

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29. *Nahrstedt*, 8 Cal. 4th at 376, 878 P. 2d at 1283.

30. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 1-4 (May 8, 2002).

31. CAL. CIV. CODE §§ 1350-1376 (West Supp. 2002).

32. *See* SUSAN F. FRENCH, CAL. LAW REVISION COMM'N, SCOPE OF STUDY OF LAWS AFFECTING COMMON INTEREST DEVELOPMENTS, 1, 3, 6 (2000), *available at* http://www.clrc.ca.gov/pub/BKST/BKST-811-French-CID-Scope.pdf (copy on file with the *McGeorge Law Review*) (noting that the Davis-Stirling Act is "virtually incomprehensible," even for those with legal training, and that its thirty-nine amendments make it difficult to understand its current applicability).

33. *Id.* at 5.

34. *See* CAL. CIV. CODE § 1354 (stipulating that covenants and restrictions contained in a project's declaration will be enforceable as equitable servitudes unless unreasonable, and outlining a procedure for enforcement of the governing documents using alternative dispute resolution).

35. FRENCH, *supra* note 32, at 5.

36. *See* CAL. CIV. CODE § 1368 (West Supp. 2002) (limiting the imposition or collection of penalties or fees associated with the transfer of title to the HOA's actual costs in changing its records and the reasonable fees associated with production and provision of disclosure documents).

of title.[37] Chapter 817 clarifies that the reasonableness of fees associated with HOA rules and regulations affecting marketability will be similarly limited by an HOA's actual costs.[38]

B. *An Analytical Template:* Nahrstedt v. Lakeside Village Condominium Association, Inc.

The California Supreme Court in *Nahrstedt* considered the reasonableness of CC&Rs recorded in a CID declaration.[39] The *Nahrstedt* court established a three-pronged test to determine the reasonableness, and thus the enforceability, of a recorded no-pet restriction.[40] In addition to providing a benchmark for analyzing "reasonableness" in the context of CID law, *Nahrstedt* provides helpful background on CIDs, the legislative intent underpinning provisions the Davis-Sterling Act, and the relevant policies involved in enforcing CC&Rs in recorded instruments.[41]

The court in *Nahrstedt* explained that the ability of owners to enforce CC&Rs against other owners is a significant factor in the popularity of CIDs.[42] Generally, CC&Rs are enforceable if they meet the requirements of real covenants running with the land or equitable servitudes.[43]

Typically, courts of equity will not enforce a CC&R that results in disproportionate harm compared to the benefits it produces.[44] The Davis-Stirling Act states that restrictions contained in a project's declaration are "enforceable equitable servitudes, unless unreasonable."[45] The *Nahrstedt* court held that a CC&R contained in a recorded declaration would be "unreasonable" under section 1354(a) of the California Civil Code if it could be shown to violate public policy, to bear no rational relationship to the protection, preservation, operation, or purpose of the land it burdens, or to impose a burden on the use of affected land that far outweighs any benefit.[46] Further, the *Nahrstedt* court determined that

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37. *Id.* § 1366.1 (West Supp. 2002).

38. *See id.* § 1368.1(b)(1) (enacted by Chapter 817).

39. *See Nahrstedt*, 8 Cal. 4th at 378, 878 P.2d at 1285 (beginning its analysis of enforceability of recorded restrictions by examining provisions of the Davis-Stirling Common Interest Development Act).

40. *See id.* at 374, 878 P.2d at 1282 (indicating that a CC&R is enforceable, thus reasonable, if it: (1) is not arbitrary, (2) is in accord with public policy, and (3) does not impose a substantially greater burden on individuals in the community as compared to the benefits gained by the community as a whole).

41. *See generally id.* at 386-87, 878 P.2d at 1290-91 (holding that a no-pet restriction in a CID declaration was enforceable).

42. *Id.* at 375, 878 P.2d at 1282.

43. *See id.* at 375, 878 P.2d at 1283 (explaining that a restriction meets the definition of a real covenant if the instrument containing it: (1) describes the land to be benefited and burdened by the restriction, (2) expressly provides that the restriction should bind successors in interest of the covenator's land for the benefit of the covenatee's land, (3) provides that the restriction relates to the land, and (4) was recorded).

