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NEW CALIFORNIA COMMUNITY ASSOCIATION LEGISLATION



A handful of new laws that are of particular interest to community associations went into effect January 1, 2000. Here's a quick summary.

1. Restrictive covenants in governing documents (SB 1148; Burton)

This bill adds a provision to the Davis-Stirling Common Interest Development Act (Section 1352.5) that imposes an affirmative obligation on an association's board of directors to amend and restate any of the association's governing documents (*i.e.*, CC&R's, bylaws, articles of incorporation, rules and regulations) that contain restrictive covenants that discriminate on the basis of race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry. No owner approvals for such an amendment are necessary. If an association fails to delete a violating restrictive covenant within thirty days after receiving notice requesting such deletion, any person may bring an action against the association for an order requiring the association to amend and restate the offending governing document. The court may award attorneys' fees to the prevailing party.

The bill also adds Section 12956.1 to the California Government Code, which requires any county recorder, title insurance company, escrow company, real estate broker, real estate agent or association

that provides association governing documents to any person to place a cover page over the document or a stamp on the first page of the document stating the following in at least 20-point boldface red type:

If this document contains any restriction based on race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry, that restriction violates state and federal fair housing laws and is void. Any person holding an interest in this property may request that the county recorder remove the restrictive covenant language pursuant to subdivision (c) of Section 12956.1 of the Government Code.

New Section 12956.1 also requires a county recorder to remove any blatant racial restrictive covenant contained in any recorded document associated with property upon application by any person who holds an interest in that property.

The list of problems with this bill is almost too long to catalog. First, as a practical matter, it accomplishes virtually nothing. The types of restrictions that an association's board of directors and county recorders are required to delete are already unenforceable. *See, e.g.*, California Civil Code Sections 53, 782 and 782.5. Second, it requires a board of directors to act to amend and restate offending documents within thirty days after notice, and authorizes lawsuits and attorney's fees awards if that short deadline is missed. Third, it imposes yet an additional disclosure obligation on associations: all governing documents they distribute will have to have the

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Published by

Harle, Janics & Kannen

575 Anton Boulevard, # 460
Costa Mesa, CA 92626

Telephone: (714) 429-0600

Facsimile: (714) 429-0699

E-mail: hjklaw@hjklawfirm.com

JAKOB S. HARLE

graduated *magna cum laude* from the University of California, Los Angeles in 1984 and earned his law degree from the UCLA School of Law in 1987, where he served as Managing Editor of the *UCLA Law Review*. Mr. Harle currently chairs the Publications and Media Committee of the Orange County Regional Chapter of CAI.

KATHLEEN A. JANICS

received both a bachelors and a masters degree from the University of Southern California, in 1983 and 1984, respectively. In 1990, she graduated *cum laude* from the University of San Diego School of Law where she served as an intern for the Honorable Richard Huffman at the Fourth District Court of Appeals, and as an associate editor of the *Journal of Contemporary Legal Issues*. Ms. Janics is an active member of CACM and currently serves on the Board of Directors of the Orange County Regional Chapter of CAI.

KAREN A. KANNEN

received a bachelor of science degree from Cornell University in 1985 and graduated *cum laude* from the University of San Diego School of Law in 1990. While attending law school, Ms. Kannen was a member of the *San Diego Law Review*. She is also admitted to the Colorado Bar.

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20-point boldface red disclosure on the cover. Fourth, it requires county recorders to remove blatant racial restrictive covenants from recorded documents. The problem with this requirement is that county recorders do not retain possession of original documents; county recorders only have copies on microfiche. Finally, and perhaps most problematic, is that the change to the Davis-Stirling Act empowering and requiring a board of directors to delete offensive provisions can be easily extended to apply to other restrictions (e.g., pet and motorcycle restrictions) that are opposed by powerful lobbies.

Fortunately, most association governing documents (at least those originally adopted after the civil rights era) do not contain the offensive types of restrictions targeted by this bill; most such restrictions are found in pre-1950's documents. Therefore, most associations will not have to worry about amending and restating their documents because they contain these restrictions. One type of restriction that may be an issue for some associations is a qualification for directors that bars spouses from serving on an association's board. Such provisions arguably discriminate on the basis of marital or familial status, and may have to be amended out of a document under this new law. Another type of restriction that may be an issue for some associations is an age-based restriction (in non-qualified senior citizen housing).

This bill is a classic example of politicians pandering to blocs of voters. The only positive thing about the bill is that many groups have identified its flaws, and a cleanup bill is expected in the upcoming legislative session.

