

common**INTERESTS**

Published by:

HARLE, JANICS & KANNEN

a law corporation

www.hjklawfirm.com

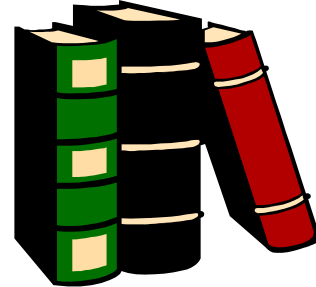
Issue 1

The Legal Newsletter for Community Associations

2004



NEW CALIFORNIA COMMUNITY ASSOCIATION LEGISLATION



The California legislature passed various bills in 2003 affecting community associations and their operations. Here are some highlights:

1. Member Reversal of Rules; Stats 2003 Ch. 557 (AB 512; Bates)

This bill adds chapter and article headings to the Davis-Stirling Common Interest Development Act (California Civil Code Sections 1350 through 1376)(the "Act"), and also makes certain substantive changes.

One minor change is the addition of new Section 1350.7, which describes the various means by which a document required to be delivered by the Act must be delivered. Those means are: personal delivery; first-class U.S. mail (delivery is deemed complete upon deposit in the mail); e-mail, fax or other electronic means, if the recipient has agreed to that method of delivery (delivery is deemed complete at time of transmission); publication in a periodical that is circulated primarily to the association's members; inclusion in an association's television broadcast

(for those associations that broadcast television programming to distribute information on association business to their members); a method of delivery provided for in a recorded governing document of the association; any other method of delivery agreed to by the recipient; and inclusion in or delivery with a billing statement, newsletter or other document delivered by one of the foregoing methods.

Another minor change is an amendment to Section 1363.6(a)(4) to include the name of the association's president on the informational form an association is required to file with the California Secretary of State.

A significant change to the Act is the addition of Sections 1357.100 through 1357.150 to the Act, which provide:

(a) standards for determining the validity and enforceability of board-adopted "operating" rules. The rules must be:

- in writing;
- adopted pursuant to authority conferred on the board by law, the association's CC&R's, articles of incorporation or bylaws;
- not inconsistent with governing law and the association's other governing documents;

INSIDE

<i>New California Community Association Legislation</i>	1
<i>Board Battles</i>	6
<i>Announcements</i>	8

Continued on page 2

commonINTERESTS

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

Website: www.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 is 2004 President 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.

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.

Permission to reprint articles in this newsletter is hereby granted providing notice is given to **Harle, Janics & Kannen** at (714) 429-0600 and proper credit is given as follows: "Reprinted from **commonINTERESTS**, The Legal Newsletter for Community Associations. Copyright © by Harle, Janics & Kannen, all rights reserved."

While every effort is made to ensure accuracy, the materials in this newsletter are for informational and educational purposes and are not intended to be exhaustive. Readers should not act on information contained herein without further seeking professional legal advice.

Continued from page 1

2

- adopted, amended or repealed in good faith and in substantial compliance with Sections 1357.100 through 1357.150; and
- reasonable (note that the statute offers no guidance as to what it means by "reasonable"; that will have to be decided by the courts, although the courts will likely look to the *Nahrstedt* decision, 8 Cal. 4th 361 (1994), and its definition of what constitutes an unreasonable [and therefore unenforceable] CC&R restriction: arbitrary, violates a fundamental public policy, or imposes burdens on the property that substantially outweigh its benefits);

(b) a board of directors is required to notify members of a proposed rule change at least thirty days in advance of making the rule change (which must include the text of the proposed rule change and a description of its purpose and effect) unless the rule change is necessary to address an imminent threat to public health or safety or imminent risk of substantial economic loss to the association ("emergency rule change");

(c) a board's decision on a rule change must be made at a board meeting after consideration of member comments;

(d) a board must deliver notice of the rule change to the members within fifteen days of adoption of the rule change; and

(e) association members owning five percent or more of the separate interests in the common interest development are authorized to request a special meeting of members to vote on reversing a rule change, which request must be delivered within thirty days of the date the members were notified of the rule change (rule reversal requires approval of a majority of a quorum, or greater proportion if required by the CC&R's or bylaws). A reversed rule may not be re-adopted for one year after the date of the meeting at which it was reversed. An association's board of directors must deliver notice to the members of the results of a reversal vote within fifteen days after close of voting. The rule reversal provisions do not apply to emergency rule changes.

