

Common *INTERESTS*

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NEW 2009 CALIFORNIA COMMUNITY ASSOCIATION LEGISLATION

This has been a relatively quiet year in the California Legislature when it comes to newly enacted legislation affecting common interest developments. Here are the highlights:

1. *Disclosures; Stats 2009 Ch. 484 (AB 899; Torres)*

This bill adds new Section 1363.005 to the Civil Code, which creates a new form ("Disclosure Documents Index") that an association is required to provide to a member upon the member's request. The bill also makes minor changes to the Assessment and Reserve Funding Disclosure Summary form set forth in Civil Code Section 1365.2.5. Finally, the bill amends Civil Code Section 1350.7 (dealing with means by which an association can deliver documents) to provide that members who consent to receive documents via e-mail, facsimile, or other electronic means must consent after first having been advised (a) that the member has the right to have the document provided in paper or non-electronic form, (b) whether the consent applies only to that transmission, to specified categories of communications, or to all communications from the corporation, and (c) of the procedures the member must follow to withdraw consent to receive documents electronically.

2. *Water-Efficient Landscapes; Stats 2009 Ch. 503 (AB 1061; Lieu)*

This bill repeals existing Civil Code Section 1353.8, which prohibits an association's *architectural guidelines* from prohibiting or including conditions that have the effect of prohibiting the use of low water-using plants as a group. The bill adds a replacement Section 1353.8, which declares void and unenforceable *any* of a common interest development's governing documents that either (a) prohibit, or include conditions that have the effect of prohibiting, the use of low water-using plants as a group, or (b) has the effect of prohibiting or restricting compliance with duly adopted water-efficient landscape ordinances or water use regulations or restrictions.

3. *Nonprofit Corporations; Stats 2009 Ch. 631 (AB 1233; Silva)*

This bill makes numerous changes to California's nonprofit corporation statutes, most of which are unlikely to have much of an effect on the manner in which most associations conduct their business. The changes implemented by this bill include:

(a) A means for a corporation to avoid having to obtain the approval of a specified person or persons (*e.g.*, a developer representative) to amend the corporation's articles of incorporation or bylaws if the document requires such approval but the specified person refuses or is unable to provide such approval (Corporations Code Sections 7132(c)(5), 7150(d));

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(b) Authorization for a corporation's articles of incorporation or bylaws to include a requirement that the presence of one or more specified directors is necessary to constitute a quorum (Corporations Code Section 7211(a)(7));

(c) Clarifying that directors cannot vote at board meetings by proxy (Corporations Code Section 7211(c));

(d) Clarifying that only directors may serve on executive committees that exercise the authority of the board (Corporations Code Section 7212(b)); and

(e) Clarifying that if a director is removed from office, his or her term ends immediately at the time of such removal, and that such term does not continue until the removed director's successor has been elected and qualified (Corporations Code Section 7220(b)).

Note that although the citations to the Corporations Code provided above are to the Nonprofit Mutual Benefit Corporation Law, the bill makes the same changes to both the Nonprofit Public Benefit Corporation Law and the Nonprofit Religious Corporation Law as well.

4. *Pool and Spa Safety; Stats 2009 Ch. 267 (AB 1020; Emerson)*

AB 1020 seeks to conform state law to the federal Virginia Graeme Baker Pool and Spa Safety Act, which Congress enacted in December of 2008 to prevent injuries and drownings associated with entrapment in public swimming pools and spas.

The bill requires an existing "public swimming pool" (defined so as to be specifically applicable to most community associations with pools and/or spas) to be equipped with anti-entrapment devices or systems that meet ASME/ANSI or ASTM performance standards. The bill also requires an existing public swimming pool with a single main drain that is not an "unblockable drain" (meaning a drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard) to meet at least one of the specified standards.

AB 1020 further requires every newly constructed public swimming pool to have at least two main drains per pump that are hydraulically balanced and symmetrically plumbed through one or more "T" fittings, and that are separated by a distance of at least three feet in any dimension between the drains.

AB 1020 requires the public swimming pool owner to file a form to indicate compliance with the requirements of the bill. The State Department of Public Health is required to develop and post the form on its website by March 31, 2010.

