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COMMUNITY ASSOCIATION
Law Bulletin

2006 LEGISLATIVE UPDATE

New Statute May Limit Architectural Review Approvals

BY MARTIN LEE

Thirty years ago, it started becoming popular in California to install skylights in the roofs over living space. While this was never much of a problem for most people, it presented some difficulties in condominium projects because the roof was common area maintained by the condominium association and the CC&Rs in almost all condominium projects prohibited exterior modifications without the prior written approval of the condominium association. If the condominium association approved of the skylight for a member, it would, in effect, be giving the exclusive use of some of the common area over to that owner. Also, if the skylight later leaked, who would repair it? What if the leak occurred years later and the owner who originally installed the skylight had sold to a new owner who did not know the skylight was anything other than common area maintained by the condominium association? Yet condominium associations wanted to approve the member installation of such skylights. A dilemma was presented.

In order to accommodate our clients back then, Feldsott & Lee developed the concept of the architectural committee of the condominium association approving of the request by a member to install a skylight conditioned upon the member entering into a recordable license agreement. The license agreement would, in pertinent part, provide that the owner and any and all later owners of the condominium unit would maintain the skylight and hold the condominium association harmless and, in exchange, the condominium association would give the owner (and the subsequent owners) a revocable license to install the skylight. The giving of a revocable license arguably prevented the association from being charged with wrongfully giving away common area (a revocable license is technically not an interest in realty) and the recordation of the agreement would protect the condominium association from confronting a subsequent owner of the condominium unit contending he did not know the skylight was his or her responsibility to maintain.

Over the decades, the Davis-Stirling Common Interest Development Act (Civil Code §1350) was passed and various forms of the recorded revocable license agreement were used by many homeowners association law firms to accommodate ever increasing uses in all sorts of common interest developments where there was some form of common area. For instance, some condominium associations wanted to permit members to install screen doors, yet this was also common area – the license agreement was used. Or in a planned development, the association wanted to permit owners to personalize their common area mailboxes – again the license agreement was used.

The use of the revocable and recordable license agreement became increasingly more complicated over the past 20 years as the Davis-Stirling Common Interest Development Act was amended and changed. The Legislature has now approved a completely new statute, Civil Code §1363.07, for the Davis-Stirling Common Interest Development Act which may well spell the end for many, if not most, uses of the recordable revocable license agreement in certain associations, and completely eliminate the necessity for their use in other situations. New Civil Code §1363.07 (which should become effective January 1, 2006) will, in general, prohibit any

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New Statute May Limit Architectural Review Approvals

BY MARTIN LEE

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association from granting the exclusive use of any portion of the common area to any member unless the grant is approved by the affirmative vote of the members owning 67% of the separate interests in the development (the association's governing documents can specify a different percentage). Of course, lawyers previously argued that a revocable license was not a "grant" (the word used in the new statute), but the Courts might well look askance at this legalistic argument, especially given what appears to be the legislative intent behind this new statute. Nonetheless, as with most statutes, there are lots of exceptions to the prohibition in the new statute. For example, the following "grants" of exclusive use are exempted:

"(A) To eliminate or correct engineering errors in documents recorded with the county recorder or on file with a public agency or utility company.

"(B) To eliminate or correct encroachments due to errors in construction of any improvements.

"(C) To permit changes in the plan of development submitted to the Commissioner of the Department of Real Estate in circumstances where the changes are the result of topography, obstruction, hardship, aesthetic considerations, or environmental conditions.

"(D) To fulfill the requirement of a public agency.

"(E) To transfer the burden of management and maintenance of any common area that is generally inaccessible and is not of general use to the membership at large of the association.

"(F) Any grant in connection with an expressly zoned industrial or commercial development, or any grant within a subdivision of the type defined in Section 1373." (Emphasis supplied).

Since many common areas where the revocable license agreement were previously used in condominium projects were genuinely inaccessible and not of general use to the members (e.g., in the skylight example), exemption E will probably be the one most used by architectural review committees. But the issue gets thornier in planned developments. For instance, in planned developments where the homeowners association has a maintenance easement for the landscaping on slopes on members' lots inaccessible and not of use to the general membership, a good argument can be made that exemption E applies and the association now has not only the power to grant exclusive use to a member, but it need not even use the device of a revocable and recordable license agreement – the new statute appears to give the homeowners association all the authority it needs. But this new statute would seem to prohibit the use of a revocable, recordable license agreement where a homeowners association in a planned development wants to, let's say, give a member architectural approval to turn a common area cement sidewalk in front of his or her home into a decorative cobblestone walkway. It would be impossible to argue that the common area sidewalk is inaccessible or not of general use to the other association members. So this new statute can cut both ways and only complicates the issue of architectural review approval for most homeowners associations. When confronted with a situation where this new Civil Code §1363.07 might apply, homeowners associations and their architectural review committees should immediately consult their legal counsel for advice. ■