44. *Nahrstedt*, 8 Cal. 4th at 381, 878 P.2d at 1287.

45. CAL. CIV. CODE § 1354(a) (West Supp. 2002).

46. *Nahrstedt*, 8 Cal. 4th at 382, 878 P.2d at 1286-87.

the Legislature intended CC&Rs in a project's declaration to be presumptively reasonable, thus shifting the burden of proof to the party challenging the reasonableness of a restriction, usually a homeowner.[47]

In sum, the *Nahrstedt* court rejected a case-by-case approach to enforcing CC&Rs,[48] thereby overruling prior appellate decisions.[49] In holding the no-pet restriction to be valid, the court explained that a restriction's reasonableness will be determined with reference to the CID community as a whole and by evaluating whether the regulation represents a good faith effort to further the common interest, whether it is consistent with the development's declaration, and whether it complies with public policy.[50] While the *Nahrstedt* court's decision has established a standard for enforcement of restrictions set forth in a CID declaration, Chapter 817 affects the enforceability of HOA created rules and regulations.[51]

III. PLUGGING THE LOOPHOLES: CHAPTER 817

Chapter 817 adds section 1368.1 to the California Civil Code clarifying that HOA regulations affecting marketability of an owner's separate interest in a CID must inure to a standard of reasonableness.[52] Chapter 817 contains four sub-parts. First, Chapter 817 renders invalid any HOA rule or regulation that "arbitrarily or unreasonably" interferes with the marketability of an owner's interest.[53] Second, Chapter 817 prohibits HOAs from "adopt[ing], enact[ing], or otherwise impos[ing]" a rule that either charges an excessive fee in connection with the marketing of an owner's interest[54] or "establishes an exclusive relationship with a

47. *See id.* at 382-384, 878 P.2d at 1287-89 (explaining that such a presumption furthers sound policy goals by discouraging excessive litigation, instilling confidence among homeowners in the promises embodied in their CID's declaration, protecting all owners from unanticipated assessments to cover defense fees in use-restriction litigation, and ensuring "the stability of expectation and obligation that arises from the consistent enforcement" of other recorded instruments).

48. *See id.* at 386, 878 P.2d at 1290 (indicating that the reasonableness of restrictions will not be determined with reference to facts particular to an objecting homeowner).

49. *See* ANDERSON, *supra* note 28 (indicating that the *Nahrstedt* decision, by rejecting a case-by-case analysis of CC&R enforcement, has been criticized for favoring judicial efficiency over judicial review).

50. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 2-3 (May 8, 2002).

51. *Id.* at 3-4.

52. *Id.* at 4 (identifying Chapter 817's purpose as prohibiting unreasonable or arbitrary restrictions on the sale of units in a CID "to promote the health [and] happiness . . . of the unit owners.").

53. CAL. CIV. CODE § 1368.1(a) (enacted by Chapter 817).

54. *See id.* § 1368.1(b) (enacted by Chapter 817) (defining excessive as "exceed[ing] the associations actual or direct costs.). An excessive "assessment or fee" under Chapter 817 would "be deemed to violate the limitation set forth in section 1366.1." *Id. See also id.* § 1366.1 (West Supp. 2002) (stating that an association shall not charge a fee or assessment exceeding the amount necessary to cover the costs for which it is levied).

real estate broker through which the sale or marketing of interests in the [CID] is required to occur.[55]

Third, Chapter 817 defines the terms "market" or "marketing" to mean "listing, advertising, or obtaining or providing access to show the owner's interest in the development."[56] Fourth, Chapter 817 does not affect the laws regulating the placement of real estate signs.[57]

By enacting Chapter 817, the California Legislature has indicated that HOA rules and regulations regarding the marketability of units must be in accord with fundamental public policy inuring to the health and happiness of a majority of CID's residents.[58] By invalidating HOA rules charging unreasonable gate fees[59] or requiring the sale of units to be conducted through a particular real estate office,[60] Chapter 817 closes a loophole in the Davis-Stirling Act.[61] While effectively addressing Davis-Sterling's inadequate coverage of CID law pertaining to marketability,[62] Chapter 817 is lax in articulating the standard of reasonableness courts will employ to address homeowner challenges to HOA rules or regulations falling within its purview.[63]

