

2006 Legislative Update

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NEW STATUTORY LAWS FOR 2006

Senate Bill 61

(Senator Battin/Palm Desert)
Amending Civil Code §1357.20

Summary:

This new law demands every Association adopt rules to provide equal access to Association media (whatever the form) as part of election campaigns and to establish qualifications for candidates and voting; the law also demands elections be held by secret ballot pursuant to specified procedures, including, but not limited to, the selection of an independent third party as an inspector of elections. It also controls and mandates the timing of sending ballots to each member as well as additional procedures for storage of ballots and member access to review of election results. Finally, this bill creates a civil penalty against Homeowners Associations who violate the procedures of this bill - - establishing a \$500.00 penalty per violation;

When does this law take effect?

July 1, 2006.

What are the basic changes?

Amendments to this section clarify and distinguish between subject matters requiring compliance with “comment and review” procedures found in 1357.130 and 1357.140 (notice provisions and special meeting to members and potential reversal of rule changes) and those decisions or actions by the HOA which do not require compliance with pre-notice and special meeting requirements of 1357.130 and 1357.140. Existing law provides any rule relating to the subjects listed below requires 30 days prior notice to members, delivery of the rule change within 15 days after making the change and/or the use of the emergency 120 day period; any rule covering one or more of these subjects is reversible with a successful petition and special meeting pursuant to the requirements of 1357.140 (i.e., 5% of the membership requests a meeting to attempt to reverse the rule within 30 days after the notification of the rule change):

- Common areas/exclusive use common area rules;
- Rules regarding use of separate interests, including architectural standards or approval of changes to separate interests;
- Member discipline, including schedule of fines or penalties;
- Any change in standards for delinquent assessment payment plans;

- The procedures regarding alternative dispute resolution;
- Physical change to the common area separate interest; and
- Procedures for elections

The following actions do not require compliance with §§1357.130 and 1357.140:

- Decisions regarding maintenance to the common area; decisions on a specific matter not related to the membership generally;
- Decisions regarding setting regular and special assessment amounts;
- Mandatory rule changes required by law outside the discretion of the Board; and
- Issuing or reissuing a document that merely repeats existing law or governing documents.

Elections and Meetings

Associations must now adopt rules that allow candidates equal access to media and pre-establish and control the qualifications for candidacy and Board membership, as well as provide for specific procedures for elections including secret ballots.

How to comply:

HOA must adopt new rules which ensure all candidates are treated equally in regard to any media, websites, newsletters, or other election campaign materials. This includes equal access by all candidates, without censorship or editing or redacting of campaign statements and equal access to all common area meeting places. The Association must also adopt rules specifying the qualifications for candidates, the qualifications for voting, and the method of selecting one or three independent third party elections and inspector of elections, this includes specifying procedures for nominating candidates and use of proxies, and methods for determining the authenticity, validity, and effect of proxies (as well as when the polls will open and close). [Civil Code §1363.03(a)]

When are Secret Ballots required?

Secret ballots must be used in any election regarding assessments, selection of members of the Association Board of Directors, amendments to the governing documents, or the grant of exclusive use of common area. [Civil Code §1363.03(b)]

An independent third party inspector of election is now mandatory:

The Association must select an independent third party as an inspector of election. There may be one or three third party inspectors selected. While a third party inspector may be a member of the Association, the inspector may not be a candidate for the board or a member of the board. An employee or a person under contract of the Association for compensation may not be an inspector *unless* previously authorized by HOA prior to the election by adopting an operating rule allowing for such an inspector either by appointment or election, or other approved method for selecting the inspector. [Civil Code §1363(c)]

The inspector of election controls all the specifics of the election including, but not limited to, the number of members entitled to vote, the authenticity and validity of any ballots, proxies, or any other documentation related to the election, challenges to the election, the

tabulation of votes and the polling times for the election as well as certifying the results and storage of ballots.

All ballots must be counted by the inspector in public in a noticed meeting (members and candidates may observe).

Ballot Procedures:

Distribution of ballots requires materials be sent at least 30 days prior to the election and requires two envelopes and a proxy that can be detached from the ballot and retained by the proxy holder. The ballot is not signed by the voter; the only connection to the voter is the outside envelope which identifies the unit number, name, address or parcel with the voter's signature entitling the voter to vote in the election.

Publication of Results:

The results shall be reported within 15 days of the election and shall be publicized in a communication directed to all members.

Storage of Ballots:

The sealed ballots are to remain in the custody of the inspector at a location designated by the inspector and retained for one year after the date of the election.

Senate Bill 61 Adds Civil Code §1363.04

How to Comply:

Do not use Association money for campaign purposes.

