

**Community Association
2004 Legislative Update**

by

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The California legislature apparently was not kept busy enough spending the state government into a \$40 billion hole; it also found time to pass various bills 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 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;
- adopted, amended or repealed in good faith and in substantial compliance with Sections 1357.100 through 1357.150; and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.

Any boards of directors that want to avoid this cumbersome rule adoption procedure, or that are contemplating adopting rules that might be considered controversial by the association’s membership, should seriously consider commencing adoption of those rules before January 1, 2004.

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 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.

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.