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COMMUNITY ASSOCIATION LEGISLATIVE UPDATE

NEW CALIFORNIA COMMON INTEREST DEVELOPMENT LEGISLATION

by
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The California Legislature in 1995 continued its tradition of tinkering with the laws affecting common interest developments. This article summarizes the 1995 legislative highlights, offers some observations on their effect and gives some practical pointers regarding living with these new laws.

1. ***Stats 1995 Ch. 864 (Senate Bill No. 1029; Calderon)***

Construction Defect Litigation

This bill adds Section 1375 to the California Civil Code. It sets forth, in great detail, procedures and obligations that both an association and the developer of a common interest development must comply with in attempting to resolve a construction defect dispute related to a development with twenty or more residences. Under new Section 1375, before an association commences a construction defect action, it is required to notify the developer, in writing, of a preliminary list of defects and a summary of the results of any survey of owners or actual testing performed in order to ascertain the nature and extent of any defects. Delivery of the notice (a) begins a ninety-day period during which the association and builder attempt to settle the dispute or submit it to alternative dispute resolution and (b) temporarily tolls the statute of limitations (i.e., stops the statute of limitations clock from running) to enable the parties to attempt to resolve the dispute.

Within twenty-five days of its receipt of the notice, the builder may request to meet with the association's board to discuss (a) the nature and extent of the claimed defects, (b) proposed repair methods and (c) proposals for submitting the dispute to alternative dispute resolution, and also to inspect the project and conduct testing in order to evaluate the claim. If the association has conducted any testing, it must make the tested areas available to the builder for testing following that meeting. The builder is required to conduct such tests at its own expense, restore the tested areas to the condition they were in immediately prior to the testing, and indemnify the association and the owners of any tested units for damages resulting from the testing.

Within thirty days of completion of the testing (or the meeting if there is no testing), the builder is required to submit the following to the board: (a) a request to meet to discuss settlement, (b) a written settlement offer (which may include an offer to submit the dispute to alternative dispute resolution) and a concise explanation of the reasons for the terms of the offer, (c) a statement that the builder has access to sufficient funds to satisfy the conditions of the settlement offer, and (d) the results of testing performed by the builder. The board and builder must then meet within ten days to discuss the settlement offer. (Note that Section 1375(f) allows the association and builder to modify or excuse the time periods or other obligations imposed in Section 1375.)

If the board rejects the settlement offer, it is required to hold a meeting open to the members to discuss options available to address the defects (including filing a lawsuit). The notice of this meeting must include, among other things, the complete text of the developer's settlement offer and any offer to submit the dispute to alternative dispute resolution. The developer is required to pay the expenses (up to three dollars per unit) of sending the settlement offer to the members and holding the membership meeting. Alternatively, if the builder takes certain steps outlined in the statute that relieve the association of its obligation to follow the various procedures leading up to a settlement meeting, the association may commence a lawsuit thirty days after notifying the homeowners. During this thirty-day period, the owners may call a special meeting to discuss the situation.

OBSERVATION: This bill is another step in the trend of encouraging parties to resolve their disputes without resorting to litigation. By requiring an association to communicate with a builder before filing a lawsuit, a process is initiated whereby parties can dispense with the expense and delays associated with litigation and directly address the community's construction problems.

Because Section 1375 requires an association to provide copies of any test results to the developer at the time it initially contacts the developer, and since a developer will usually want to conduct its own tests, a more cost-effective approach may be to simply notify the builder of the preliminary list of defects and suggest that the association and builder jointly engage a mutually satisfactory consultant to perform testing.

It is important to remember that the time periods and other obligations of Section 1375 can be modified or eliminated altogether if both the association and developer agree, thus allowing additional flexibility to parties who are truly settlement-minded. The time periods and obligations in Section 1375 are "default provisions" that are triggered only if the parties are unable to agree otherwise. If either party does not appear appropriately settlement-minded, associations should follow all of the steps outlined in Section 1375 to the letter in order to reduce the likelihood of subsequent challenges to its actions.

2. ***Stats 1995 Ch. 978 (Assembly Bill No. 104; Hauser)***

Antennae and Satellite Dishes

This bill adds Section 1376 to the Civil Code. It provides that restrictions effectively prohibiting or restricting (a) the installation or use of a video or television antenna (including a satellite dish) or (b) the attachment of such an antenna to a structure within the community where the antenna is not visible from any street or common area, are void as applied to antennae or satellite dishes with a diameter or diagonal measurement of thirty-six inches or less.

