

## *SOUTH COAST HOMEOWNERS ASSOCIATION*

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### UPCOMING SOUTH COAST MEETINGS

**2006 Annual Law and Legislative Update** – What has the California Legislature done to simplify your life this year? (Care to take a guess on this one?) Or do you think they have created additional complications for you and/or your manager. Schedule to attend one of our events as follows:

**Monday, January 23, 2006**

**Holiday Inn**

**5650 Calle Real, Goleta**

**Time – 7 PM – 9PM**

**Wednesday, February 22, 2006**

**Quail Meadows West Clubhouse**

**866 Whippoorwill, Santa Maria**

**Time 7PM – 9PM**

#### Scheduled to Present:

**James H. Smith**, Grokenberger & Smith – SB 137 – New Assessment Collection and Foreclosure Procedures

**David A. Loewenthal**, Loewenthal, Hillshafer & Rosen – AB 1098 – Association Records Disclosure to Members, Accounting Methods and Documentation

**Jeffrey Nerdin**, Allen & Kimbell, - AB 61 – Association Election Procedures

**Jeff Domine**, Adams, Noblin & Vratovic – Topic to be determined

As is our custom at our legal forums, we will have a moderated question and answer session where the attorneys will offer their viewpoints to your general questions.

## **NEW CALIFORNIA LAW AFFECTS ASSOCIATION ASSESSMENT COLLECTION POLICIES AND PROCEDURES EFFECTIVE JANUARY 1, 2006**

Senate Bill 137, effective January 1, 2006, changes the way your association collects its regular and special assessments. For several years, lobbying groups in Sacramento have sought to restrict or eliminate access to foreclosure by associations for unpaid assessments. Instances were noted by supporters of the legislation that foreclosure proceedings were instigated for unpaid assessments as low as \$120.

In 2004, legislation was introduced and passed by both the Assembly and State Senate which would not have allowed an association to start foreclosure proceedings on an unpaid assessment until the unpaid amount exceeded \$2,500, not counting late fees, interest and collection costs. The Governor vetoed the legislation. For associations with limited common area responsibilities and assessments, it would have taken several years for the association to be able to use foreclosure as a collection tool.

In 2005, SB 137 was introduced by Senator Ducheny. The sponsors of the legislation were the California Alliance of Retired Americans, Gray Panthers, the Congress of California Seniors and the American Homeowners Resource Center. These organizations provided much of the information used by staff in developing analyses for the Senate and Assembly members to consider during the hearings and votes. This legislation was portrayed by these groups as consumer protection for senior citizens, protecting the equity in their homes. After a series of committee hearings and six amendments, the legislation passed the State Senate 29-3 and the Assembly 64-12. All of our local legislators (Assemblymen Nava and Blakeslee and Senators McClintock and Maldonado) voted for the legislation.

What does this new law mean to you? The new law provides that when an association of a common interest development seeks to collect delinquent assessments of less than \$1,800, not including accelerated assessments and specified late charges and fees, the association must either file a civil action in small claims court or record a lien upon which it would be prohibited from foreclosing until the amount equals or exceeds \$1,800 **or** the assessments are more than 12 months delinquent. The new law deletes provisions authorizing the owner of a separate interest to pay assessments that are in dispute in full under protest and requiring the board of directors of an association to respond to an owners written dispute of a debt within 15 days.

The new law permits an association of a common interest development seeking to collect delinquent regular or special assessments of \$1,800 or more, not including accelerated assessments and specified late charges and fees, or any assessments that are more than 12 months delinquent, to use foreclosure subject to specified conditions. Among these conditions, the new law requires the board of directors of an association to make the decision to foreclose upon a lien at an executive meeting of the board, by a majority vote at least 30 days prior to any public sale, and to record the results of the vote. The board must also provide notice of the decision to foreclose. A managing agent or any other person cannot make the decision to foreclose. It must be done by the board of directors.