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COMMUNITY ASSOCIATION
Law Bulletin

SB 662

Protecting Contractors that Provide Free Construction Services to Those Who Lost Their Homes During the October 2003 San Diego County Fire

BY RYAN MILUN

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As noted above, the purpose of this statute is to provide an incentive to construction professionals to provide their services, **free of charge**, to those families whose homes were destroyed by the October 2003 Cedar Fire. The rebuilding of the homes destroyed by the Cedar Fire would not be protected by provisions of Title 7 (commencing with Section 895 of the Civil Code) because those provisions only apply to new homes sold on or after January 1, 2003. As such, by the addition of Section 946.5, the legislature has allowed contractors to receive the same protections, both pre- and post litigation, that apply to contractors that have built new homes sold on or after January 1, 2003.

Some of the most significant of these protections appear in Civil Code §§ 910 through 938 and 941, which outline the pre-litigation procedures that must be followed prior to the actual filing of an action, including: having the claimant "provide written notice. . . of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896)" (Civil Code § 910.); setting forth nonadversarial procedures for resolving the dispute (Civil Code § 914.); and giving the contractor an opportunity to repair the violation; (Civil Code § 917.) among other procedures. Further, Civil Code § 941 establishes a 10 year statute of limitations for claims brought under Title 7, (commencing with Civil Code Section 895.)

Finally, it is important to note several limitations on the applicability of the provisions of Section 945.6. First, in order for the protections within Title 7 (commencing with Civil Code Section 895) to apply, the contractor and the homeowner would have to agree to incorporate those protections into their contract for reconstruction. (Civil Code § 945.6[a].) Second, Section 945.6 only applies to the reconstruction of a residence lost during the October 2003 Cedar Fire in the County of San Diego and only to those homes within the County of San Diego. (Civil Code § 945.6[a].) Third, and perhaps most importantly, the word "contractor," for purposes of this statute, is not given its ordinary meaning, but rather includes only those subcontractors, design professionals, or general contractors who, after the effective date of this act and on or before January 1, 2008, provides his or her services **without compensation**. Finally, Title 7, (commencing with Civil Code Section 895) "shall remain in effect only until January 1, 2008, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2008, deletes or extends that date." (Civil Code § 945.6[c].)

It is likely that the adoption of Section 945.6 will at least provide some incentive to construction contractors to rebuild the homes lost in the Cedar Fire of October 2003; however, the adoption of Section 945.6 certainly does not make "Good Samaritan" contractors judgment proof. Therefore, it is very important that the reconstruction agreements between the contractors and the homeowners specifically incorporate the rights and remedies of Section 945.6, otherwise contractors will be exposing themselves to liability, despite the fact that they have provided their service free of charge. ■

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New Definitions

close of escrow for the first sale of a separate interest to a member of the general public pursuant to the public report issued for the first phase of the development.

"(o) The section shall become operative on July 1, 2006."

As one can see, a new, highly detailed and quite specific procedure is now set forth for member inspection rights. Prior limitations on member inspection rights in some areas have now been eliminated and, in other areas, expanded. In the future, association responses to member requests for access to association records will require a much more detailed analysis but, hopefully, there will now be less uncertainty and less litigation. ■

SB 662

Protecting Contractors that Provide Free Construction Services to Those Who Lost Their Homes During the October 2003 San Diego County Fire

BY RYAN MILUN

In an effort to alleviate the devastation associated with the October 2003 San Diego County Fires, the legislature enacted Assembly Bill 662. ("AB 662") AB 662 was characterized by the legislature as "urgency legislation" and as such took effect immediately upon approval. The purpose of AB 662 is to provide a reasonable litigation procedure pertaining to construction defect litigation that would encourage insurers and licensed contractors to rebuild homes for the families victimized by the Cedar Fire of October of 2003."

In support of Assembly Bill 662, the legislature made the following findings:

"(a) California has a statewide housing crisis.

(b) Nationally, nine of the 10 least affordable housing markets are in California.

(c) Evidence indicates that there is increasing difficulty to obtain adequate insurance for the construction of single-family homes, as well as for multiple-family housing units.

(d) In October of 2003, Southern California experienced the most devastating wild land/urban interface fire disaster in history.

(e) According to the California Department of Forestry and Fire Protection, 3,631 homes were destroyed and many of these were situated in the County of San Diego.

(f) Many of these property owners who lost residential homes in the County of San Diego do not have, or are otherwise unable to obtain, adequate insurance to rebuild their lost homes.

(g) This urgency legislation would provide a reasonable litigation procedure pertaining to construction defect litigation that would encourage insurers and licensed contractors to rebuild homes for the families victimized by the Cedar Fire of October of 2003."

