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Summary Of Important New Legislation Affecting California Homeowner, Condominium And Stock Co-Op Associations/Common Interest Developments In 2012

Prepared by the Community Association Attorneys at Swedelson & Gottlieb

As they do almost every year, the California Legislature has yet again changed the Davis-Stirling Act (there have been approximately 50 amendments to the Act since its inception in 1985). Below is a summary of the most significant changes which impact how boards will hold meetings including executive session meetings, how boards communicate with one another, fees at escrow, electric charging stations, and rental restrictions. We will be preparing additional articles on these changes and posting them to www.hoalawblog.com.

- **AB 771 (Butler) – Fees at Escrow**

  - This bill amends Civil Code Section 1368, and became effective January 1, 2012.

  - The general purpose of this bill is to require an itemization and disclosure of fees charged to an owner for providing hard copies of association documents to a prospective purchaser of the owner's unit/lot during escrow as required by Section 1368.

  - Section 1368 already requires a community association to provide specified documents to the owner within 10 days of the mailing or delivery of the request, and limits the amount of fees charged for the provision of the documents to the association's actual costs to procure, prepare and reproduce the requested documents; however, there was no limitation on the fees charged directly to the owner by the association's management company/managing agent for those documents.

  - Following are the major changes as a result of this new legislation:

    - An association will be required to provide the selling owner, upon receipt of a written request, a written or electronic estimate of the fees that will be assessed for providing the requested documents; this billing disclosure must be provided on the form included in new Civil Code Section 1368.2.
    - The disclosure documents required under subsection (a) of Civil Code Section 1368 may be maintained in electronic form, and may be posted on the association's website; an owner has the option of receiving the documents electronically or by hard copy.
    - The association may collect a reasonable fee for the procurement, preparation, reproduction and delivery of the documents requested; no additional fees may be charged for electronic delivery of the documents requested.

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- The association may not withhold delivery of the requested documents for any reason or subject to any condition, except for the payment of the fees permitted.
- An association may contract with any person or entity to facilitate compliance with the document requirements on behalf of the association.
- The association is required to provide to a recipient authorized by the selling owner a copy of the completed 1368.2 form with the delivery of the requested documents.
  - If the selling owner makes such a request to deliver to a third party, include a disclaimer: "These documents are being provided to you in the limited scope of complying with a request of the owner of the unit/lot for same in accordance with Civil Code Section 1368. The delivery of these documents to you shall not constitute establishment of privity between you and the association, and such delivery shall not create any further responsibility for the association with respect to further disclosure of documents to you."

- **SB 150 (Correa) – Rental Restrictions**

  - This bill amends Civil Code Sections 1368 and 1373, and became effective January 1, 2012.

  - This new legislation: (1) preserves the right of an owner to lease his/her property, as those rights existed at the time the owner acquired his/her property; and (2) require a prospective purchaser to be provided minutes for the prior 12 months' open session board meetings.

  - The application of this legislation will result in the following leasing restrictions not being applicable to existing owners (but only to new owners) when such restrictions are adopted by an association on or after January 1, 2012, resulting in a grandfathering of existing owners:
    - Any amendment to an association's CC&Rs instituting or lowering a cap on the number of units/lots that may be leased at any one time;
    - Any amendment to an association's CC&Rs instituting or increasing a limit on the amount of time an owner must own his/her property before the owner can lease his/her property; and
    - Any other amendment to an association's CC&Rs that would affect the ability of an owner to lease his/her property.

  - Any leasing restriction that was duly approved, adopted by an association and recorded on or before December 31, 2011 will be applicable to all owners, both future and existing.

  - This new legislation does not apply to all rental restrictions, only those that affect the ability of an owner to lease his/her property; CC&R amendments requiring that a lease be

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in writing, that a lease be for a minimum term, that the tenant under a lease be subject to an association's governing documents, etc., will still apply to all owners (existing and future) once adopted.

- This new legislation includes changes to statute affecting escrow demands:

  - Civil Code Section 1368(a)(9) – If there is a provision in the governing documents that prohibits the rental or leasing of any of the separate interests in the association's development to a renter, lessee or tenant, a statement describing the prohibition and its applicability must be provided to the prospective purchaser.
  - Civil Code Section 1368(a)(10) – If requested by an owner, a copy of the minutes of the meetings, excluding meetings held in executive session, of the association's board of directors, conducted over the previous 12 months, that were approved by the association's board of directors, must be provided to the prospective purchaser. The Association can charge a reasonable fee to the owner for the minutes, based on the actual costs for providing the minutes.

