

**AB 1098, the Safeguard to Ownership Rights Regarding
Interest in Common Area and Document Requests**

As with many other sections of the Davis-Stirling Common Interest Development Act, the California Legislature has decided to modify the law concerning the conveyance of exclusive use common area and the documents (financial and otherwise) to which owners are entitled, if appropriately requested. This article will explore all of the major changes brought about by Assembly Bill No. 1098, and how those changes will potentially impact homeowners associations across California.

COMMON AREA PROPERTY RIGHTS

The portion of AB 1098 that relates to exclusive use common areas has been codified as Civil Code section 1363.07. The purpose of this new law is to safeguard homeowners' interests in the common area of their association by limiting the association's ability to turn common area into exclusive use common area.

Exclusive use common area is defined in Civil Code section 1351(i) as "a portion of the common area designated by the declaration [CC&Rs] for the exclusive use of one or more, but fewer than all, of the owners of the separate interests and which is or will be appurtenant to the separate interest or interests." Exclusive use common areas are typically areas such as patios, balconies or parking spaces. The Owner of the separate interest to which the particular exclusive use common area is appurtenant holds the exclusive right to possess that area and exclude others from using the area. As such, when an association changes the designation of an area from common area to exclusive use common area, that grantee-owner is receiving ownership rights tantamount to fee simple title or separate interest. Such a transfer by an association potentially impacts the other owners' overall property rights.

Civil Code section 1363.07 addresses this situation by imposing a minimum voting threshold for associations where the CC&Rs do not contain a similar provision. Specifically, section 1363.07(a) states in relevant part: "After an association acquires fee title to or any easement right over a common area, unless the association's governing documents specify a different percentage, the affirmative vote of members owning at least sixty-seven percent of the separate interests in the common interest development shall be required before the board of directors may grant exclusive use of any portion of that common area to any member, except for any of the following: . . ." The exceptions to this statute can be summarized as follows: (1) To eliminate or correct engineering errors in documents recorded with the county recorder or on file with a public agency or utility company; (2) to eliminate or correct encroachments due to errors in construction of any improvements; (3) to fulfill the requirement of a public agency; and (4) to transfer the burden of management and maintenance of any common area that is generally inaccessible and is not of general use to the owners of the association.

Finally, Section 1363.07(b) requires an association to inform the membership if monetary consideration will be paid for the granting of the exclusive use common area, and whether the owner or association will have to obtain insurance for the exclusive use common area. This provision, as well as the provisions noted above, will ensure the homeowner's interest in the common area is protected, and it will provide homeowners an opportunity to make an informed decision regarding the granting of exclusive use common area rights to an individual homeowner.

REQUESTS FOR FINANCIAL DOCUMENTS

The rest of AB 1098 relates to homeowner requests for association records. The legislature decided to amend the law regarding what records the association is required to give to members upon request in order to address the growing number of lawsuits against association boards for financial mismanagement. In 2002, the California Research Bureau Report noted that insurance providers estimated that these types of cases account for 14% to 20% of lawsuits against boards. Given this information, and the fact that there are approximately 36,000 common interest developments in California with over 3,000,000 individual housing units, the legislature recognized that it was necessary to address homeowners' concerns regarding how the boards are spending their money.

Amended Civil Code Section 1365.2 – Text

The new Civil Code Section 1365.2 defines “association records” to mean the following:

- 1) All documents required to be disclosed pursuant to Civil Code sections 1365 and 1368;
- 2) Executed contracts, not otherwise provided privileged under law;
- 3) Board approval of vendor or contractor proposals or invoices;
- 4) State and Federal tax returns;
- 5) Reserve account balances and records of payment made from reserve accounts;
- 6) Agendas and minutes of meetings of the members, the Board of Directors, and any committees appointed by the Board of Directors (excluding information from Executive Sessions);
- 7) Membership lists, including name, property address, and mailing address;
- 8) Check registers; and
- 9) Interim unaudited financial statements.

“Enhanced association records” includes the following documents:

- 1) Invoices;
- 2) Receipts;
- 3) Canceled checks for payments made by the association;
- 4) Purchase orders;

- 5) Credit card statements for credit cards issued in the name of the association;
- 6) Statements for services rendered; and
- 7) Reimbursement requests submitted to the association.

Procedure for Obtaining Records

Once an owner requests “association records” and “enhanced association records” from the association, the association must supply the document to the owner by making the documents available for inspection or, where owner and association cannot agree on an inspection location, or the owner makes a specific request to have such documents mailed, by sending the documents to the owner by first-class mail.