The author of Assembly Bill 662, Assembly Member La Seur, further argued that:

"During the Southern California Firestorm of 2003, the Cedar Fire killed 13 people in my district and destroyed approximately 2,000 homes. Many of the people left homeless by the Cedar Fire were either under-insured or not insured as a result of the homes' location. Contractors and subcontractors alike have volunteered to contribute the labor necessary to rebuild homes for these people. The one stumbling block is the potential for construction defect litigation to occur years after the homes have been rebuilt. Good Samaritans should not be placed in harm's way. There is potentially hundreds of thousands of dollars worth of free home construction labor available to provide homes for those who lost their home in the fire and many remain homeless without the donated labor and materials. A 501(c)3 has been set up and has raised enough money to [provide building materials to] build 52 homes, 800 sq. ft., 900 sq. ft., and 1000 sq. ft."

"AB 662 encourages contractors to provide services without compensation to reconstruct residential homes for persons who lost their homes during the Cedar Fire in San Diego in October of 2003 by providing [the option] of a more cost-efficient procedure to resolve any subsequent construction defect disputes."

Specifically, AB 662 adds Section 946.5 to the Civil Code, which provides that:

"(a) Nothing in Title 7 (commencing with Section 895) shall be construed to prohibit an individual from voluntarily agreeing with a contractor to incorporate the rights and remedies of Title 7 (commencing with Section 895), or any provision of Title 7 (commencing with Section 895), in a contract for reconstruction of a dwelling unit or common area of a residence lost during the October 2003, Cedar Fire in the County of San Diego.

(b) For purposes of this title, 'contractor' means any subcontractor, design professional, or general contractor who, after the effective date of this act and on or before January 1, 2008, provides his or her services without compensation.

(c) This title shall remain in effect only until January 1, 2008, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2008, deletes or extends that date."

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SB 137

Limits on Assessment Collection

This bill, affecting debts that arise on and after January 1, 2006, places new limits on an association's ability to collect unpaid assessments. The bill provides that when an association of a common interest development seeks to collect delinquent assessments of less than $1,800, (not including accelerated assessments, late charges or fees) the association must either file a civil action in small claims court or record a lien. If the association chooses to record a lien, it would be prohibited from foreclosing until the amount equals or exceeds $1,800 or the assessments are more than 12 months delinquent.

The bill removes provisions authorizing the owner of a separate interest to pay assessments that are in dispute in full under protest and then require the board of directors of an association to respond to the owner's written dispute of a debt within 15 days. Instead, associations must offer Internal Dispute Resolution ("IDR") before pursuing a lien.

This bill allows foreclosures only when the amount of unpaid assessments is over $1,800, or when the assessments have remained unpaid for at least one year. It also imposes new conditions to the foreclosure procedure. Among these conditions, the bill requires the board of directors of an association to make the decision to foreclose upon a lien at an executive meeting of the board, by a majority vote, at least 30 days prior to any public sale, and to record the results of the vote in the meeting minutes. The board is also required to provide notice of the decision to foreclose, both to the association unit address, and to an additional address, if the unit owner has another address, and has provided written notice of the secondary address to the association.

Associations will be prohibited from recording a lien or initiating a foreclosure action without participating in IDR and ADR procedures if so requested by the owner. If it is determined through dispute resolution or alternative dispute resolution that an association has filed a lien for a delinquent assessment in error, the association will be required to reverse charges and take other corrective actions. The bill also requires the association to file an itemized statement of the charges owed by the owner together with the notice of delinquent assessment.

Previously, delinquent assessments were subject to a right of redemption only if a deficiency judgment may have been entered against the homeowner (i.e., when the equity in the home is less than the judgment amount). Now, foreclosure by an association to collect upon a debt for a delinquent assessment, is automatically subject to a right of redemption, with a redemption period of 90 days.

The bill also authorizes an association created to manage a common interest development to appear and participate in small claims court hearings through an agent, a management company representative, or bookkeeper who appears on behalf of the association.

To the extent existing funds are available, the Department of Consumer Affairs and the Department of Real Estate are required to develop an on line education course for the board of directors of an association regarding the role, duties, laws, and responsibilities of board members and prospective board members and the nonjudicial foreclosure process. To date, no funding has been set aside for this education course. ■

SB 61

Effective July 1, 2006, new statutes will place additional burdens on associations during elections

BY RYAN MILUN

As of July 1, 2006, Senate Bill 61 ("SB 61") will become operative. The purpose of SB 61 is to provide procedural safeguards for conducting elections in common interest developments. The author of SB 61, Representative Battin, in making arguments in support of the Bill, noted that:

". . . Ballots in Common Interest Development ("CID") elections are not required by law to be secret. This leaves an opening for potential abuse wherein homeowners can be intimidated and disinclined to vote in accordance with their true desires. Numerous instances of such manipulations have been reported, giving the impression that elections conducted in many CIDs lack procedural safeguards to fully protect the integrity of the voting process. . ."