IV. WHAT IS "REASONABLE"?

While section 1368.1(b) of the California Civil Code provides a standard to determine the reasonableness of fees and assessments, section 1368.1(a) asserts no clear standard to determine whether an HOA rule "arbitrarily or unreasonably" affects marketability.[64] Such a standard likely will be determined with reference to

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55. *Id.* § 1368.1(b)(2) (enacted by Chapter 817).

56. *Id.* § 1368.1(c) (enacted by Chapter 817); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2546, at 3 (June 18, 2002) (explaining the provisions of SB 2546).

57. *See* CAL. CIV. CODE § 1368.1(d) (enacted by Chapter 817) (providing that Chapter 817 "does not apply to rules or regulations made pursuant to [s]ection 712 or 713 regarding real estate signs."); *see also id.* §§ 712, 713 (West 1998) (regulating the placement of for-sale signs).

58. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 4 (May 8, 2002).

59. CAL. CIV. CODE § 1368.1(b)(1) (enacted by Chapter 817).

60. *Id.* § 1368.1(b)(2) (enacted by Chapter 817).

61. *See* ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 3-4 (May 8, 2002) (stating that "current California law does not adequately address the marketing and sales of CID units.").

62. *Id. See* ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 3-4 (May 8, 2002) (reporting criticism of CID law for not adequately covering the sale and marketing of owners' units).

63. *See* CAL. CIV. CODE § 1368.1(a) (enacted by Chapter 817) (neglecting to define "arbitraril[y] or unreasonab[le]" with regard to HOA regulations affecting marketability of CID units).

64. *See id.* § 1368.1(a) (enacted by Chapter 817) (rendering void any rule that "arbitraril[y] or unreasonab[le]" restricts marketability).

the deference afforded HOAs by California courts[65] and in light of state and federal constitutional guarantees.[66] In any event, courts should consider the reasonableness of HOA rules on a case-by-case basis for at least two reasons: first, courts do not give HOA rules the same deference as CC&Rs,[67] and second, a case-by-case approach will increase litigation[68] and thus better "fetter the discretion of the [HOA] board"[69] as it crafts its rules.

Chapter 817 purports to address the public policy prong of the three-part test outlined in *Nahrstedt*.[70] The *Nahrstedt* court equated public policy concerns with constitutional guarantees.[71] Thus, an HOA rule is unreasonable or arbitrary if it abridges an owner's constitutionally protected rights.[72] Though HOAs are private actors, not state actors, due process requirements have been postulated as applicable where HOA action resembles that of a government entity.[73] HOA rules also must inure to the health and happiness of the majority of community members.[74] Therefore, HOA rules alleged to interfere unreasonably or arbitrarily with marketability under Chapter 817 may be considered in light of their effect on a community as a whole, rather than on any single homeowner.[75] This view is consistent with the *Nahrstedt* decision, disfavoring a case-by-case approach to dispute resolution[76] and the applicability of due process protections to broad

65. *See Nahrstedt*, 8 Cal. 4th at 382-83, 878 P.2d at 1287-88 (justifying the presumption of validity courts afford to restrictions contained in recorded declarations).

66. *See id.* at 387, 878 P.2d at 1290.

67. *See supra* Part II.B and note 27 (explaining that recorded CC&Rs are considered presumptively valid while HOA rules are not).

68. *See Nahrstedt*, 8 Cal. 4th at 384, 878 P.2d at 1289 (indicating that allowing case-by-case exceptions to CC&Rs would increase litigation at great cost and "strain on the social fabric of the [CID].")

69. *See id.* at 376, 878 P.2d at 1283 (citing Hidden Harbour Estates v. Basso, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981) stating "[HOA rules and regulations] should be subject to a 'reasonableness' test, so as to 'somewhat fetter the discretion of the board of directors.'").