The law requires, if the owner so requests, that the association permit the owner of the separate interest to elect dispute resolution or alternative dispute resolution procedures, under specified circumstances. The association would be prohibited from recording a lien or initiating a foreclosure action without participating in those procedures if so requested by the owner. If it is determined through dispute resolution or alternative dispute resolution that an association has filed a lien for a delinquent assessment in error, the association would be required to reverse specified charges and take other corrective actions.

The law also requires the association to file an itemized statement of the charges owed by the owner together with the notice of delinquent assessment. The bill would further provide that, notwithstanding any law to the contrary, a foreclosure by an association to collect upon a debt for a delinquent assessment, as specified, is subject to a right of redemption. The bill would provide a redemption period of 90 days.

The law requires the association to send any and all correspondence and specified legal notices to both a primary and secondary address, as specified, if the owner provides written notice of the secondary address to the association. The bill also would authorize an association created to manage a common interest development to appear and participate in small claims court hearings through an agent, a management company representative, or bookkeeper who appears on behalf of the association.

**Commentary:** Let's get realistic. Foreclosure is a rarely used collection tool in Santa Barbara County. In my financial comparison database referenced in the December 2005 edition of the newsletter, the total delinquent assessments for all 53 associations in the database was \$120,440. That amount is spread over 4,184 housing units - \$28.79 per unit in delinquent assessments. Most owners recognize their responsibility to pay their assessments monthly and on time. Some members forget and when you send a late notice after the 15<sup>th</sup> of the month, they will promptly pay and may even include next month's assessment, too. Some owners travel and forget to send in their assessments. That leaves a small group who doesn't care about the association and will pay other bills instead of r association. Maybe they're in over their head. Maybe there have been some health issues or other family crises. Maybe they're upset with the association. Prompt communication is important to minimize collection problems: Send late notices as soon as the member is delinquent. Assess late fees as permitted by your CC&Rs or Civil Code. If a member is more than a couple months delinquent, send a pre-lien letter specifying the amounts owed and collection costs incurred to date. Send this letter by regular and certified, return receipt mail. Many times, certified mail is returned unclaimed. Your pre-lien letter will need to be modified to reflect the new collection procedures law. Continue to file liens for assessments that remain unpaid. Consult with your legal counsel or management professional as to whether to pursue additional collection procedures through small claims court or wait until the unpaid assessment balance exceeds \$1,800 to start the foreclosure process. Foreclosure takes time from start to finish and there are significant legal fees to be paid during the process. While these fees can be added to the amount owed the association by the delinquent owner, the association will have to advance these costs.

I am concerned about some speculative purchases of association units by investors in recent years. The significant increases in prices and the availability of low-interest and low down payment loans leaves little at risk for the speculative investor. Should prices decline, interest rates rise or sales slow down, these owners may not keep paying their assessments. If there

is no equity in the property, foreclosure yields nothing for the association! In extreme cases, associations may have to write off uncollectable assessments and all remaining owners will have to make up the difference.

## **SENATE BILL 61 CHANGES THE WAY YOUR ASSOCIATION CONDUCTS ITS ELECTIONS – EFFECTIVE DATE – JULY 1, 2006**

The California Legislature believes that associations do not conduct their elections fairly. As a result, this law was passed by the Legislature unanimously. Not a single “no” vote was recorded. This law was authored by State Senator Jim Battin (R-La Quinta). According to the Senator, “*Now homeowners will be able to cast votes on important issues affecting themselves and their families without the fear of intimidation or scare tactics*”. On Senator Battin’s web site, there is an online poll.

“Are Homeowner Association Elections...”

- For the most part, fair and balanced – 15%
- Allow the potential for intimidation and mismanagement – 39%
- Should require secret ballots – 27%
- Should be open – 17%

As of January 11, 2006.

While the law is not effective until July 1, 2006, implementing the new procedures may require the association to change its operating rules and put new procedures in place to conduct its annual meetings and elections.