In an effort to eliminate the potential for abuse, SB 61 makes several amendments and additions to the Civil Code, and more specifically, the Davis-Stirling Common Interest Development Act. (Civil Code §1350 et seq.) The most relevant of these amendments will be discussed in detail below.

First, SB 61 Amends Section 1357.120 of the Civil Code to add subparagraph (7). The addition of subparagraph 7 makes the rule changing procedures and the procedures for reversing rule changes in Section 1357.130 and Section 1357.140 directly applicable to procedures for elections.

Next, SB 61 adds several Sections to Title 6, Chapter 4, Article 2 (commencing with Section 1363.05) of the Civil Code including Section 1363.03, Section 1363.04, and Section 1363.09. Section 1363.03 sets forth the procedures that an Association must follow prior to and during elections; Section 1363.04 sets forth a limitation on the use of Association funds for campaign purposes; and finally, Section 1363.09 sets forth the legal remedies available to the members of an Association alleging violations of the election procedures.

Civil Code § 1363.03:

The first major requirement of Section 1363.03 is set forth in subparagraph (a), which requires an Association to adopt rules that:

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 the 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 position, 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 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.
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.

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New Definitions and Procedures Relative to a Member's Right of Access to Association Records

BY MARTIN LEE

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expenses, including reasonable attorney's fees, and may assess a civil penalty of up to five hundred dollars ($500) for the denial of each separate written request. A cause of action under this section may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court. A prevailing association may recover any costs if the court finds the action to be frivolous, unreasonable, or without foundation.

"(g) The provisions of this section apply to any community service organization or similar entity, as defined in paragraph (3) of subdivision (c) of Section 1368, that is related to the association, and this section shall operate to give a member of the community service organization or similar entity a right to inspect and copy the records of that organization or entity equivalent to that granted to association members by this section.

(h) Requesting parties shall have the option of receiving specifically identified records by electronic transmission or machine-readable storage media 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 shall be limited to the direct cost of producing the copy of a record in that electronic format.

"(i) The time periods for which specified records shall be provided is as follows:

"(1) Association records shall be made available for the current fiscal year and for each of the previous two fiscal years.

"(2) Minutes of member and board meetings shall be permanently made available. If a committee has decisionmaking authority, minutes of the meetings of that committee shall be made available commencing January 1, 2007, and shall thereafter be permanently made available.

"(j) The timeframes in which access to specified records shall be provided to a requesting member is as follows:

"(1) Association records prepared during the current fiscal year, within 10 business days following the association's receipt of the request.

"(2) Association records prepared during the previous two fiscal years, within 30 calendar days following the association's receipt of the request.

"(3) Any record or statement available pursuant to Section 1365 or 1368, within the timeframe specified therein.

"(4) Minutes of member and board meetings, within the timeframe specified in subdivision (d) of Section 1363.05.

"(5) Minutes of meetings of committees with decisionmaking authority for meetings commencing on or after January 1, 2007, within 15 calendar days following approval.

"(6) Membership list, within the timeframe specified in Section 8330 of the Corporations Code.

"(l) There shall be no liability pursuant to this section for an association that fails to retain records for the periods specified in subdivision (i) that were created prior to January 1, 2006.

"(m) As applied to an association and its members, the provisions of this section are intended to supersede the provisions of Sections 8330 and 8333 of the Corporations Code to the extent those sections are inconsistent.

"(n) The provisions of this section shall not apply to any common interest development in which separate interests are being offered for sale by a subdivider under the authority of a public report issued by the Department of Real Estate so long as the subdivider or all subdividers offering those separate interests for sale, or any employees of those subdividers or any other person who receives direct or indirect compensation from any of those subdividers, comprise a majority of the members of the board of directors of the association. Notwithstanding the foregoing this section shall apply to that common interest development no later than 10 years after the

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New Definitions and Procedures Relative to a Member's Right of Access to Association Records

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check, stock, and credit card numbers.

"(B) The release of the information is reasonably likely to lead to fraud in connection with the association.

"(C) The information is privileged under law. Examples include documents subject to attorney-client privilege or relating to litigation in which the association is or may become involved, and confidential settlement agreements.

"(D) The release of the information is reasonably likely to compromise the privacy of an individual member of the association.

"(E) The information contains any of the following:

"(i) 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.

"(ii) Records of disciplinary actions, collection activities, or payment plans of homeowners other than the homeowner requesting the records.

"(iii) Any person's personal identification information, including, without limitation, social security number, tax identification number, driver's license number, credit card account numbers, bank account number, and bank routing number.

"(iv) Agendas, minutes, and other information from executive sessions of the board of directors as described in Section 1363.05, except for executed contracts not otherwise privileged. Privileged contracts shall not include contracts for maintenance, management, or legal services.

