

2006
STATUTORY CHANGES
ARISING OUT OF SB 61, SB 137, AND AB 1098

[All references are to the Civil Code unless otherwise noted]

SB 61 (Battin) Elections/Campaign Funding/Remedies

SEC. 1

§1357.120. Rule Changes for Certain Operating Rules; Applicability and Exceptions

(a) Sections 1357.130 and 1357.140 only apply to an operating rule that relates to one or more of the following subjects:

- (1) Use of the common area or of an exclusive use common area.
- (2) Use of a separate interest, including any aesthetic or architectural standards that govern alteration of a separate interest.
- (3) Member discipline, including any schedule of monetary penalties for violation of the governing documents and any procedure for the imposition of penalties.
- (4) Any standards for delinquent assessment payment plans.
- (5) Any procedures adopted by the association for resolution of disputes.
- (6) Any procedures for reviewing and approving or disapproving a proposed physical change to a member's separate interest or to the common area.

(7) *Procedures for elections.*

(b) Sections 1357.130 and 1357.140 do not apply to the following actions by the board of directors of an association:

- (1) A decision regarding maintenance of the common area.
- (2) A decision on a specific matter that is not intended to apply generally.
- (3) A decision setting the amount of a regular or special assessment.
- (4) A rule change that is required by law, if the board of directors has no discretion as to the substantive effect of the rule change.

(5) Issuance of a document that merely repeats existing law or the governing documents.

SEC. 2

**§1363.03. Election Rules; Secret Ballots; Inspectors of Election; Balloting
[Operative on July 1, 2006]**

(a) An association shall adopt rules, in accordance with the procedures prescribed by Article 4 (commencing with Section 1357.100) of Chapter 2, that do all of the following:

(1) Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or Internet Web sites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election. The association shall not edit or redact any content from these communications, but may include a statement specifying that the candidate or member, and not the association, is responsible for that content.

(2) Ensure access to the common area meeting space, if any exists, during a campaign, at no cost, to all candidates, including those who are not incumbents, and to all members advocating a point of view, including those not endorsed by the board, for purposes reasonably related to the election.

(3) Specify the qualifications for candidates for the board of directors and any other elected position, and procedures for the nomination of candidates. A nomination or election procedure shall not be deemed reasonable if it disallows any member of the association from nominating himself or herself for election to the board of directors.

(4) Specify the qualifications for voting, the voting power of each membership, the authenticity, validity, and effect of proxies, and the voting period for elections, including the times at which polls will open and close.

(5) Specify a method of selecting one or three independent third parties as inspector, or inspectors, of election utilizing one of the following methods:

(A) Appointment of the inspector or inspectors by the board.

(B) Election of the inspector or inspectors by the members of the association.

(C) Any other method for selecting the inspector or inspectors.

(b) Notwithstanding any other law or provision of the governing documents, an election within a common interest development regarding assessments, selection of members of the association board of directors, amendments to the governing documents, or the grant of exclusive use of common area property pursuant to Section

1363.07 shall be held by secret ballot in accordance with the procedures set forth in this section.

(c) (1) The association shall select an independent third party or parties as an inspector of election. The number of inspectors of election shall be one or three.

(2) For the purposes of this section, an independent third party includes, but is not limited to, a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public. An independent third party may be a member of the association, but may not be a member of the board of directors or a candidate for the board of directors or related to a member of the board of directors or a candidate for the board of directors. An independent third party may not be a person who is currently employed or under contract to the association for any compensable services unless expressly authorized by rules of the association adopted pursuant to paragraph (5) of subdivision (a).

(3) The inspector or inspectors of election shall do all of the following:

(A) Determine the number of memberships entitled to vote and the voting power of each.

(B) Determine the authenticity, validity, and effect of proxies, if any.

(C) Receive ballots.

(D) Hear and determine all challenges and questions in any way arising out of or in connection with the right to vote.

(E) Count and tabulate all votes.

(F) Determine when the polls shall close.

(G) Determine the result of the election.

(H) Perform any acts as may be proper to conduct the election with fairness to all members in accordance with this section and all applicable rules of the association regarding the conduct of the election that are not in conflict with this section.

(4) An inspector of election shall perform his or her duties impartially, in good faith, to the best of his or her ability, and as expeditiously as is practical. If there are three inspectors of election, the decision or act of a majority shall be effective in all respects as the decision or act of all. Any report made by the inspector or inspectors of election is prima facie evidence of the facts stated in the report.

(d) Any instruction given in a proxy issued for an election that directs the manner in which the proxy holder is to cast the vote shall be set forth on a separate page of the proxy that can be detached and given to the proxy holder to retain. The proxy holder shall cast the member's vote by secret ballot.