This new law requires that an association adopt rules, pursuant to specified procedures, to provide equal access to various association media as part of election campaigns, as specified, and to establish qualifications for candidates and voting, as specified, among other things.

**Civil Code § 1363.03(a)** – “*An association shall adopt rules, in accordance with the procedures prescribed by Article 4 (commencing with Section 1357.100 – this is the section relating to providing notice to members that the association board has voted to make a change in its rules) 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.”*

**Civil Code § 1363.04.(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.”*

The law requires that elections be held by secret ballot within a common interest development regarding:

- 1) assessments,
- 2) selection of members of the association board of directors,
- 3) amendments to the governing documents, or
- 4) the grant of exclusive use of common area property

#### **PROCEDURES FOR SECRET BALLOT**

**Civil Code § 1363.03.(e,f,g,h,i)** – *“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.*

*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.*

*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.*

*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.*

*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.*

*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."*

#### **WHO CAN BE AN INSPECTOR OF AN ELECTION?**

The law would permit a member of an association to bring a civil action, as specified, for violations of these provisions, and other provisions regarding open meetings, by his or her association, and impose a civil penalty of up to \$500 per violation.

Per **Civil Code § 1363.03.(c)**: *"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.*

*For the purposes of this section, an independent third party includes, but is not limited to,*

- 1) *a volunteer poll worker with the county registrar of voters, (Note – the Santa Barbara League of Women's Voters has indicated to us that they would be available as inspectors of elections)*
- 2) *a licensee of the California Board of Accountancy (CPA),*

- 3) or a notary public.
- 4) *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)*

*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.*

*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.*

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

**Commentary:** In my mind this new law raises a lot of questions. The law makes no distinction on the size of the association that is subject to this new law - from 2 units up to infinity. Implementing these procedures in a small association makes no sense, whatsoever. In most elections that I've seen, the inspector(s) is(are) not selected until the meeting. Now the inspector would have to be selected ahead of the election who would then specify where the ballots would be mailed. What if the association has only three nominees running for three open seats on the board? Does there have to be an election? Some associations have trouble meeting their quorum requirements. If ballots and proxies are going to third parties, how will an association be able to know whether it may have a quorum prior to the meeting? Would the meeting have to be rescheduled when the quorum requirements are less? If your manager is involved in the balloting and election process, your costs will go up to implement these changes, not to mention the cost of hiring an appropriate “Inspector of Election.”

Some commentators believe that corrective legislation will be offered in 2006 to clear the confusion. Don't count on it.

If you believe that your association will take some heat from members who believe this to be unduly complicated and a waste of money and time in many cases, I would suggest a notation on your election materials – “Required by SB 61 – State Senator Jim Battin – 75-710 Fred Waring Dr #112, Palm Desert, CA 92260 – 760-568-0408”

#### **WHAT IF WE DON'T COMPLY WITH THE LAW?**

**Civil Code § 1363.09(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 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.”*

#### **BLUEBOOKS ARE IN**

The 2006 *Condominium Bluebooks* have arrived and are being mailed out on January 13. We have about 50 extra copies of the book that are available for \$17 postpaid on a first-come, first-served basis. At this writing, about 15 members have not paid their South Coast dues for 2006. If you received the invoice but someone else pays it, please forward to your Treasurer/Property Manager as soon as possible. Books are a 2006 member benefit. If you choose not to renew, this will be your last newsletter.

**Email** – We offer email distribution, one email per association/professional member, of our newsletter, meeting reminders and other pertinent information. If your association is not on the email list, you may send me an email to [gartzke@silcom.com](mailto:gartzke@silcom.com). The email contact can then forward to other members of your board. Over 110 members are receiving the newsletter via email – no additional charge.

#### **NEXT ISSUE – AB 1098 RECORDS RETENTION AND ACCESS – ACCOUNTING METHODS AND FINANCIAL REPORTING**

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