"(v) Personnel records other than the payroll records required to be provided under paragraph (2).

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

"(2) Except as provided by the attorney-client privilege, the association may not withhold or redact information concerning the compensation paid to employees, vendors, or contractors. Compensation information for individual employees shall be set forth by job classification or title, not by the employee's name, social security number, or other personal information.

"(3) No association, officer, director, employee, agent or volunteer of an association shall 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 under this subdivision unless the failure to withhold or redact the information was intentional, willful, or negligent.

"(4) If requested by the requesting homeowner, an association that denies or redacts records shall provide a written explanation specifying the legal basis for withholding or redacting the requested records.

"(e)(1) The association records, and any information from them, may not be sold, used for a commercial purpose, or used for any other purpose not reasonably related to a member's interest as a member. An association may bring an action against any person who violates this section for injunctive relief and for actual damages to the association caused by the violation.

"(2) This section may not be construed to limit the right of an association to damages for misuse of information obtained from the association records pursuant to this section or to limit the right of an association to injunctive relief to stop the misuse of this information.

"(3) An association shall be entitled to recover reasonable costs and expenses, including reasonable attorney's fees, in a successful action to enforce its rights under this section.

"(f) A member of an association may bring an action to enforce the member's right to inspect and copy the association records. If a court finds that the association unreasonably withheld access to the association records, the court shall award the member reasonable costs and

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COMMUNITY ASSOCIATION
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SB 61

Effective July 1, 2006, new statutes will place additional burdens on associations during elections

BY RYAN MILUN

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It is important to note that the Association must follow the procedures set forth in Section 1357.100 through Section 1357.150 for affecting rules changes. The five "goals" of Section 1363.03(a) should be used by the Association as a guidepost to adopting its own set of rules regarding its election procedures. So long as each of these "goals" are met, the Association will have complied with this Section of the statute.

Next, Section 1363.03(b) requires that an election within a common interest development regarding assessments, **selection of members of the association board of directors,** amendment to the governing documents or the grant of exclusive use of common area property pursuant to Section 1363.07 shall be held by secret ballot. The requirements set forth in subparagraph (b) are mandatory and must be followed by the Association regardless of whether the governing documents provide otherwise. Further, the procedures for assuring that the ballots remain secret are set forth within Section 1363.03(e) and must be followed by the Association as well.

Next, Section 1363.03 subparagraph (c), requires an Association to select an "independent third party" to be the inspector of elections. An Association can choose to have either one or three inspectors of elections. According to the definition provided within this section, an "independent third party" includes but is not limited to:

> ". . a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public. An independent third party may be a member of the association, but may not be a member of the board of directors or a candidate for the board of directors or related to a member of the board of directors or a candidate for the board of directors. An independent third party may not be a person who is currently employed or under contract to the association for any compensable services unless expressly authorized by rules of the association adopted pursuant to paragraph (5) of subdivision (a)." (Civil Code § 1363.03[c][2].)

It is important to note that the only people who are explicitly prohibited, by statute, from being an "independent third party" for purposes of an election are members of the board, candidates for the board, or relatives of board members or candidates. **Any other person** may be considered an independent third, even those employed by or under contract to the association for compensable services, so long as the rules adopted by the Association allow them to be.

> *..."failure to comply with these newly enacted statutes can result in lawsuits, liability for attorney's fees, court costs and possibly civil penalties."*

The duties of the inspector of elections are set forth in Section 1363.03(c)(3) and include:

1. Determining the number of memberships entitled to vote and the voting power of each.
2. Determining the authenticity, validity, and effect of proxies, if any.
3. Receiving ballots.
4. Hearing and determining all challenges and questions in any way arising out of or in connection with the right to vote.
5. Counting and tabulating all votes.
6. Determining when the polls shall close.

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SB 61

Effective July 1, 2006, new statutes will place additional burdens on associations during elections

BY RYAN MILUN

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7. Determining the result of the election. and
8. Performing any acts as may be proper to conduct the election with fairness to all members in accordance with this section and all applicable rules of the association regarding the conduct of the election that are not in conflict with this section.

The inspector of elections (or potentially all three inspectors of elections) is also required to "perform his or her duties impartially, in good faith, to the best of his or her ability, and as expeditiously as is practical." (Civil Code § 1363.03(c)(4).) If there are three inspectors of election, the decision or act of a **majority** shall be effective in all respects as the decision or act of all. (Id.)

The next Section of the Civil Code, Section 1363.03 subparagraph (d) requires that:

"Any instruction given in a proxy issued for an election that directs the manner in which the proxy holder is to cast the vote shall 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 shall cast the member's vote by secret ballot."

This Section ensures that the proxy will be voted confidentially.

