

# common**INTERESTS**

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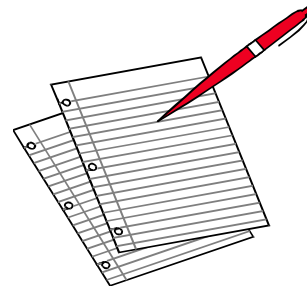
Issue 1

*The Legal Newsletter for Community Associations*

2005



## NEW CALIFORNIA COMMUNITY ASSOCIATION LEGISLATION



**1. Mechanic's liens (Stats 2004 Ch. 279; AB 447; Vargas)** Existing law entitles the owner of real property encumbered by a mechanic's lien to petition the court for a decree to release the property from the lien if the time for the lien claimant to enforce the lien has expired and the lien claimant has not brought an action to enforce the lien. The prior law entitled the prevailing party in an action involving such a petition to recover attorney's fees of up to \$1000. This bill amends Civil Code Section 3154(g) to increase that amount to \$2000.

**2. Roof covering materials (Stats 2004 Ch. 318; AB 224; Kehoe)** This bill adds Section 1353.7 to the California Civil Code to prohibit a common interest development (presumably the Legislature meant "association") from requiring a homeowner to install or repair a roof in a manner that violates Health and Safety Code Section 13132.7 (dealing with fire retardant roof materials in common interest developments located in very high fire severity zones, as designated by either the Director of Forestry and Fire Protection or a local agency). Per Health and Safety Code Section 13132.7(l), the governing documents of a common interest development located in a very high fire severity zone must allow for at least one type of fire retardant roof covering material that meets the requirements of Section 13132.7.

**3. Architectural review (Stats 2004 Ch. 346; AB 2376; Bates)** Effective January 1, 2004, associations were burdened with a new procedure (including a notice and comment period) for adopting, amending or repealing rules and regulations relating to certain subjects. This bill adds a new subject to the categories of rules and regulations covered by this procedure. Beginning on January 1, 2005, the adoption, amendment and repeal of architectural review *procedures* (as opposed to architectural *standards* such as "no chain link fences" or "no aluminum patio covers") are subject to the requirements of Civil Code Sections 1357.130 and 1351.140 (including, the notice/comment and member-vote-to repeal procedure).

This bill also adds new Civil Code Section 1378 to the Davis-Stirling Common Interest Development Act, setting forth certain requirements for architectural review procedures, as follows:

- (a) an association must provide a fair, reasonable and expeditious procedure for making its decision, which procedure must (i) be included in the association's governing documents, (ii) provide for prompt deadlines, and (iii) state the maximum time for response to an application or a request for reconsideration by the board;

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### Harle, Janics & Kannen

575 Anton Boulevard, # 460  
Costa Mesa, CA 92626

Telephone: (714) 429-0600

Facsimile: (714) 429-0699

E-mail: [hjklaw@hjklawfirm.com](mailto:hjklaw@hjklawfirm.com)

Website: [www.hjklawfirm.com](http://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*.

#### 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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- (b) the decision on an architectural application must be made in good faith, and may not be unreasonable, arbitrary or capricious;
- (c) the decision on an architectural application must be consistent with any governing provision of law, including but not limited to the California Fair Employment and Housing Act;
- (d) a decision on an architectural application must be in writing, and if the decision is a disapproval, the written decision must include an explanation of why the proposal was disapproved, and a description of the procedure for reconsideration of the decision by the board; and
- (e) an applicant whose application is disapproved is entitled to have the application reconsidered by the board, at an open meeting of the board, unless the original disapproval was made by either the board or a body (*e.g.*, architectural committee) that has the same membership as the board, at a meeting that satisfies the requirements of the Common Interest Development Open Meeting Act (Civil Code Section 1363.05).

The bill also requires an association to provide its members with notice of requirements for approval of changes to property. The notice must describe the types of changes that require approval, and must include a copy of the procedure used to review and approve or disapprove a proposed change. This notice must be provided annually, although the statute does not specify when or how it must be delivered. The requirements of new Section 1378 do not apply to commercial and industrial developments.

COMMENT: This bill is another in a long line of poorly drafted statutes covering common interest developments. Although our view is that the Legislature's intent in requiring an architectural review decision to be "consistent with any governing provision of law" was probably to make sure that issues such as handicap access and accommodation requirements are properly considered, a broad (although, we believe, misguided) interpretation would be that architectural review decisions must consider local building, plumbing and electrical code requirements. Although we do not believe that this is a correct interpretation, the argument could be made.

