

Assessments, Elections and Inspection Rights

New Homeowner Association Legislation for 2006

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In what seems to have become an annual “right of passage” ritual, homeowner associations are again becoming subject to more complex laws. Despite valiant efforts, negative publicity forced negotiations to focus on making the laws less troublesome, rather than making them go away.

The new laws with the greatest impact cover (1) assessment collections, (2) election procedures, and (3) member inspection rights, and will likely require procedure changes and the adoption of new rules.

1. Assessment Collection Procedures – SB 137

Remember last year’s effort against the bill to limit association’s rights to foreclose? Well, the bill was reintroduced, and this time was signed by the Governor. Effective for liens after January 2006, there are changes to the assessment collection procedures for associations.

Threshold – Chief among the changes is a requirement that assessment delinquencies cannot be foreclosed upon unless the principle assessment amount is \$1,800.00 or more than 12 months delinquent. Principle assessments mean assessments only; no late charges, no interest, no attorneys’ fees, and no “accelerated” assessments (assessments that are approved, but not yet due). Only assessments that are due and not paid count.

Right to IDR/ADR – Owners must be informed that they have the right to use dispute resolution for assessment disputes, not once, but twice; first at the pre-lien stage, and second, before beginning the foreclosure process. And, like dispute resolution laws, the owner has the option to refuse to participate; the association does not have that option, and must participate if the owner accepts or starts the process.

Liens – First, if an owner becomes delinquent, the board, and only the board, can make the decision whether to record a lien or not. The decision must be made at an open meeting by a majority vote of the board, and reflected in the minutes with the owners’ identity protected by reference to property parcel number. The decision cannot be delegated.

Pre-lien notice – You must send a pre-lien letter to the owner. In addition to required information in the pre-lien letter, you now have to include a statement about the right to dispute the assessment debt by submitting a written request for dispute resolution pursuant to Civil Code Sections 1363.810, et. seq., and a statement about the right to request alternative dispute resolution with a neutral third party pursuant to Civil Code Sections 1369.510, et. seq. before the Association may initiate foreclosure. Binding arbitration shall not be available if the association intends to initiate a judicial foreclosure.

Dispute resolution offer – Sometime before recording the lien, the association must offer an owner a chance to “meet and confer” with the association pursuant to any dispute resolution program adopted under Civil Code sections 1363.810 et. seq. Even if you don’t have a program, you still must make this offer.

Once that is complete, the association can record the lien. In addition to all information required in the lien, you must include an itemized statement of the charges owed by the owner. Also, a copy of the recorded lien must be sent to every person whose name is shown as an owner of the home by certified mail no later than 10 calendar days after recording.

After lien is recorded – Nothing can be done with it until the principle assessment amount is \$1,800 or 12 months delinquent. The lien will just sit there, protecting the association’s position in the event of a bankruptcy, sale or refinancing. Once the delinquency crosses that threshold, the association may proceed with judicial or nonjudicial foreclosure to collect the delinquent payments after the following happens:

- At least 30 days prior to any sale, the board, and only the board, must make the decision to initiate foreclosure in executive session, reflected in the minutes of the next open meeting. This decision cannot be delegated to anyone else. Again, the owners’ privacy must be protected by referring to the property parcel number.
- Once the decision is made, you must give notice by *personal service* to an owner who occupies the home or to the owner’s legal representative. If the owner does not occupy the home, you must give notice by first-class mail, postage prepaid, to the most current address shown on the books of the association.
- Sometime before starting a foreclosure on an owner’s home, you must offer the owner to participate in dispute resolution pursuant to Civil Code Section 1363.810 et. seq., or alternative dispute resolution as set forth in Civil Code Section 1369.510 et. seq. The decision to pursue dispute resolution or a particular type of alternative dispute resolution *is the choice of the owner*, except that binding arbitration is not available if the association intends to initiate a judicial foreclosure.

If the owner, at any time in the process, agrees to participate in dispute resolution, the association must participate. The new law does not reference how the costs of the dispute resolution are to be shared, unless it is found that the association has recorded a lien in error. If there is an error, the association must pay all the costs of the dispute resolution,

as well as reverse all late charges, fees, interest, attorneys' fees, collection costs and other costs. Existing law says, "meet and confer" costs cannot be charged to an owner, but ADR costs can be "...borne by the parties."

Also, owners will now have the right to provide you with a secondary address to send information to. If you receive such a secondary address, you must send additional copies of everything to this second address.

As an alternative, the new law allows associations to file small claims actions to collect delinquent assessments, and allows other parties, like the association manager, to represent the association at the hearing. However, you can only sue for up to \$5,000 each time, and you can't file more than two claims in any calendar year in excess of \$2,500. Also, if you file more than twelve claims in any twelve-month period, the filing fee goes up.

