NEW CALIFORNIA COMMUNITY ASSOCIATION LEGISLATION

The California legislature, in addition to spending the state treasury into a $24 billion deficit, also found time in 2002 to pass a host of bills affecting California's community associations.

1. Assessment collections (AB 2289; Kehoe)

This bill, which amends and adds various sections of the California Civil Code, significantly changes the way associations can collect delinquent assessments.

The bill:

- Requires an association to distribute a written notice in 12 point type to members within a 60 day period prior to commencement of the association's fiscal year.
  The full text of the required notice can be found at new Civil Code Section 1365.1(b).

- Clarifies that if association CC&R's specify an interest rate on delinquent assessments, that rate cannot be exceeded. Civil Code Section 1366(e)(3).

- Entitles members to request a meeting with the association's board of directors to discuss a payment plan prior to recordation of a lien against their property.

- Prohibits recordation of a lien until 30 days after the postmark date of written notice required to be sent to a delinquent owner. This period would be extended if the owner requests a meeting with the board of directors to discuss a payment plan.
  Civil Code Section 1367.1(a).

- Requires the association to notify the owner via certified mail of the following at least 30 days prior to recording a lien:

  (1) A general description of the collection and lien enforcement procedures of the association and the method of calculation of the amount, a statement that the owner of the separate interest has the right to inspect the association records pursuant to Section 8333 of the Corporations Code, and the following statement in 14-point boldface type, if printed, or in capital letters, if typed: "IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS PLACED IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR ASSESSMENTS, IT MAY BE SOLD WITHOUT COURT ACTION".

  (2) An itemized statement of the charges owed by the owner, including items on the statement which indicate the amount of any delinquent assessments, the fees and reasonable costs of collection, reasonable attorney's fees, any late charges, and interest, if any.

  (3) A statement that the owner shall not be liable to pay the charges, interest, and costs of collection, if it is determined the assessment was paid on time to the association.

  (4) The right to request a meeting with the board to discuss a payment plan.

Associations must adopt collection policies consistent with this new requirement. In addition to the foregoing, the bill also (a) adds new Civil Code Section 1361.5, which prohibits associations from denying owners or occupants of a residence physical access to that residence (except as otherwise provided in law or pursuant to a court order or a final and binding arbitration decision), and (b) amends Civil Code Section 1363.05(a) to include a meeting with a member regarding the member's payment of assessments among the subjects that are appropriate for boards of directors to deal with in executive session.

2. Display of U.S. flag (SB 2032; Monteith)

This bill adds California Civil Code Section 1353.5 in an attempt to broaden owners' rights to display the American flag. In reality, it does little to expand the rights currently afforded owners under Government Code Section 434.5. Under new Civil Code Section 1353.5, an association's governing documents may not prohibit or limit, or be construed to limit or prohibit, the display of the United States flag by an owner in or on an owner's separate interest or exclusive use common area. The statute carves out an exception for the protection of the public health and safety (*e.g.,* if the display of the flag on the owner's property impedes traffic).

"Display of the flag," as defined in Civil Code Section 1353.5, includes United States flags made of fabric, cloth, or paper displayed from a staff or pole or in a window. The statute also provides that if an owner prevails in an action to enforce his rights under Civil Code Section 1353.5, he is entitled to recover his costs and attorneys fees.

It is interesting to note that under existing Government Code Section 434.5, owners already have a right to display the flag on their private property, and while reasonable restrictions as to time, place and manner of display are allowed, such restrictions must relate to preservation of public health, safety or order and may not be based on aesthetics. Thus, the only real "broadening" of existing rights accomplished by this bill is to expand "private property" to specifically include exclusive use common area. However, in the context of an attached condominium building, the exterior of the building is generally not defined as "separate interest" or "exclusive use common area." Applying the literal meaning of the new statute, an association could prohibit an owner from displaying a flag on a pole attached to the outside of his unit. However, under Government Code Section 434.5, if the owners own the common area as tenants in common, the exterior of the building may be deemed "private property," as the owner owns an undivided interest in the building. Accordingly, the owner's rights may be broader under Government Code Section 434.5!

3. Executive session minutes (AB 2417; La Suer)

California Civil Code Section 1363.05, known as the Common Interest Development Open Meeting Act, already mandates that any matter that is discussed in executive session must be generally noted in the minutes of the board of directors. The legislature has now amended Civil Code Section 1363.05(c) to clarify *when* such information must be noted in the minutes. Section 1363.05(c) now reads as follows: "Any matter discussed in executive session shall be generally noted in the minutes of the *immediately following meeting open to the entire membership*." Accordingly, if executive session takes place (a) immediately prior to a Board meeting or (b) in the middle of a Board meeting (*i.e.*, the Board adjourns into executive session for a permissible purpose), then the minutes of that Board meeting must state that the Board met in executive session and "generally note" matters that were discussed. If the Board meets in executive session after the regular Board meeting, then the executive session matters would be generally noted in the minutes of the next Board meeting.