2. Budget treatment of construction defect lawsuit proceeds (AB 1048; Firebaugh)

This bill revises Civil Code Section 1365 with respect to including information about construction defect lawsuit settlement or award proceeds in an association's budget. Effective January 1, 2000, the portion of an association's budget summarizing the association's reserves will have to include as separate line items under cash reserves (a) the amount of funds received as an award in or in settlement of a construction defect lawsuit, and (b) expenditure or disposition of funds, including the amounts expended for direct and indirect costs of repair of construction or design defects. As an alternative, an association required to issue a review of its financial statement prepared by a licensed accountant because its gross income exceeded \$75,000 (see Civil Code Section 1365(b)) may include the information regarding construction defect proceeds in the financial statement review.

The bill also amends the definition of "reserve accounts" in Civil Code Section 1365.5(f) to include funds received and not expended from a construction defect settlement or award. Such funds must be separately itemized from the association's other reserve funds.

3. Senior housing qualifications (SB 382; Haynes)

This bill amends Civil Code sections dealing with senior citizen housing. The amendments make it easier for a person to qualify as a "qualified permanent resident," i.e., a person who is permitted to reside in a senior citizens housing development even though he or she is not a senior citizen. Before the effective date of this bill, a qualified permanent resident had to satisfy three

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Ask Jake

Does A Majority of an Association's Board Of Directors Who Communicate Via E-Mail With One Another About Issues On the Agenda For the Next Board Meeting Violate the Common Interest Development Open Meeting Act (the "Act")?

This is one of those situations where technological capabilities and statutory requirements don't mesh together well. First, it's important to understand what the Act (California Civil Code Section 1363.05) requires.

Basically, the Act requires members to be given notice of meetings of the board of directors and entitles members to attend and speak at such meetings. Section 1363.05(f) provides that, for purposes of the Act, "meeting" includes 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.

So, the issue boils down to whether a majority of a board communicating via e-mail falls within the Act's definition of "meeting." We believe the answer can be found by asking, "Is e-mail more like sending faxes back and forth, or is it more like talking around a table?" We think e-mail is more like exchanging faxes (or telegrams or conventional mail, for that matter), so the Act would *not* apply in that situation.

However, we feel that the Act would apply if a majority of an association's board communicated about agenda subjects in an on-line chat. Corporations Code Section 7211(a)(6) authorizes members of a board to participate in a meeting via conference telephone, electronic video screen communications, or other communications equipment, so long as each director participating in the meeting can communicate with all other directors concurrently, each member is provided the means of participating in all matters before the board, including the capacity to propose or object to specific actions, and the corporation implements some means of verifying that (a) all persons participating in the meeting are entitled to participate, and (b) all votes by the board are cast only by the directors, and not by persons who are not directors. For purposes of Civil Code Section 1363.05(f), our view is that chatting on-line is a congregation in that amorphous place known as cyberspace, and that association members would therefore have to receive notice of the chat "meeting" and be entitled to "speak." *

CC&R CORNER


In light of SB 1148 (*see* page 1), now is an excellent time for association boards of directors to review their governing documents to ensure they do not contain discriminatory provisions. Remember, even if such a provision hasn't been enforced for decades, the mere fact that it is in the governing documents can expose the association and its directors to liability.

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requirements: He or she must (a) have been residing with the senior citizen in the development prior to the senior citizen's death, hospitalization, or other prolonged absence, or dissolution of marriage from the senior citizen; (b) be at least 45 years of age, or a spouse, co-habitant, or person providing primary physical or economic support to the senior citizen; and (c) have an ownership interest in, or expect an ownership interest in, the dwelling in the senior citizen housing development. After January 1, 2000, requirement (c) no longer applies. Thus, a person must only satisfy elements (a) and (b) to be a "qualified permanent resident" within the meaning of the statute. The bill also expands the definition of "qualified permanent resident" to include a permanently physically or mentally impaired or terminally ill adult who is a dependent child of either the senior citizen or other qualified permanent resident, unless the governing body of the senior citizen housing development determines that the dependent child is or may be harmful to himself or herself or others, in which case such person would be disallowed as a qualified permanent resident.

Although this bill makes the California requirements somewhat easier to administer by deleting requirement (c) above, it does nothing to harmonize the awkward interplay between California and federal requirements for senior housing. In addition, its expansion of the definition of "qualified permanent resident" adds an additional burden to a senior development's board of directors by giving the board the ability to disqualify a dependent adult child from being a qualified permanent resident by determining that such child is or may be harmful to himself or herself or others. Any such determination could very likely result in a lawsuit by the child's parents or guardians.

4. Filing of Corporate Statement (SB 284; Kelley).

This bill changes the requirement that incorporated associations file a "Statement by Domestic Non Profit Corporation" with the Secretary of State every year to a requirement that such a form be filed every other year. Associations that have changed management companies must be careful to ensure that their old management companies forward the forms when received from the Secretary of State. 

Harle, Janics & Kannen
575 Anton Boulevard, Suite 460
Costa Mesa, CA 92626
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