70. *See* ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 4 (May 8, 2002) (explaining that Chapter 817 addresses the public policy issue included in the *Nahrstedt* court's three-pronged test for enforceability of CC&Rs).

71. *See Nahrstedt*, 8 Cal. 4th at 387-88, 878 P.2d at 1290-91 (framing the plaintiffs argument in terms of an individual's right to privacy as guaranteed by the California Constitution).

72. *Id.*

73. *See* Memorandum from Brian Hebert, Staff Counsel, California Law Revision Commission, Nonjudicial Dispute Resolution Under CID Law: Due Process in Association Rulemaking and Decisionmaking, 9-15 (June 14, 2001), *available at* http://www.clrc.ca.gov/pub/2001/MM01-55.pdf [hereinafter Herbert Memorandum] (copy on file with the *McGeorge Law Review*) (indicating that HOA decisions may succumb to due process scrutiny if (1) state action is required to enforce an HOA rule, (2) a sufficiently close nexus or relationship exists between the character of private conduct and state action, or (3) the HOA is the functional equivalent of a municipality).

74. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 4 (May 8, 2002).

75. *Id.*

76. *See Nahrstedt*, 8 Cal. 4th at 384, 878 P.2d 1288-89 (rejecting a case-by-case approach to enforcement of CC&Rs in a CID recorded declaration).

legislative decisions.[77] Under such a blanket standard of enforcement, an HOA regulation limiting a homeowner's ability to market his unit will be deemed unreasonable or arbitrary only if it is otherwise unconstitutional or does not inure to the benefit of the majority.[78]

By limiting its holding to recorded restrictions, the *Nahrstedt* court did not rule out a case-by-case approach to disputes involving HOA created rules and regulations.[79] Enforcing HOA rules on a case-by-case basis would be consistent with HOA rules being given less deference than recorded CC&Rs[80] and the court's desire to protect homeowners from expensive and risky litigation, especially given that the Davis-Stirling Act offers no alternative forum for such challenges.[81] Following a case-by-case analysis, courts likely would invalidate HOA created rules affecting marketability that are unconstitutional or place unreasonable restrictions on an individual owner's enjoyment of her interest.[82]

Pursuing a case-by-case approach, however, may only lead to excessive litigation[83] and risk judicial legislation in an area of the law staked out by the Legislature and currently under review.[84] The majority in *Nahrstedt* explained that ensuring the consistent enforcement of written instruments protects the expectations of all parties similarly bound by the restrictions contained therein.[85] Justice Arabian, dissenting, arguing in favor of a case-by-case analysis, accused the majority in *Nahrstedt* of sacrificing the freedom and self-determination emblematic of our Nation for "the tyranny of the 'commonality.'"[86] The majority in *Nahrstedt* also argued that, because homeowners are empowered to repeal restrictions, a restriction's existence evidences the community's desire to retain

77. *See* Hebert Memorandum, *supra* note 73, at 10-11 (indicating that due process is only required with respect to adjudicative decisions, those that affect individual rights under the particular facts of a case, opposed to legislative decisions that affect the community as a whole decided upon public policy concerns).

78. *See* ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF AB 2546, at 4 (May 8, 2002) (indicating that public policy in a CID serves "the health, happiness, and peace of mind of the majority of [residents].").

79. *Nahrstedt*, 8 Cal. 4th at 386, 878 P.2d 1290 (indicating that its holding is applicable to restrictions contained in a CID declaration).

80. *See id.* at 376-77, 878 P.2d at 1283-84 (indicating that some courts will apply a "reasonableness" standard to HOA created rules, while upholding CC&Rs contained in a CID declaration regardless of their reasonableness).

81. FRENCH, *supra* note 32, at 1, 5.

82. *See* Nahrstedt v. Lakeside Vill. Condo. Assn., 25 Cal. App. 4th 1473, 1489-90, 11 Cal. Rptr. 2d 299, 307-08, (1992), *overruled by* Nahrstedt v. Lakeside Vill. Condo. Ass'n, Inc., 8 Cal. 4th 361, 878 P.2d 1275 (1994) (arguing that the enforceability of recorded CC&Rs should be considered on a case-by-case basis to afford CID residents the least restrictive enjoyment of their property and avoid enforcement of blanket restrictions that could lead to all-inclusive bans on a diversity of common behaviors).