Section 1363.03(e), as noted above, sets forth the procedures for insuring that the ballots cast by homeowners remain confidential up to and including the time they are counted. Specifically, Section 1363.030(e) provides that:

"Ballots and two preaddressed envelopes with instructions on how to return ballots shall be mailed by first-class mail or delivered by the association 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, parcel, or unit number on the ballot. The association shall use as a model those procedures used by California counties for ensuring confidentiality of voter absentee ballots, including all of the following:

1. 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 parcel, or unit number that entitles him or her to vote.
2. 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."

While this Section provides that the Association must use the above procedures as a "model" for keeping ballots confidential, it may not be mandatory to do so. However, it would probably be in an Association's best interest to follow the above procedures rather than come up with a different method for keeping ballots confidential in order to ensure compliance with the confidentiality requirements of the statute.

Next, Sections 1363.03(f) and (g) set forth the procedures for counting the votes and the procedures for reporting the results of the election respectively. Section 1363.03(f) provides that:

"All votes shall be counted and tabulated by the inspector or inspectors of election in public at a properly noticed open meeting of the board of directors or members. Any candidate or other member of the association may witness the counting and tabulation of the votes. No person, including a member of the association or an employee of the management company, shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated."

The results of the election are to be "promptly reported to the board of directors of the association and shall be recorded in the minutes of the next meeting of the board of directors and shall be available for review by members of the association." (Civil Code § 1363.03[g].) The results of the election need only be made public by the Board, within 15 days of the election, in a

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New Definitions and Procedures Relative to a Member's Right of Access to Association Records

BY MARTIN LEE

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contacted via the alternative process described in subdivision (c) of Section 8330 of the Corporations Code. This opt-out shall remain in effect until changed by the member."

"(J) Check registers

"(2) 'Enhanced association records' means 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, 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.

"(b)(1) The association shall make available association records and enhanced association records for the time periods and within the timeframes provided in subdivisions (i) and (j) for inspection and copying by a member of the association, or the member's designated representative. The association may bill the requesting member for the direct and actual cost of copying requested documents. The association shall inform the member of the amount of the copying costs before copying the requested documents.

"(2) A member of the association may designate another person to inspect and copy the specified association records on the member's behalf. The member shall make this designation in writing.

"(c)(1) The association shall make the specified association records available for inspection and copying in the association's business office within the common interest development.

"(2) If the association does not have a business office within the development, the association shall make the specified association records available for inspection and copying at a place that the requesting member and the association agree upon.

"(3) If the association and the requesting member cannot agree upon a place for inspection and copying pursuant to paragraph (2), or if the requesting member submits a written request directly to the association for copies of specifically identified records, the association may satisfy the requirement to make the association records available for inspection and copying by mailing copies of the specifically identified records to the member by first-class mail within the timeframes set forth in subdivision (j).

"(4) The association may bill the requesting member for the direct and actual cost of copying and mailing requested documents. The association shall inform the member of the amount of the copying and mailing costs, and the member shall agree to pay those costs, before copying and sending the requested documents.

"(5) In addition to the direct and actual costs of copying and mailing, the association may bill the requesting member an amount not in excess of ten dollars ($10) per hour, and not to exceed two hundred dollars ($200) total per written request, for the time actually and reasonably involved in redacting the enhanced association records as provided in paragraph (2) of subdivision (a). The association shall inform the member of the estimated costs, and the member shall agree to pay those costs, before retrieving the requested documents.

"(d)(1) Except as provided in paragraph (2), the association may withhold or redact information from the association records for any of the following reasons:

"(A) The release of the information is reasonably likely to lead to identity theft. For the purposes of this section, 'identity theft' means the unauthorized use of another person's personal identifying information to obtain credit, goods, services, money, or property. Examples of information that may be withheld or redacted pursuant to this paragraph include bank account numbers of members or vendors, social security or tax identification numbers, and

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New Definitions and Procedures Relative to a Member's Right of Access to Association Records

BY MARTIN LEE

Civil Code §1365.2 in the Davis-Stirling Common Interest Development Act (Civil Code §1350) sets out a member's right to have access to the association's "accounting books and records and . . . minutes" but has never really defined what was meant by "accounting books and records". Civil Code §1365.2 also sets forth broad principles relative to member access, but has always left important details hanging. For instance, did its broad principles and loose procedures supercede those in Corporations Code §§8330 and 8333? What about inconsistencies between the Corporations Code and the Davis-Stirling Common Interest Development Act relative to member access to records? Were all association records to be made available to members or just accounting records? What about "records" that could be considered confidential (such as attorney-client communications)? Civil Code §1365.2 was silent regarding these definitions and litigation over the issue of specifically what records a member was entitled to see, and how, has been making its way through the courts.