Reimbursement of Fees and Costs

The association may bill the owner for the “direct and actual cost” for any copying and mailing services that are undertaken in response to a records request. However, if the association intends to impose such a charge, it must inform the owner in advance of the copying and mailing costs, and the owner must agree to pay such charges before the association may proceed.

In addition, the association may bill the owner “an amount not in excess of ten dollars (\$10) per hour, and not to exceed two hundred dollars (\$200) total per written request in order to reimburse the association for the “time actually and reasonably involved in redacting” the enhanced association records. Again, the association must inform the owner, in advance, of the association’s estimated costs, and the owner must agree to such charges prior to the Association processing the request.

Right to Redact Information

The amended law broadens the categories of documents that a homeowner is entitled to review, and thereby expands the potential to accidentally release confidential and otherwise sensitive information. In order to address the problem, the legislature has also expanded an association’s power to redact (black out) information that may lead to identity theft, fraud, invasion of privacy, or violation of the attorney-client privilege. The amended law provides examples of information that may be redacted, which includes, but is not limited to, bank account numbers, social security/tax identification numbers, check numbers, stock numbers, credit card numbers, a la carte goods or services provided to individual members of the association; records of disciplinary actions, collection activities, or payment plans of owners; driver’s license numbers; bank routing numbers; agendas, minutes and other information from executive sessions; personal records other than payroll records; and interior architectural plans, including security features, for individual homes.

Even though the legislature has enabled associations to redact documents to a sufficient extent, the reality is that associations may not be able to spot and identify all of the information that needs to be redacted in order to provide adequate protection to the association and individual owners, which creates a few problems for the associations. First, if there is a large document request, the \$200 maximum amount for reimbursement will not cover the cost of reviewing the producing the documents. Second, if an association accidentally produces information it should have redacted, there is the issue of liability. In recognition of this problem, the revised law has a provision that immunizes the association and its agents from liability for identity theft or breaches of privacy that may result from failure to redact information. This protection does not extend to the intentional, willful or negligent failure to withhold or redact the information.

Still, the unanswered question is whether the protection provided under the new law is sufficient to protect the association and its agents. As such, it is critical for anyone charged with the task of redacting information to check and double-check every document that is prepared and distributed to an owner in response to a document request.

Membership Lists

Another important change in the law relates to requests for membership lists. Associations used to be able to deny an owner's request for membership lists and instead elect to provide the requesting owner a reasonable alternative in lieu of the membership lists under the Corporations Code. Now such requests are covered by Civil Code section 1365.2(a)(1)(I). The new section limits an association's power to conceal membership lists, unless the association can prove that the member had an ulterior motive for requesting the membership list.

As such, an association presented with a request for a membership list would be well served by writing to the owner to request that the owner state the exact purpose the owner believes her request is reasonably related to the owner's membership interest. The association can then use the owner's response as a basis to decide whether the association should conduct further investigation of the owner's intentions.

In recognition of an individual's right to privacy regardless of their membership in an association, the legislature has provided an opt-out provision whereby an owner can elect not to have their information on a membership list. The owner must notify the association in writing that she wishes to opt out. If the opt-out provision is triggered, the association simply reverts back to the Corporations Code to process the member's request for membership lists relative to those members who have opted out.

Right of Legal Action and Recoverable Costs

The amended law now allows an owner or an association to bring a legal action for the purpose of enforcing Civil Code section 1365.2. If an association brings a legal action and prevails, it is entitled to its attorneys' fees and costs as is a prevailing owner.

In addition, the Court may also assess a civil penalty against an association of up to \$500 for the inappropriate denial of each separate written request.

Time Frames to Maintain and Distribute Certain Documents

Once an association receives a request for certain specified records, it must make the records available for the current fiscal year, and for each of the previous two fiscal years, and minutes of member and board meetings shall be permanently made available. However, the law is not retroactive, so that association is not liable if the association does not currently have records for the specified periods. Obviously, beginning next year, all associations should employ a system that tracks and maintains accurate books and records.

Finally, association must make records for the current fiscal year available within ten (10) business days following the association's receipt of the request. And association records prepared during the previous two fiscal years, must be available within thirty (30) calendar days following the Association's receipt of the request. On this point, document requests and responses should be made in writing so that there is an accurate paper trail in the event there is a dispute.

Effective Date of Statute

Civil Code section 1363.07 shall become effective on July 1, 2006.

Brian D. Moreno is an associate of Green Bryant & French, LLP