Sections 1357.100 through 1357.150 only apply to rule changes commenced (*i.e.*, the board takes its first official action leading to adoption of the rule change) on or after January 1, 2004. These new Sections do not apply to commercial and industrial common interest developments.

2. Community Service Organization Transfer Fees; Stats 2003 Ch. 393 (AB 1086; Laird).

This bill amends Civil Code Section 1368(c) to prohibit the imposition or collection of transfer fees by an association, community service organization or similar entity. These community service organizations have become popular means in recent years of providing

Continued on page 3

supplemental services such as community intranets, recreation classes, festivals and social events to residents of large master planned communities. They are typically funded through fees calculated as a percentage of a property's sales price, and are imposed via a recorded document encumbering the property. The bill exempts from its prohibition on community service organization fees those fees required to be paid to (a) community service organizations established prior to February 20, 2003 that exist and operate to fund or perform environmental mitigation or restore wetlands or native habitat, or (b) community service organizations which were established and received a transfer fee prior to January 1, 2004 and which, commencing January 1, 2006, offer purchasers the choice of paying the transfer fee either in one lump sum at time of transfer, or pursuant to an installment plan over a period of at least seven years (in which case actual costs of billing and finance charges may be added).

3. Member Inspections of Association Records; Stats 2003 Ch. 375 (AB 104; Lowenthal)

This bill adds new Section 1365.2 to the Civil Code, requiring an association to make "the accounting books and records and the minutes of proceedings of the association" available for inspection and copying by a member of the association or a member's designated representative. The materials are to be made available at the association's business office in the common interest development (if such a business office exists) or at another location upon which the association and the member agree. Alternatively, the association can satisfy its obligation by providing copies to the member by mail within ten days of receipt of the member's request. The association can charge the member for actual, reasonable costs for copying and mailing the requested items, so long as the association informs the member of the amount of the copying and mailing charges before sending the requested items.

This Section prohibits selling the information, using it for a commercial purpose, or using it for any purpose not reasonably related to the member's interest as a member. Section 1365.2(c) authorizes an association to withhold or redact from the provided materials information that is privileged under law, or that is reasonably likely to lead to identity theft or fraud; however, an association may not withhold information concerning compensation paid to employees, vendors or contractors (but does provide that compensation information for individual employees may be set forth by job classification or title rather than by employee name, social security number or other personal information).

It is unclear whether this new Section expands member inspection rights insofar as the list of items subject to inspection ("accounting books and records and the minutes of proceedings of the association") is practically identical to the list of documents subject to member inspection per Corporations Code Section 8333. Leading commentators have suggested that Section 8333 does not confer on members the right to inspect contracts between a corporation and its vendors, or the original supporting documents on which financial reports are based. The true scope of the inspection right conferred by new Section 1365.2 will likely ultimately be determined by a court.

4. Signs, Posters, Flags and Banners; Stats 2003 Ch. 774 (AB 1525; Longville)

This bill adds Section 1353.6 to the California Civil Code. New Section 1353.6 provides that an association's governing documents may not prohibit posting or displaying noncommercial signs, posters, flags or banners on or in an owner's separate interest, except as required for protection of public health or safety or if the posting or display would violate a local, state or federal law. Associations can still prohibit noncommercial signs or posters more than nine square feet in size and noncommercial flags or banners more than fifteen square feet in size.

Because the bill only protects the described signs, posters, flags and banners displayed on or in an owner's separate interest, the condominium plans for condominium projects will have to be reviewed to determine whether the portion of an owner's property from which a sign, poster, flag or banner is

displayed is an element of the unit (in which case the display is protected by the statute) or exclusive use common area (in which case the display is not covered by the statute). This new law will render void and unenforceable bans on signs contained in an association's CC&R's.

This bill continues the trend in the legislature toward micromanaging community associations that began when Civil Code Section 1376 (protecting certain satellite dish and antenna installations) was adopted and continued with the addition of Civil Code Section 1360.5 (prohibiting pet bans).