(e) Ballots and two preaddressed envelopes with instructions on how to return ballots shall be mailed by first-class mail or delivered by the association to every member not less than 30 days prior to the deadline for voting. In order to preserve confidentiality, a voter may not be identified by name, address, or lot, parcel, or unit number on the ballot. The association shall use as a model those procedures used by California counties for ensuring confidentiality of voter absentee ballots, including all of the following:

(1) The ballot itself is not signed by the voter, but is inserted into an envelope that is sealed. This envelope is inserted into a second envelope that is sealed. In the upper left hand corner of the second envelope, the voter prints and signs his or her name, address, and lot, or parcel, or unit number that entitles him or her to vote.

(2) The second envelope is addressed to the inspector or inspectors of election, who will be tallying the votes. The envelope may be mailed or delivered by hand to a location specified by the inspector or inspectors of election. The member may request a receipt for delivery.

(f) All votes shall be counted and tabulated by the inspector or inspectors of election in public at a properly noticed open meeting of the board of directors or members. Any candidate or other member of the association may witness the counting and tabulation of the votes. No person, including a member of the association or an employee of the management company, shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated.

(g) The results of the election shall be promptly reported to the board of directors of the association and shall be recorded in the minutes of the next meeting of the board of directors and shall be available for review by members of the association. Within 15 days of the election, the board shall publicize the results of the election in a communication directed to all members.

(h) The sealed ballots at all times shall be in the custody of the inspector or inspectors of election or at a location designated by the inspector or inspectors until after the tabulation of the vote, at which time custody shall be transferred to the association.

(i) After tabulation, election ballots shall be stored by the association in a secure place for no less than one year after the date of the election. In the event of a recount or other challenge to the election process, the association shall, upon written request, make the ballots available for inspection and review by association members or their authorized representatives. Any recount shall be conducted in a manner that shall preserve the confidentiality of the vote.

(j) The provisions of this section apply to both incorporated and unincorporated associations, notwithstanding any contrary provision of the governing documents.

SEC. 3

§1363.04. Association Funds and Campaigns [Operative on July 1, 2006]

(a) Association funds shall not be used for campaign purposes in connection with any association board election. Funds of the association shall not be used for campaign purposes in connection with any other association election except to the extent necessary to comply with duties of the association imposed by law.

(b) For the purposes of this section "campaign purposes" include, but are not limited to, the following:

(1) Expressly advocating the election or defeat or any candidate that is on the association election ballot.

(2) Including the photograph or prominently featuring the name of any candidate on a communication from the association or its board, excepting the ballot and ballot materials, within 30 days of an election, provided that this is not a campaign purpose if the communication is one for which subdivision (a) of Section 1363.03 requires that equal access be provided to another candidate or advocate.

SEC. 4

§1363.09. Remedies for Violation of Election Procedures, Campaign Fund Restrictions, CID Open Meeting Act, Invalid Grants of Exclusive Use of Common Area [Operative on July 1, 2006]

(a) A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by an association of which he or she is a member, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues. Upon a finding that the election procedures of this article, or the adoption of and adherence to rules provided by Article 4 (commencing with Section 1357.100) of Chapter 2, were not followed, a court may void any results of the election.

(b) A member who prevails in a civil action to enforce his or her rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars (\$500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

(c) A cause of action under Section 1363.03 with respect to access to association resources by a candidate or member advocating a point of view, the receipt of a ballot by a member, or the counting, tabulation, or reporting of, or access to, ballots for

inspection and review after tabulation may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court.

Is It Time to Amend the Governing Documents?



**ARE YOUR GOVERNING DOCUMENTS
OUT-DATED, INADEQUATE, POORLY ORGANIZED?**

Are members or directors confused because current requirements of the law conflict with what your documents say?

Do members or directors have questions about ordinary operations that aren't answered in your governing documents?

Are you paying for costly legal opinions to answer these questions?

Do your documents lack remedies for predictable problems?

The Berding & Weil GovDocProjectSM

Dedicated to raising the benchmark for association governing documents

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To provide logical, sequential, coherent information to members, directors, and others concerning duties of the board, powers of the association, and rights of members within the range of issues and events that regularly come up in the ongoing operations of a homeowners association so that associations will have less need to resort to legal counsel for what should be day-to-day operations.