2. Election Procedures – SB 61

Beginning on July 1, 2006, associations are required to adopt new rules for elections. The new rules adopted by the association must cover the following areas, and must be sent to owners for review and comment 30 days before they are adopted:

- Associations must have a rule that ensures that if any candidate or member advocating a point of view is provided access to any 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. This includes those not endorsed by the board, for purposes that are reasonably related to the election. You cannot edit or delete any content from these communications, but you can include a statement specifying that the candidate or member, and not the Association, is responsible for that content.
- Associations are required to have a rule ensuring equal access to any common area meeting space, if any exists, during a campaign, at no cost, to all candidates. This includes those who are not incumbents, and all members advocating a point of view, including those not endorsed by the Board, for purposes reasonably related to the election.
- Associations are required to have a rule specifying the qualifications for candidates for the board and any other elected position, and procedures for the nomination of candidates. The new rule must allow any member of the association to nominate himself or herself for election to the Board.
- Associations are required to have new rules regarding voting, including the qualifications for voting, the voting power of each membership, the authenticity, validity, and effect of proxies, and the voting period for elections, including the times at which polls will open and close.
- Associations are required to have new rules specifying a method of selecting independent third parties as inspector or inspectors of election utilizing either (a) appointment of the inspector or inspectors by the Board, (b)



election of the inspector or inspectors by the members of the association, or (c) some other method for selecting the inspector or inspectors. Note that unless your rules specifically allow the association manager or an agent to be an inspector, he or she may not be one.

- Speaking of inspectors of election, a new Civil Code 1363(c)

requires associations to select one or three independent third party inspectors of election. These inspectors can be volunteer poll workers with your County registrar of voters, a CPA, a notary public, or a member of the community who is not a director or candidate or related to a director or candidate.

The inspectors are required to act in good faith as quickly as practical, to the best of their abilities, and must be impartial, doing each of the following:

- Determine the number of memberships entitled to vote and the voting power of each.
- Determine the authenticity, validity, and effect of proxies, if any.
- Receive ballots. The sealed ballots at all times must be in the custody of the inspector or inspectors of election or at a location designated by the inspector or inspectors until after the tabulation of the vote, at which time custody will be transferred to the association. No person, including a member of the association or an employee of the management company, may open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated.
- Hear and determine all challenges and questions arising out of the right to vote.
- Count and tabulate all votes in public at a properly noticed open meeting of the board or members. Any candidate or other member of the association may witness the counting and tabulation of the votes.
- Determine when the polls shall close.
- Determine the result of the election. The results of the election must be promptly reported to the board, must be recorded in the minutes of the next meeting of the board and must be available for review by members of the association.
- Perform any acts as may be proper to conduct the election with fairness to all members and all applicable rules of the association regarding the conduct of the election that are not in conflict with law.

Section 1363.03(e) requires specific procedures for voting ballots. Ballots and two pre-addressed envelopes with

New 2006 Legislation

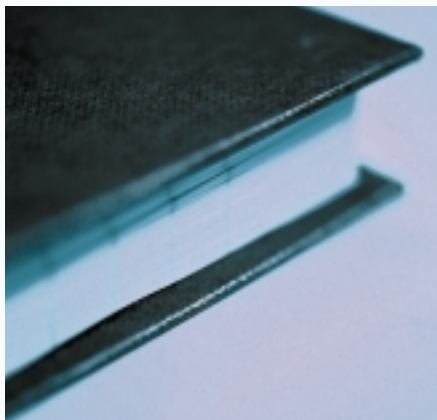
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instructions on how to return ballots must be mailed by first-class mail or delivered to every member not less than 30 days prior to the deadline for voting. In order to preserve confidentiality, a voter may not be identified by name, address, or Lot or Unit number on the ballot.

Associations are encouraged to use, as a model, those procedures used by California counties for ensuring confidentiality of voter absentee ballots, including:

- The ballot itself is not signed by the voter, but is inserted into an envelope that is sealed. This envelope is inserted into a second envelope that is sealed. In the upper left hand corner of the second envelope, the voter prints and signs his or her name, address, and Lot or Unit number, that entitles him or her to vote; and
- The second envelope is addressed to the inspector or inspectors of election, who will be tallying the votes. The envelope may be mailed or delivered by hand to a location specified by the inspector or inspectors of election. The member may request a receipt for delivery.

Proxies – Any instruction given in a proxy issued for an election that directs the manner in which the proxy holder is to cast the vote must be set forth on a separate page of the proxy that can be detached and given to the proxy holder to retain. The proxy holder is required to cast the vote by secret ballot.



Secret ballots – Note that the law specifically requires secret ballots for voting on (a) assessments, (b) selection of directors, (c) amendments to the governing documents, and (d) any grant of exclusive use of common area property to any owner.

Publicize – Within 15 days of the election, the board is required to publicize the results of an election in a communication directed to all members of the association.

Storing – After counting, election ballots must be stored by the association in a secure place for at least one year. In the event of a recount or other challenge, the association is required to make the ballots available for inspection and review by members or their authorized representatives. Any recount must be conducted in a manner that preserves the confidentiality of the vote.

Campaign funds – Another new law prohibits the use of association funds for campaign purposes. Campaign purposes can include pushing for an election or defeat of any candidate, or including candidate photographs or names in association publications within 30 days of the election.

So, what happens if you don't do all of this? You can get sued. Members can file civil lawsuits for violations; even in small claims court! If they win, members get their "reasonable" attorneys' fees and court costs, and the association can be fined an additional civil penalty of \$500.00 for each violation. The election results can also be voided.