**4. Budgets, reserves (Stats 2004 Ch. 766; AB 2718; Laird)** This bill modifies many of the requirements relating to distribution of budgets and other financial information.

First, it modifies Civil Code Section 1365 as follows:

- (a) requires budgets to be distributed between 30 and 90 days in advance of an association's fiscal year (instead of 45 to 60 days in advance of the fiscal year);

*Continued on page 3*

- (b) the summary of an association's reserves must be based only on assets held in cash or cash equivalents;
- (c) the statement regarding a determination by the board that special assessment(s) will be necessary to repair, replace or restore major components or reserve therefor must set out the estimated amount, commencement date and duration of the special assessment;
- (d) requires inclusion of a statement as part of the budget setting forth the mechanism(s) by which the board will fund reserves (*e.g.*, assessments, borrowing, use of other assets, deferral of selected replacement or repairs);
- (e) specifies a formula for calculating reserve requirements, and prohibits assuming a rate of return on cash reserves more than two percent above the Federal Reserve Bank of San Francisco's rediscount rate;
- (f) requires the association's statement of its policies and practices in enforcing delinquent assessments to be delivered to members between 30 and 90 days in advance of the fiscal year (instead of during the 60 days prior to the beginning of the fiscal year); and
- (g) requires the summary of the association's property, general liability, earthquake, flood and fidelity insurance policies to be distributed between 30 and 90 days prior to the beginning of the fiscal year.

Second, the bill dictates a form that is to be used in making the required assessment and reserve funding disclosure. It must be completed and distributed annually to the members.

Third, the bill requires any "community service organization" that derives ten percent or more of its budget from an association or its members to prepare and distribute to the association a report meeting the requirements of Corporations Code Section 5012, and that describes in detail administrative costs and identifies the payees of those costs in a manner consistent with Civil Code Section 1365.2.

Fourth, the bill requires that, if an association's board of directors wishes to transfer funds from reserves to meet short-term cash flow requirements or other expenses, then the board must notify the members (in accordance with Civil Code Section 1363.05) of its intent to consider such a transfer, which notice must include the reasons the transfer is needed, some of the repayment options, and whether a special assessment may be considered.

Fifth, the bill allows an association to maintain the information it is required to provide to an owner upon request pursuant to Civil Code Section 1368 in electronic form, and the requesting party has the option to receive the information via electronic transmission if the association maintains the information in electronic form.

Finally, these requirements apply to reports and disclosures made after July 1, 2005.

COMMENT: Note that, even though the bill provides for more flexible time periods for making distributions, an association may still have to abide by more restrictive time periods in its governing documents.

For example, Civil Code Section 1365(a) provides that budgets are to be distributed between 30 and 90 days in advance of the fiscal year, even if the governing documents provide otherwise (so, by its very terms, the code provision "trumps" the governing documents). However, that is not the case with respect to distribution of policies and practices in enforcing lien rights (between 30 and 90 days in advance of fiscal year under this bill, but during the 60 days preceding the fiscal year under the previous version of

the statute). If an association's governing documents provide for the 60 day period, then our view is that the distribution should be made during a period that is consistent with both the statutory time frame and the governing document time frame (in this instance, that "overlap" period is between 30 and 60 days in advance of the fiscal year). The same goes for the distribution of insurance summaries under Civil Code Section 1365(e).

**5. Dispute resolution (Stats 2004 Ch. 754; AB 1836; Harman)** This bill re-structures and re-shuffles governing document enforcement and dispute resolution procedures.

First, the bill makes it clear that an association and its members are entitled to enforce not only an association's declaration, but also its other governing documents (e.g., bylaws, architectural guidelines, rules and regulations).

Second, the bill changes the list of the types of "operating rule" adoption, amendments or repeals that are subject to the cumbersome procedures implemented January 1, 2004 to include operating rules relating to resolution of disputes in general, instead of just disputes related to assessments (so the procedures in Civil Code Sections 1357.130 and 1357.140 now apply to more types of operating rule changes).