83. *See Nahrstedt*, 8 Cal. 4th at 384, 878 P.2d at 1288-89 (expressing concerns that enforcement of CC&Rs on a case-by-case basis would be impractical and disrupt a CIDs social fabric by fostering divisiveness and accusations of partiality resulting in protracted and costly litigation).

84. *See* FRENCH, *supra* note 32, at 1-8 (discussing criticism and reform of the Davis-Stirling Act).

85. *Nahrstedt*, 8 Cal. 4th at 389, 878 P.2d at 1292.

86. *Id.* at 396, 878 P.2d at 1297 (Arabian, J., dissenting).

and enforce it.[87] Whether the "commonality" expects HOA rules to be enforced to the same degree as recorded restrictions and whether courts will afford HOA rules the same presumption of validity as recorded restrictions, so as to justify their enforcement by their existence, remain open questions.

The California Law Revision Commission is considering extending CID procedural due process requirements to HOA rule making.[88] However, enhanced procedural requirements[89] will not diminish disputes if homeowners remain uninformed and inactive in influencing their governance.[90]

Absent legislative action,[91] courts will likely consider the three-pronged test in *Nahrstedt* when ruling on the enforceability of an HOA created rule or regulation under section 1368.1(a) of the California Civil Code.[92] However, courts are unlikely to be willing participants in enforcing HOA created rules, regardless of whether a case-by-case or community-wide standard is appropriate to effecting public policy.[93]

V. CONCLUSION

The increasing popularity of CIDs has attracted attention to their governance.[94] The CID concept requires the establishment of a balance between the rights of the community as a whole and those of its individual members.[95] Chapter 817 seeks to further define that balance by preventing HOAs from enforcing rules that unreasonably restrict an owner's ability to market and sell his unit.[96] Though Chapter 817 makes certain aspects of HOA litigation more predictable, homeowners pursuing such litigation will continue to face great financial risks.[97] While the need for regulating governing boards of CIDs is often cited, disagreement remains whether it should arise in the judiciary, the

87. *Id.* at 389, 878 P.2d at 1292.

88. JOHNSTON & JOHNSTON-DODDS, *supra* note 12, at 41.

89. *See id.* at 67-69 (charting due process requirements applicable to HOA governing boards regarding meetings, notification thereof, disclosure of matters arising therein, financial reports, member and homeowner participation, and disciplinary action).

90. *See id.* at 46 (indicating that "up to [ninety] percent of home[owners] either do not read or do not understand [their CID's governing documents]").

91. *See Nahrstedt*, 8 Cal. 4th at 388, 878 P.2d at 1291 (recognizing that legislative caveats allowing elderly and disabled Californians to keep pets would defeat a recorded no-pet restriction).

92. *See id.* at 389, 878 P.2d at 1292 (concluding that courts must enforce restrictions in recorded instruments unless they can be shown to be arbitrary, violate fundamental public policy, or impose a burden on land use that substantially outweighs the benefits of the restriction).

93. JOHNSTON & JOHNSTON-DODDS, *supra* note 12, at 49.

94. *Id.* at 11.

95. *Nahrstedt*, 8 Cal. 4th at 374, 878 P.2d at 1282.

96. CAL. CIV. CODE § 1368.1(a) (enacted by Chapter 817).

97. FRENCH, *supra* note 32, at 1, 5.

legislature, or at all.[98] Currently, the Legislature is best situated to forecast potential conflicts between HOA rules and public policy and clarify the law to effectuate a balance between CID communities and the individuals that comprise them.[99]

98. *See* JOHNSTON & JOHNSTON-DODDS, *supra* note 12, at 49-50 (indicating that the California Supreme Court has expressly declined to second-guess HOAs, that state entities also are not eager to take on the role of overseer, and that proponents of CID autonomy express mistrust of the government as a regulating body).

99. *Supra* Part IV (indicating judicial deference to the Legislature vis-à-vis regulating CID law).