The form is required to include a certification by a “qualified individual” (defined in the bill to mean a contractor who holds a current valid license issued by the State of California or a professional engineer licensed in the State of California who has experience working on public swimming pools) that the prescribed factual information provided on the form is true to the best of his or her knowledge. The bill authorizes the State Department of Public Health to assess a nominal fee not to exceed six dollars on the owners of each public swimming pool for filing. Pursuant to the bill, every six months, the local health department is required to submit to the State Department of Public Health a list containing the name and address of the owner of every public swimming pool who has failed to pay the state fee for more than ninety days after the date that the bill was provided to the owner of the public swimming pool.

Public swimming pools constructed prior to January 1, 2010 must be retrofitted to comply with AB1020 no later than July 1, 2010. No further retrofitting is required for a public swimming pool that completed a retrofit between December 19, 2007 and January 1, 2010 that complies with the Virginia Graeme Baker Pool and Spa Safety Act, although the owner of such a public swimming pool must file certain specified paperwork prior to September 30, 2010.

5. Construction Defects; Stats 2009 Ch. 7 (AB 927; Calderon)

This bill extends the effective period of the “Calderon Process” for construction defect matters (California Civil Code Section 1375) from its current “sunset” date of July 1, 2010 to a new “sunset” date of July 1, 2017.

6. Assessments; Stats 2009 Ch. 431 (AB 313; Fletcher)

This bill adds new Section 1366.4 to the Civil Code. It confirms that any association that imposes assessments on the separate interests in a common interest development on the basis of the taxable value of the separate interest (instead of some other method, such as pro rata or based on unit size) in accordance with its governing documents prior to December 31, 2009, may continue to do so, but no other associations may impose assessments based on taxable value. This bill will have extremely limited applicability; there are probably less than a handful of associations in California that impose assessments based on taxable value of the separate interests.

7. Water-Efficient Plumbing; Stats 2009 Ch. 587 (SB 407; Padilla)

This bill imposes new water efficiency requirements for plumbing fixtures installed in residential and commercial properties. Subject to certain very limited exceptions, all residential and commercial real property built and available for use on or before January 1, 1994 will have to be retrofitted with water-conserving plumbing fixtures (*i.e.*, toilets, urinals, showerheads, and faucets) that are compliant with current building standards applicable to newly constructed real property of the same type by (a) January 1, 2017 if the property is a single-family residential property (if the property requires a certificate of final completion and occupancy or final permit approval by the local building department after January 1, 2014, then the retrofit must be accomplished at that time), and (b) January 1, 2019 for multifamily residential (*i.e.*, attached or stacked residences) and commercial real property (the deadline is accelerated to January 1, 2014 if there is a building addition or additions that increases the floor area by more than ten percent (10%), or if there are building alterations or improvements with an estimated construction cost (as reflected on the building permit) greater than \$150,000.00, or in connection with an alteration or improvement requiring a building permit to a room and the room contains non-compliant plumbing fixtures).

Because of the way the statute defines “multifamily residential real property,” these new requirements, codified at new Civil Code Sections 1101.1 through 1101.9, would appear to require individual owners of attached or stacked units in a common interest development to replace non-compliant plumbing fixtures with water-conserving plumbing fixtures if the *association* performs work (*e.g.*, roof replacement) on the building containing the residences if the construction cost estimated in the building permit is greater than \$150,000.00. Although the owners would be required to upgrade the plumbing fixtures by January 1, 2019 anyway, they could be required to accelerate that upgrade if work of the specified cost amount is performed to their building. It is unclear what remedy an association might have if the statute applies to this situation and an owner fails to upgrade his plumbing fixtures (*e.g.*, if a roof replacement is necessary and the city building department refuses to issue a permit unless and until all plumbing fixtures in that building are upgraded, and if one or more owners refuse to upgrade their fixtures, where does that leave the association?). Notwithstanding that the statute by its terms does not specifically exempt attached and stacked common interest developments from its application, a consensus seems to be developing among common interest development attorneys that the legislature did not intend the statute to apply to common interest developments, but rather to property like apartment complexes where all the dwellings are owned by a single entity responsible for maintenance and repair of all elements of the complex.



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