Senate Bill 61 Adds Civil Code §1363.09

A member has one year to bring a civil action for declaratory, equitable, restitution or injunctive relief against the Association for violation of any election procedure or other provision of the open meeting act. Upon finding a violation, the court can void any results of the election and potentially award the member a civil penalty of up to \$500.00 for each violation, (except that each identical violation shall be subject to only one penalty if the violation affects each member of the Association equally). Note, the member may also bring a small claims action against the Association if the number of violations and the penalty claim does not exceed the cap on small claims action (i.e., the amount demanded does not exceed \$5,000.00).

Assembly Bill 758

Regarding Construction Contracts, Indemnity

Summary:

Modifies existing law of contractual indemnity. Affects contractors, subcontractors and those in the building industry regarding residential construction only. It alters the scope of indemnity which the courts' will enforce by contract.

When does it take effect?

This law applies to any and all residential construction contracts and/or amendments to contracts entered into after January 1, 2006. Specifically, existing Civil Code §2782 is amended to change the enforceable scope of contractual indemnity in residential construction contracts. Editor comment: this appears to favor or protect the subcontractors against the power of developer/builders. The prior statute indicated that any contract purporting to indemnify from “sole negligence but willful misconduct” was void. This law makes any indemnity contract void and against public policy to the extent it purports to indemnify against claims arising out of or pertaining to or relating to the negligence of the builder or the builder’s other agents. This law settles the long standing feud between developers/builders and subcontractor over the scope of indemnity and the interpretation of contractual indemnity and residential construction projects.

Senate Bill 137

Summary:

This bill is a fairly comprehensive effort to overhaul the homeowners association foreclosure process.

Civil Code Section 1365.1 (amended):

The amended version of 1365.1 provides a notice regarding assessments and foreclosures which must be distributed to the association members within the 60-day period prior to close of the association’s fiscal year.

What this means:

Associations need to update the notice sent with the annual budget packet.

Civil Code Section 1366.3 (repealed)

This section had provided delinquent owners with the opportunity to pay their assessments in full and then request alternative dispute resolution.

What this means:

Assessment matters no longer have their own dispute resolution procedure; any owner interested in pursuing alternative dispute resolution must choose either or both of the options available in Civil Code Sections 1369.510 et seq. or 1363.810 et seq.

Civil Code Section 1367.1 (amended):

1367.1(a): The amended version of 1367.1 sets forth mandatory language to be included in pre-lien letters; specifically, members must be notified of the new alternative dispute resolution option.

1367.1(b): If a homeowner requests IDR, pursuant to 1363.810 et seq., the Association must participate prior to recording a lien. Also, if a homeowner requests ADR pursuant to 1369.510 et seq., the Association must participate before initiating non-judicial foreclosure.

1367.1(c)(2): The board must decide whether to record a lien and that decision must be recorded in the minutes of the meeting.

1367.1(c)(3): This section permits delinquent owners to request a meeting with the Board to discuss a payment plan if mailed within 15 days of the pre-lien letter date. Such a meeting, if properly requested, must occur within 45 days of the postmark on the owner's request. Late fees shall not accrue during the payment plan period if the owner is in compliance with the terms. Also, if an association enters into a payment plan with a delinquent owner, the accounting must be adjusted so late fees will not accrue as long as the owner is current with the payment plan.

1367.1(d): Whenever a lien is recorded against an owner/property, the recording party must also include an itemized statement of the charges owed.

1367.1(j): Whenever a homeowner is in default, notice of default must be served on the owner's legal representative in the same manner one would serve a summons.

1367.1(k): If an owner provides a secondary contact address for purposes of collection notices, the association must send copies of notices to that secondary address.

What this means:

In performing assessment recovery work, the pre-lien letter format must be changed in order to conform with the new requirements effective January 1, 2006. Associations should be very careful to watch for IDR/ADR request from homeowners, participation may be required. In reference to the recordation decisions, the Board need only make sure the decision is recorded in the appropriate minutes. If an association enters into a payment plan with a delinquent owner, the accounting must be adjusted so late fees will not accrue as long as the owner is current with the payment plan. When recording liens, the owner's legal representative must be notified as noted above in subsection (j). Finally, where a secondary address is provided for purposes of collection notices, the association must send an additional notification to that address.

Civil Code Section 1367.4 (added):

If an owner has less than \$1,800.00 in delinquent assessments (not including accelerated assessments, late charges, or interest or cost collection); the association may not collect the debt through judicial foreclosure at that time. However, if the delinquent assessments are \$1,800.00, the association may pursue a small claims action or record a lien which would not be foreclosable until the assessments either exceeded \$1,800.00 or were more than 12 months delinquent. In the event the owner's delinquent assessments total more than \$1,800.00, the association may proceed to judicial or non-judicial foreclosure so long as the association has offered the alternative dispute resolution that is statutorily required.