5. Mandatory Employer-Provided Health Care Coverage; Stats 2003 Ch. 673 (SB 2; Burton)

This bill requires certain employers to provide health insurance to their employees and their employees' dependents as of certain dates, depending upon the number of employees. Large employers (*i.e.*, those with 200 or more employees) must comply effective January 1, 2006; medium employers (*i.e.*, those between 20 and 199 employees) must comply effective January 1, 2007 (there is an exception for employers with between 20 and 49 employees; the exception ceases to apply if a specified tax credit is enacted). The program established by the bill requires employees to also contribute to the plan.

Although the vast majority of community associations will not be directly affected by this bill (because they employ fewer than 20 people), most associations will be indirectly affected because they contract with vendors (*e.g.*, landscape maintenance companies) whose payrolls are large enough to trigger the bill. Vendors who are subject to the bill's requirements will certainly pass the cost of the mandated health care coverage on to their customers. Consequently, associations can anticipate an increase in common expenses, and it would behoove them to plan for this increase. Associations were blindsided by the electricity rate and insurance premium increases over the past few years. Those associations with healthy reserve balances were better able to financially cope because they could borrow from reserves to address short-term cash flow requirements per Civil Code Section 1365.5(c). We therefore recommend that any association with reserves less than one hundred percent funded (or even one hundred ten percent funded, to allow for a margin of error) aggressively fund reserves over the next two to three years so as to create a fund that can be borrowed from if vendor contracts suddenly become more expensive. If vendor contracts somehow do not drastically increase, the "downside" to this strategy will be that an association's reserves will be in a healthier condition.

Please note that business organizations in California are attempting to qualify initiatives to repeal this legislation to present to California voters.

6. Contracts for Construction, Janitorial or Security Guard Services; Stats 2003 Ch. 9008 (SB 179; Alarcon)

This bill adds Labor Code Section 2810 and significantly impacts contracts entered into for construction, janitorial or security guard services (among other non-applicable services). This new law prohibits, in pertinent part, a person or entity, including community associations, from entering into contracts for construction, janitorial or security guard labor or services, if the person or entity knows or should know that the contract does not include sufficient funds to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided.

Under this law, a rebuttable presumption that no violation has occurred arises if the contract is in writing, in a single document, and contains all of the following provisions:

- (a) The name, address, and telephone number of the person or entity and construction, janitorial or security guard contractor ("Contractor") through which the labor or services are to be provided;

- (b) a description of the labor or services to be provided and a statement of when those services are to be commenced and completed;
- (c) the employer identification number for state tax purposes of the contractor;
- (d) the workers' compensation insurance policy number and the name, address, and telephone number of the Contractor's insurance carrier;
- (e) the vehicle identification number of any vehicle owned by the Contractor and used for transportation in connection with the services provided pursuant to the contract, the vehicle liability insurance policy number that covers the vehicle, and the name, address, and telephone number of the insurance carrier;
- (f) the address of any real property to be used to house workers in connection with the contract;
- (g) the total number of workers to be employed under the contract, the total amount of all wages to be paid, and the date(s) when those wages are to be paid;
- (h) the amount of any commission or other payment made to the Contractor for services under the contract;
- (i) the total number of persons who will be utilized under the contract as independent contractors, along with a list of the current local, state, and federal contractor license identification numbers that the independent contractors are required to have under local, state, or federal laws or regulations; and
- (j) the signature of all parties to the contract and the date on which the contract was signed.

If a person or entity fails to request or obtain from the Contractor any of the information required above, knowledge of that information will be imputed to such person or entity for purposes of this new law.

If a material change to the contract is made, it must be in writing, in a single document, and contain all of the provisions listed above to qualify for the rebuttable presumption that no violation exists.

If, at the time the contract is entered into, the information required above is unknown, the parties are required to include in the contract the best estimate available. In such a situation, the parties have a continuing duty to ascertain the information required and to reduce that information to writing once the information becomes known.

The person or entity entering into such a contract is required to keep a copy of the written contract for at least four years following the termination of the contract (not four years from when the agreement was entered into, but four years after the contract ends).

If an employee is able to successfully prove that he or she was injured as a result of a violation of this law, the aggrieved employee is entitled to damages, injunctive relief, and/or recovery of reasonable attorney's fees and costs.

