

New Laws, New Challenges

2003 California Homeowner Association Legislation

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In 2003, California followed a national trend in homeowner association legisla-

tion. From coast to coast in America, states are passing laws expanding the rights of homeowners in common interest subdivisions. Many of these new laws result from actual or perceived abuses by some boards of directors, and the corresponding activism of individual homeowners in these communities. An example from last year in California was the "Flag Bill," invalidating restrictions on flying the American flag in subdivision communities. This year brings several similar new laws, most will be effective on January 1, 2004.

AB 104, Chapter 375, Accounting Books & Records; Minutes.

While provisions of the existing California Civil and Corporations Codes already required homeowner associations to maintain certain financial and meeting records, AB 104 adds Section 1365.2 to the Civil Code regarding more regulation of financial and meeting records. Section 1365.2 makes certain clarifications and additions to the "where" and "what" of record keeping duties and member inspection rights.

THE WHERE — After January 1, 2004, associations must make the "accounting

books and records" of the association, and the minutes of proceedings, available for inspection by a member or the member's representative (which must be done in writing by the member). These documents must be available at the association's on-site business office. If there is no on-site business office, the association must make the

utes of proceedings. Section 1365.2 restricts the ability of an association to withhold, or "redact," certain information. While you can withhold information that may likely lead to identity theft, fraud or that which is otherwise privileged, you cannot withhold information concerning compensation paid to employees, vendors or contractors. For

commercial use. Conversely, owners have the right to sue the association for failing to follow the new law, and may be awarded up to \$500 for each violation.

AB 512, Chapter 557, Chapter & Article Headings; Procedural Fairness in Decisions and Rules.

A product of the California Law Revision Commission, AB 512 represents an effort by the legislature to "clarify and simplify" the laws relating to common interest subdivisions. With one hand they give you their version of simplicity and understanding, and with the other hand they take away the ability of the board of directors to unilaterally enact rules and architectural standards. Sprinkle in a few provisions requiring the president's name to be filed with a state agency and some changes affecting only commercial and industrial projects, and you have a recipe for a dish only lawyers would love!

SIMPLICITY — The Davis-Stirling Common Interest Development Act was originally enacted by California as a means of simplifying the various laws relating to subdivisions. It took separate provisions of several different codes and centralized them in one area of the Civil Code. Since that time, we understand that the Davis-Stirling Act has been one of the most amended portions of the Civil Code ever! What started out as a relatively simple and well-intentioned Act became con-

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documents available at a location agreed upon by both the member and the association. If the parties cannot reach an agreement, the association may satisfy its obligation by mailing copies of the documents to the member. The association must also mail the documents to the member if it receives a written request to do so. The cost of copying and mailing may be billed to the member, but you must inform them of the amount first.

THE WHAT —

Associations must keep and produce detailed accounting books and records and min-

example, the accounting books and records must now show the amounts paid to landscape companies, management companies, and any person employed directly by the association, such as janitors or security personnel, as a separate line-item rather than lumped together in one category. Fortunately, employment information may be set forth by job title, *not* by name, social security number or other personal information.

Note that this information may not be requested or used for any commercial purpose, and the association has a specific right to sue to stop such

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fusing and understandable only by professional masochists (attorneys).

Enter the California Law Revision Commission (“CLRC”). This is a body of professionals whose sole job is to research and deliberate upon subjects referred to them by the legislature. The legislature said “Fix the Act!” And so, after many years and many studies, CLRC determined that the Act needed chapter and article headings. (Hmm, do you think clearer language choices may be more effective?!)

But wait. . . there’s more!

CLRC also thought that owners needed more rights in their communities! Therefore...

RULES — A whole new section is being added to the Davis-Stirling Act regarding enactment of rules by community associations. No longer can the governing body, the board of directors or governors, enact rules all by themselves without owner input. These new sections, beginning with Section 1357.100, totally change the way rules can be enacted and enforced. First, a rule is valid and enforceable only if:

- The rule is in writing;
 - The rule is within the authority of the board to enact;
 - The rule is consistent with law and the community documents;
 - The rule is “adopted, amended, or repealed” in good faith and in compliance with the new laws; and
 - The rule is “reasonable.”
- Second, owners now have a right to see some types of rules before they are enacted, and have the right to veto, or take-back, the rules they don’t like.

Owners have review and veto rights for the following types of rules:

- Common area use rules;
- Exclusive-use common area use rules (for example, balcony storage);
- Home use rules (for example, noise regulations);
- Architectural rules;
- Discipline rules, including any fine schedule;
- Payment plans for delinquent assessments; and
- Assessment dispute procedures.

Any proposal to change any of the above rules must be copied and sent to all members thirty days before any decision is made.

Then, any decision on that change must be made at a board meeting, after discussion of any members’ comments. If the board decides to adopt the rule change, they must provide notice to all owners within fifteen days. If, within thirty days of the rule-change-notice, at least five percent of the membership disagrees with the rule change, they may call for a special meeting to vote on the rule change. The rule change may be reversed if a majority of members at the meeting (assuming there is a quorum present) vote to reverse the rule change. The vote may be by mail-ballot, instead of holding a meeting.