The Legislature has now stepped in and, effective July 1, 2006, it has repealed current Civil Code §1365.2 and replaced it with a new Civil Code §1365.2. This new Civil Code §1365.2 defines specifically what is meant by "association records" and provides more detailed procedures designed to clarify the rights and duties of both the members and the homeowners association. The new Civil Code §1365.2 is quite detailed and specific and reads as follows:

"(a) For the purposes of this section, the following definitions shall apply:

"(1) 'Association records' means all of the following:

"(A) Any financial document required to be provided to a member in Section 1365.

"(B) Any financial document or statement required to be provided in Section 1368.

"(C) Interim unaudited financial statements, periodic or as compiled, containing any of the following:

"(i) Balance sheet.

"(ii) Income and expense statement.

"(iii) Budget comparison.

"(iv) 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 shall be prepared in accordance with generally accepted accounting principles.

"(D) Executed contracts not otherwise privileged under law.

"(E) Written board approval of vendor or contractor proposals or invoices.

"(F) State and federal tax returns.

"(G) Reserve account balances and records of payments made from reserve accounts.

"(H) Agendas and minutes of meetings of the members, the board of directors and any committees appointed by the board of directors; excluding, however, agendas, minutes, and other information from executive sessions of the board of directors as described in Section 1363.05.

"(I)(i) Membership lists, including name, property address, and mailing address, if the conditions set forth in clause (ii) are met and 4except as otherwise provided in clause (iii).

(ii) The member requesting the list shall state the purpose for which the list is requested which purpose shall be reasonably related to the requester's interest as a member. If the association reasonably believes that the information in the list will be used for another purpose, it may deny the member access to the list. If the request is denied, in any subsequent action brought by the member under subdivision (f), the association shall have the burden to prove that the member would have allowed use of the information for purposes unrelated to his or her interest as a member.

"(iii) A member of the association may opt out of the sharing of his or her name, property address, and mailing address by notifying the association in writing that he or she prefers to be

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SB 61

Effective July 1, 2006, new statutes will place additional burdens on associations during elections

BY RYAN MILUN

CONTINUED

communication directed to all members. (Id.) The manner of communication of the results is not provided by the statute; however it is likely that a letter to the members would suffice or perhaps the results can be included within an Association newsletter, so long as it is sent to the members within the statutory time frame.

Section 1363.03 (h), sets forth procedures for handling the ballots - the sealed ballots shall be in the custody of the inspector of election or at a location designated by the inspector or inspectors until after the tabulation of the vote, at which time custody shall be transferred to the association. While it is not clear from this Section whether, the inspector of elections can remove the sealed ballots from the envelopes in which they are contained (See Section 1363.03[e], above) the reasonable interpretation of this section is that the sealed ballots do in fact remain enclosed within the envelopes addressed to the inspector of elections until the actual counting of the votes is to take place on the day of the election, at which time the ballots will be removed.

Section 1363.03(i) sets forth the Association's responsibility for storing of the ballots - election ballots shall be stored by the association in a secure place for no less than one year after the date of the election. Further, this Section sets forth the procedure for access to the ballots in the event of a recount - in the event of a recount or other challenge to the election process, the association shall, upon written request, make the ballots available for inspection and review by association members or their authorized representatives. Any recount shall be conducted in a manner that shall preserve the confidentiality of the vote.

Finally, Section 1363.03(j) provides that "The provisions of this section apply to both incorporated and unincorporated associations, notwithstanding any contrary provision of the governing documents."

All of the above referenced provisions of Section 1363.03 will be added to the Civil Code once SB 61 goes into effect on JULY 1, 2006. As such, Associations will have added responsibilities when conducting elections, including the election of the members to the board of directors and as will be discussed more fully below, the Association may potentially be exposed to additional liability if the above requirements are not followed.

Civil Code § 1363.04:

Civil Code § 1363.04 specifically prohibits the use of association funds for "campaign purposes" in connection with any association board election. The use of Association funds for "campaign purposes" is further limited in the context of elections regarding assessments, amendments to the governing documents, or the grant of exclusive use of common area property pursuant to Section 1363.07. In these situations, Association funds may only be used to the extent necessary to comply with duties of the Association imposed by law. By way of example, as noted above, under what will be the newly enacted Civil Code §1363.03(e), two preaddressed envelopes must be provided to the homeowners at least 30 days prior to the time for voting on any of the elections listed in Section 1363.03(b), which includes those listed above. As such, Association funds could be used to accomplish proper delivery of the envelopes and ballots in order to comply with this new law.

"Campaign purposes" are defined in Section 1363.04(b) and include:

"(1) Expressly advocating the election or defeat or any candidate that is on the association election ballot.

(2) Including the photograph or prominently featuring the name of any candidate on a communication from the association or its board, excepting the ballot and ballot materials, within 30 days of an election, provided that this is not a campaign purpose if the communication is one for which subdivision (a) of Section 1363.03 requires that equal access be provided to another candidate or advocate."

