

COMMUNITY ASSOCIATION LAW UPDATE
PRESENTED BY:
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and
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It's official. The legislature sent three bills affecting community associations to the Governor, and he signed them into law. This new legislation is complicated, has "issues" and was modified from what was originally proposed (you should have seen what they proposed) as a result of the efforts of CAI-CLAC and CACM. The resulting amendments and additions to the Davis-Stirling act require significant changes in how associations collect assessments, handle annual meetings and other solicitations for votes, and what documents owners may inspect. These new laws become effective either January 1, 2006, or July 1, 2006, as stated.

AB 1098 Jones - Records Inspection and Common Area Transfers

Record Inspections:

Under the Civil Code and Corporations Code Sections pertaining to inspection of records under current law members are only entitled to inspect the accounting books and records of their association, minutes of meetings and the membership names and addresses.). This right of inspection currently does not include inspection of specific documents such as contracts, invoices, receipts, credit card statements, cancelled checks, check registers, etc.

AB 1098 repeals and replaces Civil Code Section 1365.2 and supercedes members

inspection rights under Corporations Code Sections 8330 and 8333 where inconsistent with new Civil Code Section 1365.2. These new expanded inspection rights go into effect July 1, 2006. Community associations will now be required to make available, for inspection by members or any person the member designates in writing as the member's representative, on the site of the association (or if an on-site office does not exist, at a place the association and the member can agree to), "association records," and "enhanced association records," which is an expansion what is required under the current law.

"Association records" that owners will now be entitled to inspect includes the following items:

- (1) Any and all financial documents that were prepared and distributed to the members as required by Civil Code Section 1365.
- (2) Any and all financial documents or statements required to be provided to prospective purchasers under Civil Code Section 1368.
- (3) Any and all interim financial statements even though they have not been audited, periodic or compiled, that contain any of the following:
 - (a) balance sheets;
 - (b) income and expense statements;

- (c) budget comparisons; and
 - (d) general ledgers, which are now defined as reports that illustrate all association transactions over specific periods.
- (4) Executed contracts not otherwise privileged under law.
 - (5) Written board approval of vendor or contractor proposals or invoices.
 - (6) State and federal tax returns.
 - (7) Balances of reserve accounts and records of payments made out of the reserve accounts.
 - (8) Agenda and minutes of meetings of members, the board (except executive sessions) and committees appointed by the board.
 - (9) Lists of members, including the name, property and mailing address of members, subject to following limitations: a request for a copy of the membership list must specify the purpose for being submitted which is reasonably related to an interest as a member, and if the association reasonably believes that the information in the list will be utilized for a purpose other than what the requester specifies, then the association can deny the request. Members may “opt out” of sharing this personal information by notifying the association in writing that such member prefers to be contacted via the alternative process in Corporations Code Section 8330(c),
 - (10) Check Registers.
- “Advanced association records” includes invoices, receipts and cancelled checks for payments made by the association, purchase

orders approved by the association, credit card statements for credit cards issued in the name of the association, statements for services rendered, and reimbursement requests submitted to the association, provided that the person submitting the reimbursement request shall be solely responsible for removing all personal identification information from the request.

The Bill requires that associations make the above referenced records available, and/or provide copies of same, for the current fiscal year and the previous two fiscal years for inspection and copying by a member of the association, or the member's designated representative. These documents and records must be made available within 10 business days of receipt of the request for current association records or 30 calendar days of receipt of the request for association records prepared during the previous 2 fiscal years. In addition, minutes for member and board meetings must be permanently retained and made available. Of course, if the association did not maintain association records prior to January 1, 2006, the association is exempt from liability from these provisions.

Certain costs are to be paid by the requesting member, but no charges can be made for administrative time to locate and gather the records. Charges of up to \$10 per hour up to a maximum of \$200 (which includes attorney time/fees) can be made for redaction of important information that might lead to identity theft, fraud, or is privileged by law.

In addition, the association may redact or refuse to produce information that is “reasonably likely to compromise the privacy of an individual member of the association,” as well as the following information:

(1) Records of a-la-carte goods or services provided to individual members for which the association received monetary consideration other than assessments.

(2) Records of disciplinary actions, collection activities, or payments plans of homeowners other than the homeowner requesting the records.

(3) Any person's personal identification information, including, without limitation, social security numbers, tax identification numbers, bank account numbers and bank routing numbers.

(4) Association records from executive sessions except privileged contracts, such as contracts for maintenance, management or legal services.

(5) Personnel records other than the payroll records provided in the Code, such as compensation paid to employees, vendors or contractors not protected by the attorney-client privilege.