3. Member Inspection Rights – AB 1098

Beginning July 1, 2006, the new law provides more certainty as to what "accounting books and records" members of the association may see. These records are:

- Any financial documents (e.g. budgets, reserve studies, insurance, etc.).
- Interim unaudited financial statements, periodic or as compiled, containing any of the following: (a) balance sheet; (b) income and expense statement; (c) budget comparison; and (d) general ledger. A "general ledger" is a report that shows all transactions that occurred in an association account over a specified period of time. The records described in this paragraph must be prepared in accordance with generally accepted accounting principles.
- Executed contracts not otherwise privileged under law. Privileged contracts do not include contracts for maintenance, management, or legal services, and must be available for inspection.
- Written board approval of vendor or contractor proposals or invoices.
- State and federal tax returns.
- Reserve account balances and records of payments made from reserve accounts.
- Agendas and minutes of meetings of the members, the directors and any committees appointed by the board, excluding information from executive sessions.
- Check registers.
- Membership lists, including name, property address, and mailing address, with the rights of members to "opt out."

There are additional documents to which members have a right of access; they are called by the statute "Enhanced Association Records."

Enhanced association records include:

- Invoices.
- Receipts and canceled 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.
- Reimbursement requests submitted to the Association.

Note: Reimbursement requests can include some very personal information, including account numbers and other identifying information. The person submitting the reimbursement request is solely responsible for removing all personal identification information.

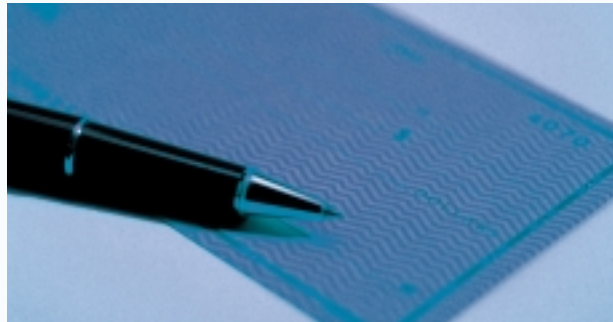
These records include those for the current fiscal year, and the previous two fiscal years. However, minutes of meetings (board, member and committee meetings) must be *permanently* available. That means forever.

Associations are obligated to make the records available for inspection and copying in any on-site business office. If there is no business office on the project, the parties can agree on a place for inspection. If they cannot agree, or if the member specifically requests copies, these obligations can be satisfied by mailing copies by first-class mail.

Associations can charge the requesting member for the direct and actual cost of copying and mailing requested documents, with prior notice and agreement to pay. If the association has to remove certain information from the records first, it can bill the requesting member an amount not in excess of \$10 per hour, and not to exceed \$200 total per written request, for the time actually and reasonably involved in removing sensitive information that is allowed to be removed. Again, there must be prior notice and an agreement to pay first.

Associations are entitled to remove information from the records for any of the following reasons:

- The release of the information is reasonably likely to lead to identity theft.
- The release of the information is reasonably likely to lead to fraud.
- The information is privileged under law.
- The release of the information is reasonably likely to compromise the privacy of an individual member of the association.
- Records of "...a-la-carte goods or services..." provided to individual members of the association for which the association received monetary consideration other than assessments.



- Records of disciplinary actions, collection activities, or payment plans of homeowners other than the homeowner requesting the records.
- Any person's personal identification information (social security number, tax identification number, driver's license number, etc.).
- Agendas, minutes, and other information from executive sessions.
- Personal personnel records. This does not include compensation paid to employees, vendors, or contractors.
- Interior architectural plans, including security features, for individual homes.

If requested by the member, when the association denies or redacts records, it must specify the legal basis for its actions.

Timeline to respond – Request for records for the current fiscal year must be provided within 10 business days

following receipt of the request. Records prepared during the previous two fiscal years must be provided within 30 calendar days following receipt of the request. For minutes, provide within 30 days of the meeting.

Methods of transmission –

Requesting parties have the option of receiving specifically identified records by electronic transmission (e.g., e-mail) or machine-readable storage media (e.g. CD) as long as those records can be transmitted in a redacted format that does not allow the records to be altered. The cost of duplication is to be limited to the direct cost of producing the copy of a record in that electronic format.

Good-faith protections – The association, nor any officer, director,

employee, agent or volunteer can be liable for damages to a member of the association as the result of identity theft or other breach of privacy because of the failure to withhold or redact that member's information, unless the failure to withhold or redact the information was intentional, willful, or negligent. Also, there is no liability for failing to retain

records for the periods specified herein that were created prior to January 1, 2006.

Again, members have the right to bring a civil action to enforce their right to inspect and copy the records, even in small claims court. If a court finds that the association unreasonably withheld access to the records, the court must award the member reasonable costs and expenses, including reasonable attorney's fees, and may assess a civil penalty of up to \$500 dollars for the denial of each separate written request. On the other hand, a prevailing association may recover any costs if the court finds the action to be frivolous, unreasonable, or without foundation.

If you have any questions about these or any other requirements, please consult with an appropriate legal professional. ■