Section 1376 does not apply to any covenants, conditions or restrictions imposing "reasonable restrictions" on such antennae and satellite dishes. "Reasonable restrictions" is defined as restrictions that do not significantly increase the cost of, or significantly decrease the efficiency or performance of, the antenna or satellite dish system (including all related equipment), and specifically includes:

(a) Requirements for application and notice to the association prior to the installation (e.g., an architectural approval request);
(b) Requirements that an owner obtain the association's approval before installing an antenna or satellite dish smaller than thirty-six inches on the lot or unit of another owner;
(c) Provision for the maintenance, repair or replacement of roofs or other building components; and
(d) Requirements that the installers of the antenna or satellite dish indemnify or reimburse the association or its members for loss or damage caused by the installation, maintenance or use of the thirty-six inch or smaller antenna or satellite dish.

In those instances where approval for a dish or antenna is required, the application must be processed by the same body responsible for reviewing architectural approval applications, and issuance of a decision may not be willfully delayed. In an action to enforce compliance with Section 1376, the prevailing party will be awarded reasonable attorney's fees.

OBSERVATION: The impact of Section 1376 may not be as bad as it initially appears. First, it does not affect the application of any restrictions to antennae or satellite dishes larger than thirty-six inches. Second, it implicitly recognizes that restrictions dealing with antennae or satellite dishes that are visible from streets or common area are permissible. The only category of antennae/satellite dishes that are covered by Section 1376 are therefore those that are ***both*** (a) thirty-six inches or less in size, ***and*** (b) not visible from streets or common areas (i.e., either not visible at all, or only visible to other residents from their homes).

Those antennae/satellite dishes that are not visible at all presumably do not present a problem. The only remaining antennae/satellite dishes that do pose a problem are those thirty-six inches or less in size that are only visible to other residents from their homes, and Section 1376 permits "reasonable restrictions" for such devices. The challenge for a community association that wishes to regulate these antennae and satellite dishes is to determine whether their existing antennae and satellite dish restrictions are "reasonable" within the meaning of Section 1376, and if not, to determine whether it should attempt to amend its existing restrictions to satisfy the requirements of Section 1376.

3. ***Stats 1995 Ch. 661 (Assembly Bill No. 46; Hauser)***

Open Board Meetings

This bill adds Section 1363.05, the "Common Interest Development Open Meeting Act," to the California Civil Code. In addition to re-locating some of the provisions of existing Section 1363 into Section 1363.05, the bill defines a "meeting" as including "any congregation of a majority of the members of the board at the same time and place to hear, discuss, or deliberate upon any item of business scheduled to be heard by the board, except those matters that may be discussed in executive session." Matters that may be discussed in executive session are litigation, matters relating to the formation of contracts with third parties, member discipline, and personnel matters.

Unless the time and place of meetings is fixed by the association's bylaws, or unless the bylaws provide for a longer period of notice, members must be given at least four days advance notice of the time and place of board meetings, which they are entitled to attend. Notice may be given by posting the notice in a prominent place in the common area, by mail or delivery to each unit in the development, or by newsletter or similar means of communication. These notice requirements do not apply to "emergency meetings," which may be called by the president or any two members of the board other than the president, if there are circumstances that could not have been reasonably foreseen which require immediate attention and possible board action, and which of necessity make it impracticable to provide notice to members.

OBSERVATION: Board members will need to be very careful to avoid discussing non-executive session type association business except at duly called, noticed and held meetings. Board members may be especially vulnerable if they meet socially or run into one another (e.g., at the community pool). Please also note that the requirement that minutes of meetings be taken and made available to members applies to ***all*** "meetings," including those gatherings which this bill now defines as "meetings."

Two potential loopholes may exist, however, in the new definition of "meeting." The first involves the use of the word "to," which can arguably be interpreted as synonymous with "for the purpose of." Under such an interpretation, a "meeting" is a gathering of a majority of the board for the purpose of hearing, discussing or deliberating association business. Therefore, if board members get together at a gathering which is not for the purpose of conducting association business (e.g., a social occasion), such a gathering would arguably not constitute a "meeting" within the scope of Section 1363.05.

The second potential loophole lies in the use of the word "scheduled" in the phrase "any item of business scheduled to be heard by the board." This suggests that discussion of matters which have not been set for consideration by the board would not be within the scope of Section 1363.05. The interpretation of "scheduled" is therefore critical. For example, if one member of a three-member board calls another board member to invite him over to discuss a homeowner's parking violation, the topic of that owner's parking violation may have suddenly become "scheduled" within the meaning of Section 1363.05. If, on the other hand, a majority of an association's directors accidentally meets and discusses association business which has not yet been identified or set for discussion, the gathering would arguably not be a "meeting" as defined by Section 1363.05.