(6) Interior architectural plans, including security features for individual homes.

This new law specifically authorizes a member to bring an action to enforce his or her right to inspect and copy association records in small claims court if the amount demanded does not exceed the jurisdiction of that court. The new law also authorizes the court to assess a civil penalty of up to \$500 for the denial of each separate written request.

If the association cannot make the records available on site, it is required to copy them, at cost to the member. The definition of records that would be subject to inspection

is greatly expanded from what most interpreted the prior language to be.

The new law also includes a prohibition on the sale or commercial use of association records and enhanced association records, and against using such records for purposes not reasonably related to a member's interest in the association. The relief sought by the association for such uses of records includes seeking damages or injunctive relief.

Grants for Exclusive Use Common Area:

Owners often want or just take a portion of the common area for their exclusive use. Currently, the only prohibition on an association permitting this exclusive use may be the CC&Rs which may, or may not, require the vote of the owners. As for grants of exclusive use common area, unless the association governing documents requires a different percentage, Civil Code Section 1363.07 is added. It requires an affirmative vote of the members owning at least 67% of the voting power of the separate interests in the association to grant exclusive use of any portion of a common area to any homeowner member. There are some exceptions for things like correcting engineering errors, granting property back to a subdivider to enable completion of the development, etc.

SB 61 (Battin) (Elections):

AB 1098 is directly tied to SB 61 (Battin) (Elections), which provides as follows:

Effective July 1, 2006 new Civil Code Section 1363.03 (e) requires that any vote of the members pertaining to election of directors, assessments, amending governing documents or grants of exclusive use common area must be done by "secret ballot." The procedure for secret balloting is

as follows:

(1) Ballots and two pre-addressed envelopes with instruction on how to return the ballots must be mailed by first-class mail or delivered by the association to every member at least thirty (30) days before the deadline date for voting.

(2) Ballots must not identify the voter's name, address or lot/parcel/unit number.

(3) A Ballot itself cannot be signed by voters, but is inserted into an envelope that is sealed. This envelope is then inserted into a second envelope that is sealed and is addressed to inspector(s) of election, and the voter prints and signs his or her name on the upper left hand corner of the second envelope and delivers or mails the envelope to the inspector(s) of election before the voting deadline.

In addition, an association now includes "procedures for elections" as a type of operating rule subject to member review and challenge procedures in Civil Code Section 1357.100 *et seq.*

These rules must be made pursuant to specified procedures, which include the following:

"(1) ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or Internet Web sites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election. The association shall not edit or redact any content from these communications, but may include a

statement specifying that the candidate or member, and not the association, is responsible for that content.

(2) ensure access to common area meeting space, if any exists, during a campaign, at no cost, to all candidates, including those who are not incumbents, and to all members advocating a point of view, including those not endorsed by the board, for purposes reasonably related to the election.

(3) Specify the qualifications for candidates for the board of directors and any other elected positions, and procedures for the nomination of candidates. A nomination or election procedure shall not be deemed reasonable if it disallows any member of the association from nominating himself or herself for election to the board of directors.

(4) Specify the qualifications for voting, the voting power of membership, the authenticity, validity, and effect of proxies, and the voting period for elections, including the times at which polls will open and close.

(5) Specify a method of selecting one or three independent third parties as inspector, or inspectors, of election utilizing one of the following methods: (A) Appointment of the inspector or inspectors by the board. (B) Election of the inspector or inspectors by the members of the association. (C) Any other method for selecting the inspector or inspectors."

Paragraph (4), above, (new Civil Code Section 1363.03(a)(4) makes reference to times at which polls open and close. It appears that the intent of this new law is to eliminate proxies and in their place permit owners to submit their secret ballot by mail, hand delivery to the meeting/polling place at which the ballots are to be counted, or by

completing the ballot at the meeting.

While the new law references proxies, it is not clear if they are permitted as they may be inconsistent with the secret ballot concept. On the other hand, if an owner wants to give their proxy to another person, we assume they can waive their right to a secret ballot.

While the new law is silent on the issue of cumulative voting, and the issue may be open to interpretation, we believe that cumulative voting is permitted under changed law.

It is also important to note that under the new law, votes will be tabulated at open meetings of the board or members, and may be witnessed by any owner in the association. This meeting is subject to the notice and quorum requirements for special meetings of the board or members.

When the results of voting are determined by the inspectors of election, they must be promptly reported to the board. Within fifteen (15) days, the results must be publicized in a communication to all members, must be recorded in the minutes of the next board meeting and must be available for review by any and all members of the association.