4. Marketing and sales of homes in common interest developments (AB 2546; Nation)

This bill adds new Section 1368.1 to the California Civil Code. The bill declares that any association rule or regulation that arbitrarily or unreasonably restricts an owner's ability to market his or her home is void. The bill further prohibits an association from adopting, enforcing, or otherwise imposing any rule or regulation that (a) imposes an assessment or fee in connection with the marketing of an owner's home in an amount that exceeds the association's actual or direct costs, or (b) establishes an exclusive relationship with a real estate broker through which the sale or marketing of homes in the development is required to occur. As used in the new statute, "market" and "marketing" mean listing, advertising, or obtaining or providing access to show the owner's property.

> ***Comment:*** Because existing California Civil Code Section 711 already provides that unreasonable restraints on alienation (*i.e.,* transferability) of property are void, this new statute probably adds little, if anything. The disputes that are likely to arise under the statute will involve whether a particular regulation (*e.g.,* a regulation limiting "open house" events to one or two weekends per month) "arbitrarily or unreasonably" restricts the owner's right to market his or her property.

5. Assessments and disclosures (AB 643; Lowenthal)

This bill re-numbers existing Civil Code Section 1363.6 (authorizing an association to record a document identifying itself and the properties over which it has jurisdiction in order to facilitate collection of assessments and transfer fees) as new Section 1366.2, and adds new Section 1363.6 to require associations to submit to the Secretary of State, on a form prescribed by the Secretary of State and with a fee not to exceed $30.00, information regarding the association, including the address and either the daytime telephone number or e-mail address of the association's president. Incorporated associations are required to provide the information within ninety days of the filing of their original articles of incorporation, and thereafter concurrently with the submission of its "Statement by Domestic Nonprofit Corporation." Unincorporated associations are required to provide the information in July 2003 and in that same month biennially thereafter. Commencing on January 1, 2006, the penalty for an incorporated association's noncompliance with these filing requirements is suspension of its rights, privileges and powers as a corporation, plus monetary penalties.

This bill also amends Civil Code Section 1368 to specify that among the governing documents a selling owner is required to provide to a prospective purchaser (and which an association is required to provide to a requesting owner) is a copy of the association's articles of incorporation or, if not incorporated, a statement from an authorized association representative that the association is not incorporated.

> ***Comment:*** Other than creating an additional source of revenue for the State of California, this bill serves no useful purpose.

6. Common interest development managers (AB 555; Dutra)

This is the long-awaited bill that imposes state regulation on the common interest development management industry. The bill adds Sections 11500 through 11506 to the California Business and Professions Code. The new law imposes certain education and continuing education requirements for any person wishing to hold himself or herself out as a "certified common interest development manager," and makes it an unfair business practice (on or after July 1, 2003) to hold oneself out as such without having satisfied those requirements. The bill also requires a manager to annually disclose the following to the

board of directors of an association to which he or she provides management services: (a) whether the manager is "certified"; (b) the name, address and telephone number of the professional association that certified the manager, and the date and status of the certification; (c) the location of the manager's primary office; and (d) prior to entering into or renewing a management contract, whether the fidelity insurance of the manager or the manager's employer covers the association's operating and reserve funds. These provisions automatically terminate on January 1, 2008, unless a statute enacted before then extends that date.

The bill amends Civil Code Section 1363.5 to require an association's articles of incorporation to include a statement regarding whether the association's management agent is certified in accordance with Business and Professions Code Section 11502. The bill also amends Civil Code Section 1365(e) to include fidelity insurance policies among the insurance policies about which an association must make annual disclosure to its members.

Finally, the bill also adds education regarding common interest developments to the education requirements of real estate licensees.

> ***Comment:*** This bill should lead to greater "truth-in-advertising." At least it did not subject the management industry to oversight by a state bureaucracy.

7. Construction defects (SB 800; Burton)

This bill establishes a procedure for attempting to resolve construction defect claims without resorting to adversarial procedures. It also establishes performance standards for various systems and components of residential dwelling structures, and requires that a builder be permitted to attempt to remedy any deficiencies before an action may be filed. By establishing performance standards for building components, it effectively overrules the California Supreme Court's decision in *Aas v. Superior Court*, 24 Cal. 4th 627 (2001), which ruled that no damages are recoverable under a negligence theory in a construction defect case unless the defects actually caused injury to persons or property. The bill applies to residences originally sold on or after January 1, 2003.

8. Airport Influence (AB 2776; Simitian)

This bill, which becomes effective January 1, 2004, requires various parties to disclose whether their property is located in an "airport influence area" to prospective purchasers. The parties required to make this disclosure are subdividers who offer property for sale pursuant to a Final Subdivision Public Report issued by the California Department of Real Estate, and homeowners offering their homes for sale. In addition, any declaration of restrictions affecting property within an "airport influence area" that is recorded after January 1, 2004, must contain a disclosure statement specified in amended Civil Code Section 1353. As used in this bill, the term "airport influence area" is an area in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses or necessitate restrictions on those uses as determined by an airport land use commission.

> ***Comment:*** It would be prudent for any association located in an "airport influence area" to include the prescribed disclosure in any amendment to its declaration that is recorded after January 1, 2004.