Additional subsections of 1367.4:

1367.4(c): If the Board decides to foreclose, the board must also provide notice to the owner via personal service if the owner resides in the unit, or by first-class mail if the owner lives off-site.

1367.1(c)(4): See right of redemption procedures in Code of Civil Procedure Section 729.035 as discussed below.

Civil Code Section 1367.5 (added):

If, through IDR or ADR, it is determined that a lien was recorded in error, the association is responsible for reversing all late charges, interest, attorney's fees and costs, and pay the costs of the ADR or IDR.

Code of Civil Procedure Section 116.540 (amended):

Homeowners associations may appear and participate in small claims proceedings through its management company, representative or bookkeeper; a Board member no longer need be present.

Code of Civil Procedure Section 729.035 (amended):

Owners' retain a right of redemption for 90 days following sale by the association.

What this means:

The right of redemption will probably make properties sold at foreclosure by associations less desirable.

Assembly Bill 885

Summary:

This law amends Code of Civil Procedure Sections 2429(b) and 2924(g) to the effect of allowing unlimited postponements of foreclosure sales, within 365 days, before notice of a new sale must be given.

What his means:

The Board and manager need not worry about providing a new notice in conjunction with a postponement unless a year has elapsed since the previous notice.

Assembly Bill 1098

Summary:

This bill adds California Civil Code Section 1363.07 and amends Section 1365.2. Section 1363.07 requires an affirmative vote of at least 67% of all members in order to grant exclusive use of any common area to one member, with four exceptions. In addition, the new section also requires that the Board designate whether the association will receive monetary consideration for the grant and who will be responsible for insurance coverage for the granted common area. In addition, 1365.2 provides a comprehensive list of association records which must be provided to an owner upon proper request.

What this means:

Associations should check the exceptions found in before submitting an approval for a grant of common area to an owner for exclusive use. Additionally, associations should review the disclosure policies in 1365.2 to insure proper document production.

Assembly Bill 662

Summary:

The Bill, which only applies to San Diego County, permits a contractor and homeowner to voluntarily incorporate into their contract the rights and remedies of what is commonly referred to as “SB 800” or any part of SB 800 (commencing with California Civil Code Section 895). “Contractor” is defined to include subcontractors, design professionals or general contractors who, after the effective date of the Bill and on or before January 1, 2008, provide their services without compensation to victims of the Cedar Fire in October 2003. In addition to the services being provided for free, the Bill also specifically requires that the contract only be for the reconstruction of a “dwelling unit” or “common area” of a residence lost during the October, 2003, Cedar Fire in the County of San Diego. It essentially puts the builders on the same footing as if they were building new construction as opposed to rebuilding any fire damage dwelling.

What this means:

With regard to common interest developments, there is really no direct impact on the operations of common interest developments as the Bill contemplates contracts between individual owners and contractors. Nonetheless, members of community associations impacted by the Cedar Fire can certainly take advantage of AB662 and use it as a means of encouraging persons in the building industry to volunteer their expertise to the rebuilding process. As indicated above, the Bill was only enacted to meet a perceived short-term need and will sunset on January 1, 2008, so it behooves any homeowner or contractor currently contemplating any volunteer construction services to consider taking advantage of the potential protections offered by AB662.

Senate Bill 853

Summary:

California Civil Code Section 1378 was amended to add the following language: “Notwithstanding a contrary provision in the governing documents, a decision on a proposed change may not violate any governing provision of law, including, but not limited to, the Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), or a building code or other applicable law governing land use or public safety.”

Assembly Bill 1754

Summary:

This bill revises California Civil Code Section 1365 and Government Code Section 1091.5.

Under previous law (Civil Code Section 1365), associations were required to prepare and distribute certain documents, including a report on reserve calculations, to all members. The revised law changes that requirement and permits an association to instead provide a summary of all funds received from either compensatory damage award or settlement to an association from any person or entity. In addition, rather than distribute a pro forma budget to the members, the association may instead distribute a summary with written notice that the full pro forma budget is available at the business office.

Regarding Government Code Section 1091.5, this new law specifies that an officer, employee, or member of the Board of Directors of the California Housing Finance Agency is not be deemed to be interested in a contract involving a loan product or program if the officer, employee, or member participated in the planning, discussions, development, or approval of the loan product or program, the loan product or program is or may be originated by lenders approved by the agency, and the loan product or program is generally available to qualifying borrowers on terms and conditions that are substantially the same for all qualifying borrowers at the time the loan is made.