If your association contains delegate district, your association must still comply with the secret ballot procedures, which can get to be very complex for delegate districts.

AB 61 also establishes additional procedures for storage and review of election results. The Bill prohibits association funds from being spent for campaign purposes, as specified, in connection with an association board election or in connection with any

other association election, except as specified.

The Bill also permits a member of an association to bring a civil action for violations of these provisions, and other provisions regarding open meetings, by his or her association, and imposes a civil penalty of up to \$500 per violation.

SB 137 Ducheny -- Collections and Lien Process:

This Bill was Ducheny's second attempt to impose significant restrictions and changes on an association's ability to collect delinquent assessments. As of January 1st, associations will be prohibited from foreclosing on an assessment lien unless the amount of assessments owed (not including costs or interest) is \$1,800, or one year of delinquency has passed on any unpaid assessments

In addition, this new law changes several of the procedures for assessment collection. The following is a summary of the assessment collection procedure under the new law:

A. Date of Delinquency

As is the procedure under the existing law, regular and special assessment are considered delinquent fifteen (15) days after they are due (unless the governing documents of an association provide for a longer period.

B. Pre-Lien Notice/Letter

Once the assessment becomes delinquent, the next step in the collection process is the pre-lien notice. In addition to the information associations already must include in the pre-lien notice letter, the new law requires the following information be

put in the pre-lien notice letter:

(a) The right to dispute the assessment debt by submitting a written request for dispute resolution (“IDR”) to the association pursuant to the association’s meet and confer IDR procedure, as set forth in Civil Code Section 1363.810 *et seq.*

(b) The right to request alternative dispute resolution (“ADR”) pursuant to Civil Code Section 1369.510 *et seq.* Notice that binding arbitration is not available in a judicial foreclosure action (if applicable).

C. Secondary Address

If an owner provides what the new law calls a “secondary address,” then the association must send additional copies of all notices to same. In addition, the new law requires that the association give notice of owners’ rights to submit secondary addresses at the time the association distribute the *pro forma* operating budget.

D. Notice of Right to “IDR” Prior to Recording the Lien

If the association is ready to proceed with recording a lien, the new law requires that the association must offer IDR to the delinquent owner and agree to first participate in such IDR prior to recordation of the lien.

E. Board Decision to Record a Lien

Once this is satisfied, the new law requires that a majority of the board of directors decide to record the lien at an open meeting, and the board’s decision must be recorded in the minutes of the meeting, so managers beware.

F. The Lien

The new law requires that the same information as is now required to be set out in the Notice of Delinquent Assessment (Lien). In addition, however, associations must include an itemized statement of the charges (as described in Civil Code Section §1367(a)(2) in the recorded lien.

Once the lien is recorded, the new law requires that a copy of the recorded lien be mailed by certified mail to every person whose name is shown as an owner of the separate interest in the association’s records within ten (10) calendar days of recording. Also, a copy of any notice of default must be *served* on the owner’s legal representative by the association, in compliance with the Code of Civil Procedure, Section 415.10 *et seq.*

G. Prerequisites to Foreclosure

Once the association has reached the foreclosure stage (Notice of Sale) for delinquent assessments of \$1,800 or more or that are at least twelve (12) months delinquent, the association may foreclose if the following requirements are satisfied.

The decision to foreclose must be made by a majority vote of the board in executive session at least thirty (30) days prior to any public sale, and the decision must be recorded in the minutes of the next open meeting of the board, with reference made to only the parcel number of the delinquent owner, not the owner’s name.

If the decision to foreclose is made, the board must provide written notice of the vote by personal service to owner at the property address or the owner’s legal representative, or by first class mail at the

most current address shown on the books of the association for an owner who lives outside the property.

In addition, prior to initiating a foreclosure sale for delinquent assessments, an association must offer the owner and, if so requested by the owner, shall participate in dispute resolution pursuant to the association's "meet and confer" program required by Section 1363.810, or offer alternative dispute resolution with a neutral third party pursuant to Civil Code Section 1369.510.

The decision to pursue dispute resolution or a particular type of alternative dispute resolution shall be the choice of the owner, except that binding arbitration shall not be available if the association is going to pursue judicial foreclosure.

H. Right of Redemption

The Bill also provides that if a unit is sold for delinquent assessments, the foreclosed owner has a right of redemption within 90 days after the sale.

I. Small Claims Court

The new law will allow associations to designate an agent, a management company representative, or a bookkeeper to appear on behalf of that association. There is a requirement for small claims court that any individual who is appearing as a representative of the association must file a declaration stating (1) that the individual is authorized to appear for the Association, and (2) the basis for that authorization.