- **SB 209 (Corbett) – Electric Vehicle Charging Stations**

  - This new legislation added Section 1353.9 to the Civil Code, and became effective January 1, 2012.

  - The general purpose of this new legislation is to limit and restrict an association's ability to prohibit an owner from installing his/her own electric charging station in the association's common area (either in the owner's exclusive use common area or the general common area).

  - Any provision of an association's governing documents that unreasonably restricts the installation of an electric vehicle charging station will be deemed void and unenforceable, but an association can impose reasonable restrictions related to the appearance, installation, maintenance and use of the station.

  - An owner who installs a charging station in an association's common area will be responsible for costs associated with:

    - Installing, using, maintaining, repairing, replacing and removing the charging station (including electricity costs);
    - Repairing damage to the common area and adjacent units resulting from the installation and maintenance of the charging station; and

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- Maintaining liability insurance coverage of at least $1,000,000 for the charging station that names the association as an additional insured.

- This new law allows individual owners to exclusively use or occupy common areas without approval of the association's members or the association, contrary to Civil Code Section 1363.07 and applicable case law.

- In his signing message, Governor Brown indicated that this bill has problems that will need to be corrected to protect the right of common interest developments to regulate the use of their common areas, but that the state interests of lowering vehicle emissions and decreasing dependency on foreign oil by the use of electric vehicles are overriding concerns necessitating the adoption of this bill.

- **SB 563 (Committee on Transportation and Housing) – Open Meeting Act**

  - This bill amended Civil Code Sections 1363, 1363.05 and 1365.2, and became effective January 1, 2012.

  - The general purpose of this bill is to resolve a conflict between the Common Interest Development Open Meeting Act, which provides that board meetings are to be open to an association's membership (except when a board meets in executive session), and Corporations Code 7211, which allows for unanimous written consent for board actions outside of a meeting.

  - The following changes will occur as a result of this new legislation:

    - Except for emergency executive session board meetings, notice of meetings to be held exclusively in executive session must be given to the members/owners at least two days prior to the meeting, along with the agenda for the executive session meeting.
    - Notice of board meetings may be given by electronic means such as email to a member/owner, with the consent of the member/owner.
    - A board cannot take action on any item of business outside of a meeting.
    - Except for emergency board meetings, board meetings cannot be held via a series of electronic transmissions (such as email). Unanimous written consent of the board is required to hold an emergency board meeting via electronic transmission. A majority of a quorum of the board is required to approve an action of the board.
    - Notice of board meetings held via teleconference must identify at least one location where members/owners will be able to attend and hear all participants; at least one board member must be physically present at the location.

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- An emergency exists in the case of circumstances that could not have been reasonably foreseen, which require immediate attention and possible action by the board, and which of necessity make it impracticable to provide notice of a Board meeting as required by statute.

- There are penalties of $500 per violation plus fees and costs for noncompliance if an owner brings suit; if the association prevails, fees and costs are not recoverable unless the owner's suit was frivolous, unreasonable or without foundation.

- **SB 459 (Corbett) – Independent Contractors: Willful Misclassification**

  - Some associations incorrectly classify staff as independent contractors instead of employees.

    - Some boards think this will be to their advantage, as they believe the association will not have to pay for fees, charges, taxes, vacation pay, payroll taxes, medical insurance, *etc*.
    - The staff member may prefer an independent contractor classification because they believe they will not have taxes deducted from their paychecks, and they believe they can write off their car and other expenses.

  - The bill: (1) prohibits willful misclassification of individuals as independent contractors; (2) prohibits charging individuals who have been mischaracterized as independent contractors a fee or making deductions from compensation where those acts would have violated the law if the individuals had not been mischaracterized; and (3) authorizes the Labor and Workforce Development Agency (LWDA) to assess specified civil penalties from, and take other specified disciplinary actions against, persons or employers violating these prohibitions.

  - The Labor Commissioner can issue determinations that a person or employer has violated these prohibitions with regard to an individual filing a complaint, and to assess civil and liquidated damages against a person or employer based on a determination that the person or employer has violated these provisions.

  - The bill further provides that any person (manager or management company, for example, when advising their community association client) who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor.

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- Exempt from these provisions regarding joint and several liability is any person who provides advice to his or her own employer or an attorney who provides legal advice in the course of practicing law.

- If the association controls most aspects of a staff member's work, including assignments and scheduling, where they work and what they do, and supplies their equipment *etc*., then it is likely that staff member is an employee.