Note that there are exceptions for “emergency rule changes” made to address an imminent threat to public health or safety, or an immediate risk of substantial economic loss to the community. These rule changes do not need the 30-day notice period, but are only effective for up to 120 days, and may not be re-adopted after their expiration. The review and veto rights of

owners apply only to the types of rules described above. They do not apply to the following types of rules or decisions:

- Common area maintenance;
- A decision on a specific matter that is not intended to apply generally;
- Regular or special assessment amounts;
- Any rule required by law; and
- Any repeating of existing law or governing document provision.

There are a few other changes in AB 512. The first requires the name of the president of the association to be reported to the California Secretary of State, along with his or her address and daytime telephone number or e-mail address. The second makes changes to Civil Code Section 1373 which limits the applicability of certain portions of the Davis-Stirling Act to industrial and commercial developments. The third addresses acceptable methods of document delivery between owners and their associations, including personal delivery and first class mail. Interestingly, delivery by e-mail, facsimile, or other electronic means is allowed if agreed to by the recipient!

AB 1086, Chapter 393, Transfer of Title Fees.

Section 1368 of the Civil Code requires sellers of homes in common interest developments to provide buyers with certain documents prior to close of escrow. Some of these documents must be provided by the association for the development, and Section 1368 allows the association to charge its reasonable cost to prepare and reproduce the requested items.

AB 1086 changes this slightly. It was originally written to address situations where some associations were charging significant fees upon a transfer (to fund reserves or other improvements).

AB 1086 clarifies that an association, a community service organization, and its management agent, **may not charge any fee** in connection with a transfer of title except for (a) an amount not exceeding its actual costs to change its records, and (b) its reasonable costs to prepare and reproduce requested copies.

Certain community service organizations, for example those formed to restore or maintain wetlands or to mitigate environmental problems, may be exempt from these changes. If this exception may apply to your situation, please consult with an appropriate legal professional.

AB 1423, Chapter 147, Common Interest Development Managers.

AB 1423 was intended to cleanup certain gaps in the manager certification bill from last year’s AB 555. Essentially, if you are a community manager who has a professional designation prior to July 1, 2003 (e. g. PCAM, CCAM, etc.), you have until July 1, 2004, to receive your required California instruction, in order to be able to call yourself a “Certified Common Interest Development Manager.”

The second important provision of the bill is that **it deletes** the requirement that an association’s articles of incorporation disclose whether its managing agent is certified. This specifically addresses major concerns expressed by

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both attorneys and managers with regard to the articles of incorporation. Serving as a permanent record in the California Secretary of State's office, these articles could, for now and ever after, state that a manager or company is not certified (when, in fact, the certification was obtained later).

The third important bill provision changes the timing and content of the annual disclosures that managers are obligated to provide to the association in accordance with Section 11504 of the Business and Professions Code. Rather than mere annual certification disclosure, your disclosure obligations begin on or before September 1, 2003, and continue annually thereafter. In addition to the other disclosure items, you must disclose the possession of an active real estate license, if applicable.

AB 1525, Chapter 773, Invalidation of Sign Restrictions.

Quite possibly the most significant piece of homeowner-rights legislation to pass since the American flag bill of 2002 is AB 1525 of 2003. AB 1525 **invalidates** the restrictions on signs in each of California's 60,000+ homeowner associations. Indeed, the legislative intent behind AB 1525 specifically states that owners in common interest developments need to be protected from unreasonable restrictions on their ability to engage in constitutionally protected free speech traditionally associated with private residential property. AB 1525 adds Section 1353.6 to the Civil Code. This section prohibits all common interest community governing documents, including the CC&Rs and rules, from restricting the posting or displaying of noncommercial signs, posters, flags, or banners. The only exceptions are (a) those for the protection of health and safety, and (b) those which

violate the law. Other than those two exceptions, owners now have the right to place noncommercial messages on or in their homes. Owners may place signs or posters which do not exceed 9 square feet, or flags or banners which do not exceed 15 square feet, in their yard or windows, on their door or outside wall, and on their balcony. These items may be made of paper, cardboard, cloth, plastic or fabric. They may not be made from lights, building or paving materials, plants, or balloons. Also, owners may not paint the messages on architectural surfaces. Clearly, this has the potential, depending upon the residents in your community, to directly impact your operations and the aesthetics of your community. Imagine what two owners who are fighting each other would post in their yards. Or how about the owner with a significant complaint against the disciplinary actions being taken by the board against him or her? Or what about the owner who adores seasonal flags? Also,

don't forget that the 2004 election is rapidly approaching. Party affiliation and candidate signs are due to spring up like weeds in a flowerbed. Fortunately or unfortunately, depending upon your point of view, there's very little that you can do about this.

Conclusion

The new legislation of 2003 presents homeowner associations and the professionals working with them with new challenges and opportunities in the day-to-day operations of these important housing choices. It is now up to you, the professional and the board member, to educate your associations and their members about these new requirements, and to conduct your activities in compliance with these laws. Of course, as attorneys, we will be here to assist in any way possible. Good luck! ■