Although compliance with this new law is onerous, once contractors are familiar with the law, they should be agreeable to providing the requisite information so that it can be inserted into the contract. We recommend providing the contractor with a form for the contractor to complete the requisite information, which form can then be attached to the contract as an exhibit and incorporated therein. 📄

BOARD BATTLES

By:
Kathleen Janics, Esq.



Egos and power struggles are not unique to our federal, state and local governments. Sadly, all too often we experience warring factions within our community associations and the directors elected to govern them. The true loser in a board battle is the community association. Association business is put on hold while the battling board members recruit their armies from the membership of the community and actively seek ammunition to use against each other. Rumors are spread, communications are misrepresented, and confidences are breached.

If ever there is a winner in such a board battle, it is generally the community association attorney who is almost inevitably brought in to counsel the “other board member(s)” of the duties *they* are breaching. Often the battle is so heated that the community itself rises up and demands a recall of the board. This further divides and disrupts the community.

The only way for a board of directors and an association to win a board battle is if the opposing board members agree to a cease-fire for the good of the community. This means that the board members must agree to look beyond personality differences and past grievances and agree to work together to accomplish the association’s legitimate objectives. The board members must look at the big picture. If the governing body of the community cannot get along and follow the rules of loyalty, good faith and fair dealing, then how effective is their governance?

The “rules” that each board member must adhere to are fairly simple:

- Avoid self-dealing or promoting your personal agenda.
- Avoid breaching association confidences (*e.g.*, matters discussed in executive session, attorney-client privileged communications).
- Avoid discussing association business outside of a board or membership meeting.
- Avoid gossiping about other board members or association members (this includes via email).

Continued on page 6

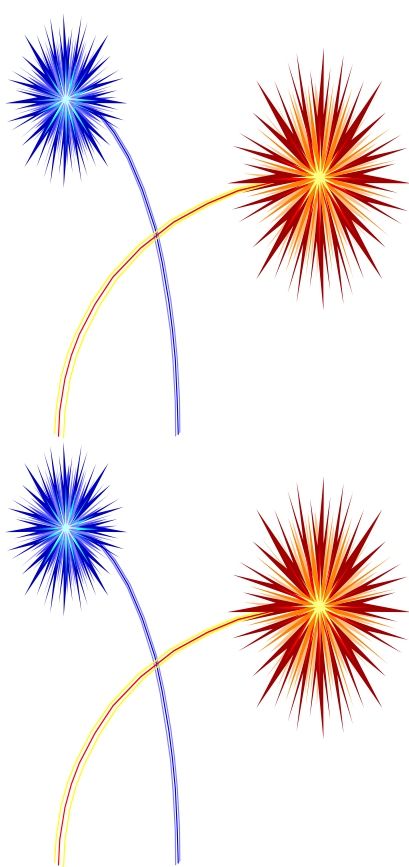
- Recuse yourself from any decision that may benefit you personally or in which you have an actual or perceived conflict of interest and fully disclose any such conflict of interest.
- Avoid interrupting board members and members at meetings; be polite to each other.
- Take the emotion out of your association business decisions.
- Communicate your point without placing blame on fellow board members.
- Refrain from acting outside the scope of your authority.
- Refrain from using your board position to intimidate or unduly influence others.
- Don't take it personally when a decision does not go your way; you can always have the minutes reflect your dissent.
- Avoid any representation that you are acting on behalf of the association when you have not been authorized to do so.
- Avoid disparaging fellow board members in or outside of a meeting.

Board infighting, especially when it is aired in front of, or communicated to, the membership, is unprofessional and demonstrates a lack of strong leadership. Members will quickly lose patience with and faith in a battling board, especially when they perceive that their assessments are funding the battle.

Although there are no guarantees, a united, cooperative board is more likely to lead to a united and cooperative community than a board made up of directors looking for every opportunity to criticize and destroy the credibility of their fellow directors.

It therefore behooves a board to "cease fire" and follow the rules. If a board finds itself hopelessly embroiled in a battle, then a prudent course of action may be to retain a consultant or mediator to assist the board members in refocusing their attention on effectively governing together, rather than spending the association's money on a recall. Remember that the association is the ultimate loser in a board battle.

Announcing . . .



We are pleased to announce that Jakob Harle will serve as President of the Orange County Regional Chapter of the Community Associations Institute during 2004.

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

ADDRESS CORRECTION REQUESTED