Civil Code § 1363.09:

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SB 61

Effective July 1, 2006, new statutes will place additional burdens on associations during elections

BY RYAN MILUN

CONTINUED

Finally, SB 61 adds Civil Code § 1363.09, which sets forth the remedies available to members of the Association should the Association fail to comply with Article 2 of the Civil Code, commencing with, what will be the newly added, Section 1363.03.

An Association member is given the authority, by statute, to bring a civil action for declaratory or equitable relief within one year of the date the cause of action accrues - i.e. the date the Association failed to comply with Article 2 of the Civil Code commencing with, what will be the newly added, Section 1363.03. If the Court finds that the election procedures or the adoption of and adherence to rules provided by Article 4 (commencing with Section 1357.100) of Chapter 2, were not followed, a court may void any results of the election. Section 1363.09 also entitles the member who prevails in a civil action to recover reasonable attorney's fees, court costs, and the court may impose civil penalties of up to five hundred dollars for each violation.

It is important to note that the Association, should it prevail in an action brought by a member challenging the election procedures, **will not** recover any costs unless the court finds the action brought by the member to be frivolous, unreasonable or without foundation. Finally, Section 1363.09(c), provides that a "cause of action under Section 1363.03 with respect to access to association resources by a candidate or member advocating a point of view, the receipt of a ballot by a member, or the counting, tabulation, or reporting of, or access to, ballots for inspection and review after tabulation may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court."

Associations should immediately consider when and how they will be able to bring themselves into compliance with the new Sections of the Civil Code, which will become operative on JULY 1, 2006. As noted above, the failure to comply with these newly enacted statutes can result in lawsuits, liability for attorney's fees, court costs and possibly civil penalties. Accordingly, Associations should consult their legal counsel if any problems or questions arise in the promulgation and more importantly in the implementation of the "election procedure" rules. ■

SB 394

Changes to Enforcement of Law Against Discriminatory Covenants

Prior law, in the Fair Employment and Housing Act, specified a procedure for homeowners with discriminatory covenants recorded in their title to follow to remove these discriminatory covenants. Previously, a homeowner would file an application with the California Department of Fair Employment and Housing ("DFEH"), requesting a determination that the covenant violates Fair Housing laws and is thus void. If the DFEH determined that the covenant constitutes discrimination and is thus void, the homeowner could modify the title document by striking out the void language, and have that modification recorded by the County Recorder.

AB 394 changes this procedure by eliminating the involvement of the DFEH. Instead, a homeowner who believes that a covenant in his or her title is discriminatory may file a "Restrictive Covenant Modification" with the County Recorder, including a copy of the original title document with the discriminatory language stricken. The County Recorder would then submit the modification documents to the County Counsel, who would make the determination whether or not the restriction is indeed discriminatory. In that case, the County Recorder would record the changed document, and may waive the fees required to do so.

This law does not change the law regarding what is or is not discrimination, nor does it remove the requirement of a cover sheet advising that any discriminatory covenants in a declaration of covenants, conditions and restrictions are void. The only change this law makes is a shift of who determines that a restriction is discriminatory from the DFEH to the County Counsel of the county where the property is located. ■

SB 853

Association Architectural Committee Approvals and Public Laws

BY MARTIN LEE

The Legislature has amended Civil Code §1378 in the Davis-Stirling Common Interest Development Act (Civil Code §1350) to clarify what architectural review committees are to do when there is a conflict between modifications a member seeks approval for and public law. This new amendment takes effect January 1, 2006. Current Civil Code §1378(a)(3) and (b), effective until December 31, 2005, provides:

> "(a)(3) A decision on a proposed change shall be consistent with 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).
>
> "(b) Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents or governing law."

The Legislature, by virtue of its amendments to Civil Code §1378, has now changed these two provisions significantly so that, effective January 1, 2006, they will read as follows:

> "(a)(3) Notwithstanding a contrary provision of 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.
>
> * * *
>
> "(b) Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents, unless the change is required by law." (Emphasis supplied).

These amendments could, indeed, be quite significant for homeowners associations. For instance, in some (if not most) common interest developments, the CC&Rs provide that the architectural committee, in approving or disapproving plans, need not be concerned with engineering, building codes, land use regulations, etc. In most homeowners associations, the architectural review provisions usually limit the association's review in approving or disapproving architectural modifications to aesthetic considerations alone. These new provisions in Civil Code §1378 seem to quite extensively broaden an architectural committee's oversight and review functions and indicate that architectural committees may now need to concern themselves with engineering issues, building and safety problems, building codes and similar such problems, despite what the association's governing documents say. This is a substantial expansion of responsibility for architectural committees in homeowners associations and in planned developments (where substantial structural modifications may, with architectural approval, often be effected). It may behoove homeowners associations in future to have specialists on retainer to assist their architectural committees in evaluating applications to make sure proposed modifications do not contravene any "building codes or other applicable law governing land use or public safety". ■

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