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Highlights of Selected 2006 Legislation

Mary W. Filson, Berding & Weil, LLP

AB 304 (earthquake retrofitting)
AB 394 (discriminatory provisions in recorded documents)
SB 422 and SB 137 (small claims court)

AB 304 (earthquake retrofitting)

Existing law authorizes but does not mandate a city, county, or city and county to assess earthquake hazard and to identify un-reinforced masonry buildings potentially dangerous to life in event of an earthquake, and to establish reconstruction standards.

This law:

Adds another category of potentially dangerous buildings – “soft story” wood frame multi-unit residential buildings built before January 1, 1978 (H&S section 19161).

Buildings otherwise exempt under H&S 19100 are not exempt from this statute; therefore could apply to duplexes and to buildings in unincorporated parts of a county.

Changes the term “reconstruction” to “seismic retrofit.”

Still does not require city/county to assess hazard.

Still does not require city/county to establish seismic retrofit standards, but if it does those standards must comply with a “nationally recognized model code” and those standards will remain in effect unless and until the city/county adopts standards established by California Building Standards Commission, if any.

Still does not require seismic retrofitting.

15 year “safe harbor” – if city/county identified a building as dangerous, and adopted seismic retrofit standards, and building was retrofitted in accordance with those standards, and building was “properly maintained” thereafter, then for a period of 15 years that building can’t be declared a seismic hazard under standards adopted subsequently.

Impact on B&W clients?? Not immediate but if city/county does assess earthquake hazard and establish retrofit standards, then other work requiring a permit (such as re-roofing or replacing siding) might trigger a requirement to seismically retrofit as well (in the same way as handicap access ramps and parking places may be required when other work is undertaken even if the Association is not technically subject to the ADA). Associations with “soft story” wood frame multi-unit buildings built before 1978 probably should consider adding seismic retrofitting to their reserve analysis and funding obligations.

AB 394 (discriminatory provisions in recorded documents)

Current law requires a statement to be attached to various recorded documents stating that certain prohibited restrictions violate the law and may be removed by filing an application with the Department of Fair Employment and Housing and recording a form from DFEH and a copy of the original document with the offending provisions stricken.

This law:

Adds sexual orientation, marital status, and source of income to the types of prohibited restrictions which must be listed in the statement (Govt. C section 12956.1). The statute specifies that senior housing *age* restrictions shall not be construed as restrictions based on familial status but left unresolved is whether senior housing restrictions based on *marital status* are still enforceable.

Creates a new separate section (Govt. C section 12956.2) to deal with “modifications”. Takes DFEH out of the process. Now the County Recorder shall make available a form (called a “Restrictive Covenant Modification”); owner to fill out form and redact the existing documents and submit to the Recorder; the Recorder to submit form and redacted document to county counsel for determination whether the restriction is unlawful; if OK with county counsel then recorder to record it.

Disturbing: “The restrictions in the Restrictive Covenant Modification, once recorded, are the only restrictions having effect on the property.” (Govt C 12956.2(d)) Allows for lawful restrictions recorded after the “Modification” but does not recognize that otherwise lawful restrictions may have been recorded before and/or after the original recordation of the offending document that has been redacted and re-recorded pursuant to this statute.

Good news: The “modification” parts of the law still do not apply to most of our clients.

Impact on our clients?? Update the covering sheet.

SB 422 and 137 (small claims court)

This law (SB 422) adds new jurisdictional amount of \$7,500 only for plaintiffs who are natural persons (Code of Civil Procedure section 116.221); requires a “course of study” in substantive areas of law (but probably not including homeowner association law) for temporary judges in small claims courts (CCP 116.240(b)); limits recovery of certain fees by prevailing party (CCP 116.610(g) – but only applies to version of section 116.230 that ceases to be operative on 7-1-2006); specifies topics to be included in personal advisory services to be provided by small claims courts (CCP116.940(b)(1)).

New CCP section 116.221 is added to provide for \$7,500 jurisdictional limit for natural persons only, “except for actions otherwise prohibited by” section 116.220(c) [actions against certain guarantors] and 116.231(a) [more than 2 actions over \$2,500 per year].

New section also requires party suing to more specifically assert the amount and basis of the debt, prior payments, charges and credits.

SB 137 deals primarily with assessment collection but as relevant here indirectly and directly encourages the use of small claims court to collect assessments. Indirect encouragement results from new (lengthier, complicated and more public) procedural foreclosure requirements and direct encouragement by permitting an Association to appear in small claims court by an agent, management company representative or bookkeeper. section 116.540(i).

Impact on our clients?? Associations can now be sued in small claims court for larger sums but the \$5,000 limit on pursuing claims still applies to actions brought by Associations. They can now be represented in small claims court by their managing agents.