Next, the bill adds new Civil Code Sections 1363.810 through 1363.850 to require that associations provide fair, reasonable and expeditious procedures for resolving disputes, and further provides a "default" procedure to follow if associations do not adopt their own procedures. A procedure is deemed to be fair, reasonable and expeditious if it

- (a) may be invoked by either party by written request;
- (b) provides for prompt deadlines, including identifying a maximum time limit for an association to respond to a request invoking the procedure;
- (c) requires the association to participate in the procedure if invoked by the member;
- (d) gives the member the option not to participate in the procedure if invoked by the association;
- (e) gives a member who has agreed to the procedure a right of appeal to the association's board of directors if the dispute is resolved by means other than agreement (e.g., a hearing before a panel of owners);
- (f) a resolution of the dispute, no matter how reached, that is not in conflict with the law or the governing documents binds the association and is judicially enforceable (thus, a decision by a panel of owners that is adverse to the association is binding on the association);
- (g) an agreement reached pursuant to the procedure that is not in conflict with the law or the governing documents binds both parties and is judicially enforceable (thus, a member is only bound if the resolution involves his agreement; the association is bound if there is an agreement or if there is an outcome adverse to the association);
- (h) provides a means for both the association and the member to explain their positions; and
- (i) does not cost the member any money to participate.

The “default” procedure works as follows:


- (i) either party can ask the other, in writing, to “meet and confer” in an attempt to resolve the dispute;
- (ii) a member can refuse a “meet and confer” request; an association may not refuse a meet and confer request;
- (iii) an association’s board of directors must designate a director to meet and confer;
- (iv) the parties must meet promptly at a mutually convenient time and place to explain their positions to one another, and confer in good faith in an effort to resolve the dispute;
- (v) a resolution agreed to by the parties must be memorialized in writing and signed by the parties (including the board designee on the association’s behalf).

Such an agreement binds the parties and is judicially enforceable if the agreement is not in conflict with law or the association’s governing documents, and the agreement is either consistent with the authority conferred by the board on the board designee, or is ratified by the board. Members may not be charged a fee to participate in the “default” dispute resolution process.

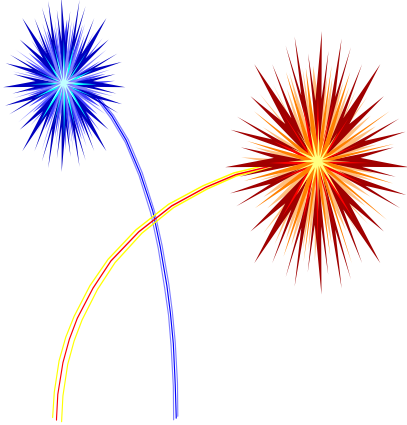
The bill also re-locates and modifies the “Request for Resolution” procedure that had been codified at Civil Code Section 1354(a) through (h). The new procedure, found at Civil Code Sections 1369.510 through 1369.590, permits service of a Request for Resolution by personal delivery, first-class mail, express mail, fax, or other means reasonably calculated to provide actual notice. The bill also provides that the statute of limitations on any enforcement action is tolled if the Request for Resolution is served before the statute of limitations has run out.

COMMENT: This bill throws yet another obstacle in front of associations which seek to get their members to live up to their obligations under the associations’ governing documents. Before this bill’s effective date, most association enforcement procedures looked something like this: courtesy violation letter(s); if no compliance, then call owner to hearing before board of directors; if no compliance, then refer matter to counsel for service of Request for Resolution; if no resolution, then file lawsuit. With this bill in effect, most association violation procedures will probably look something like this:

- (a) courtesy violation letter(s); if no compliance, then
- (b) call owner to hearing before board of directors; if no compliance, then
- (c) initiate “meet and confer” procedure; if no resolution, then
- (d) initiate Request for Resolution procedure; if no resolution, then
- (e) file lawsuit.

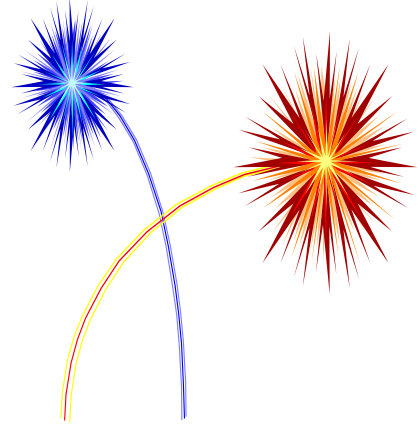
Our view is that the notice and hearing procedure (step (b) above) cannot be dispensed with for both of two reasons: (1) existing governing documents require it, and (2) until the hearing is conducted, there has been no finding that a violation (and therefore a dispute) exists, *i.e.*, until the board holds a hearing, there are only *allegations* of violations; the hearing serves, among other things, as a determination of the existence of a violation. 

# *Announcing . . .*



**C**ongratulations to Jakob Harle for a successful year as President of CAI of the Orange County Regional Chapter and for receiving CAI's 2004 Outstanding Service Award.

**W**e are also proud to announce that Mark Hopkins has joined Harle, Janics & Kannen.



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

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