Because of these potential ambiguities, the surest and most cautious course of action is for directors to avoid discussing non-executive session type association business at anything other than a properly noticed meeting, at least until further guidance in the form of legislative clarification or judicial interpretation of Section 1363.05 becomes available.

4. ***Stats 1995 Ch. 13 (Assembly Bill No. 463; Goldsmith)***

Restoration of Transferred Reserves

The Davis-Stirling Common Interest Development Act places a limit on the total amount of special assessments an association may levy during its fiscal year. The limit is equal to five percent of the association's budgeted gross expenses for that fiscal year. Prior to January 1, 1996, an association could exceed this limit (a) if approved by a majority of the members voting in an election at which at least a majority of the association's voting power is represented, (b) in order to address an "emergency situation" as defined in California Civil Code Section 1366(b), or (c) to restore funds to reserves that had been transferred to pay for legal costs associated with litigation involving repair, restoration, replacement or maintenance of major components for which the association is responsible. This bill amends Section 1365.5 of the Civil Code to delete this last exception to the "five percent of budgeted gross expenses per fiscal year" limitation. Effective January 1, 1996, an association will have to secure member approval (as described above) in order to levy a special assessment that would cause the "five percent of budgeted gross expenses per fiscal year" limitation to be exceeded, if the special assessment is levied to restore reserves that were transferred in order to fund construction defect litigation.

Notification of Construction Defect Claims

This bill also adds new Section 1368.4 to the Civil Code, which requires an association's board of directors to provide written notice to each member no later than thirty (30) days prior to the filing of a civil action against the declarant or other developer of the community for alleged damage to (a) common area or other areas the association is obligated to maintain, or (b) the separate interests (i.e., individual lots or condominium units) that arises out of or is integrally related to, damage to the common area or other areas the association is obligated to maintain. The notice must specify (i) that a meeting will take place to discuss problems that may lead to the filing of a civil action, (ii) the options, including civil actions, that are available to address the problems, and (iii) the time and place of the meeting. If the association has reason to believe that the applicable statute of limitations will expire before it files the civil action, the association may give the notice within thirty (30) days after the filing of the action.

OBSERVATION: New Section 1368.4 continues the trend of encouraging parties to a dispute to resolve the matter via alternative dispute resolution rather than litigation. By requiring an association to call a meeting to discuss options available to address construction defects, the Legislature is obviously trying to encourage associations and their members to resolve these problems without having to resort to the courts. Look for this push to alternative dispute resolution to continue in the future.

5. ***Stats 1995 Ch. 154 (Assembly Bill No. 640; Weggeland)***

Notice of Special Meetings of a Board of Directors

This bill amends Section 7211 of the California Corporations Code to expand the means by which notice of a special meeting of directors may be given to include a voice messaging system (or other system or technology designed to record and communicate messages), facsimile, electronic mail or other electronic means.

OBSERVATION: Although this amendment should make it easier to notice a special meeting of directors, it is still prefaced by the phrase "Unless otherwise provided in the articles or bylaws." Associations should therefore review their articles of incorporation and bylaws carefully to determine whether the means for noticing special meetings set forth therein are identified as the exclusive means of noticing such meetings. If so, and if noticing special meetings of the board has proven difficult in the past, it may be worthwhile to try to amend the documents to authorize these new means of giving such notice.

6. ***Stats 1995 Ch. 199 (Senate Bill No. 300; Petris)***

Information Regarding Association Insurance

This bill amends Section 1365 of the Civil Code, which requires annual preparation and distribution of the association's budget, financial statement and statement describing the association's policies and practices in enforcing lien rights or other remedies for default in payment of assessments, to also require distribution of summaries of the association's insurance policies. With respect to the association's general liability policy, the summary must state:

(a) The insurer's name;
(b) The policy limits of the insurance;
(c) Whether an insurance agent, insurance broker, or agent of an insurance agent or insurance broker assisted the association in development of the general liability policy limits, and if the recommendations of the agent or broker were followed;
(d) The insurance deductibles;
(e) The person or entity responsible for paying the deductible if a loss occurs; and
(f) Whether the insurance coverage extends to the real property improvements to the separate interests.

The summary of the association's earthquake and flood insurance policies (if any) must state items (a), (b), (d) and (e) above, and the summary of the liability coverage policy for the association's directors and officers must state items (a) and (b) above. The association may distribute copies of the insurance policies' declarations pages if the information is specified therein. The association is also required to notify its members by first-class mail if any of the policies have been canceled and not immediately replaced. If any policy is renewed or a new policy is issued to replace a policy, and where there is no lapse in coverage, the association must notify its members of that fact in the next available mailing to all members.

Information to be Provided by Transferor to Transferee

This bill also amends Section 1368 of the Civil Code to increase the list of association documents which a seller of a separate interest in a common interest development is required to provide to a purchaser. As amended, Section 1368 will require a seller to provide a buyer with copies of all of the most recent documents distributed pursuant to Section 1365

(including the insurance summaries) rather than just a copy of the most recent financial statement.

Premises Liability

Finally, the bill amends Section 1365.9 of the Civil Code, which was originally adopted to offer owners of common area as tenants in common protection from joint and several liability for injuries occurring on such common area solely by reason of their ownership interests. The protections of Section 1365.9 are only available if the association maintained general liability and errors and omissions insurance in specified amounts.

Effective January 1, 1996, Section 1365.9 no longer requires that the association (a) maintain errors and omissions insurance for officers and directors in order for the protections afforded by Section 1365.9 to apply, and (b) notify its members regarding (i) whether it carries the requisite insurance, and (ii) the effect of either carrying or not carrying the requisite insurance. As amended, Section 1365.9 will require that any cause of action in tort against an owner of a separate interest, arising solely by reason of an ownership interest as a tenant in common to the common area, be brought only against the association and not against the individual owners if the association maintained and has in effect for that cause of action, general liability insurance in the amount of at least two million dollars if the community is comprised of 100 or fewer separate interests, and three million dollars if the community is comprised of more than 100 separate interests.

OBSERVATION: When it amended Section 1365.9, the Legislature deleted the only statement in Section 1365.9 regarding the effect on individual homeowners of the association carrying the requisite insurance, namely, that owners would only be proportionately, rather than jointy and severally, liable for any judgment in excess of the insurance policy limits. In addition, the new version of Section 1365.9 states that "It is the intent of the Legislature to offer civil liability protection to owners of the separate interests in a common interest development that have common areas owned in tenancy-in-common if the association carries a certain level of prescribed insurance that covers a cause of action in tort." When one considers these two changes to Section 1365.9 together, it seems plausible to conclude that the Legislature intended to cap damage awards for injuries occurring on commonly owned common area at the association's insurance policy limits. This is because in the event of a judgment in excess of policy limits, the association would have to look to its members to make up any shortfall, which would be contrary to the express intent of the Legislature to provide civil liability protection to owners.

On the other hand, if the Legislature wished to cap damages at association insurance policy limits, it could have unambiguously stated so. Further, Section 1365.9 only deals with property held by the owners as tenants in common, and not with property owned by an association. For example, if an injury occurred in a clubhouse owned by an association, rather than by the owners as tenants in common, and the damages award exceeded association insurance policy limits, the association would have to look to its members to make up the difference. Section 1365.9 does not address this situation at all. Had the Legislature truly intended to protect an association's members against civil liability, it could have covered this circumstance as well.

In light of the foregoing, the most reasonable interpretation of this amendment to Section 1365.9 is probably that, in adopting this amendment, the Legislature wished to treat property owned by members as tenants in common in the same manner (for premises liability purposes) as property owned by an association, so long as minimum insurance coverage is maintained. In other words, if the association maintains the requisite insurance coverage, owners will not be held jointly and severally liable, but if the award exceeds the association's policy limits the owners may be responsible for their proportionate share of the excess.

7. ***Stats 1995 Ch. 218 (Assembly Bill No. 836; Weggeland)***

Suspension of Corporate Powers

This bill adds Section 5008.6 to the Corporations Code. It requires the Secretary of State to suspend the corporate powers of an association if the association (a) fails to file an annual statement with the Secretary of State containing the names and complete business or residence address of its chief executive officer, treasurer and chief financial officer, the street address of its principal office in California, and its agent for service of process, (b) did not file such a statement within the previous twenty-four months, and (c) was certified for a penalty for such failure for the same filing period of the prior year. Such suspension will only occur after sixty (60) days from the date of a notice from the Secretary of State.

OBSERVATION: The Secretary of State is required to mail the form that must be completed and returned approximately three months prior to the filing deadline; however, the Corporations Code specifically provides that neither the Secretary of State's failure to send, nor the corporation's failure to receive, the form is an excuse for noncompliance. Complying with the filing requirement (i.e., completing the form) is straightforward. The only difficulty that will generally arise is when an association has changed management agents since the last statement was filed, because the completed form usually lists the management company's address as the association's principal office, which is where the Secretary of State sends the form for the following year. If an association has changed management companies since the form for the previous year was filed, it should contact its previous manager to arrange for the form to be forwarded to its new manager.

Conclusion

The foregoing analysis only summarizes 1995's community association legislative highlights and is not intended to be exhaustive. Community associations should seek further legal advice pertaining to specific matters prior to acting upon the general information contained herein.