

CALIFORNIA COMMON INTEREST DEVELOPMENTS 2020 LEGISLATIVE AND CASE LAW UPDATE

I. APPROVED BILLS AND AFFECTED STATUTES

SB 323 Association Elections Effective January 1, 2020

Amends Civil Code §§5100, 5105, 5110, 5115, 5125, and 5145.

SB 323 implements a series of reforms to the laws governing association elections. Notably, the new law makes it unlawful to deny a ballot to any owner who is an owner on the date ballots are distributed, regardless of standing. It prevents non-owners from running for the board and allows associations to disqualify candidates only if they have been an owner for less than one year, if a joint owner is on the board or a candidate, if they have a criminal conviction which jeopardizes the association's fidelity bond insurance coverage, or if they are delinquent in the payment of assessments (not including fines, late fees, collection costs, attorney's fees, or assessments paid under protest or subject to payment plan). All other director qualifications in an association's governing documents are null and void.

SB 323 adds a number of procedural requirements and deadlines which associations must follow leading up to an election. It deletes the exception in the current law allowing a person or business entity currently under contract with the association for compensable services to serve as inspector of elections if authorized by rule. As such, an association's existing manager, attorney, or accountant may no longer serve as inspector of elections. It designates returned ballots, signed voter envelopes, voter list, proxies, and candidate registration list as "association records" which must be produced for inspection by an owner, and requires association to include member email addresses on the membership list produced for inspection unless the owner opts out of having his or her email address included.

SB 326 Balcony Inspections Effective January 1, 2020

Enacts new Civil Code §§5551 and 5986.

New Civil Code §5551 only applies to condominium buildings containing three or more units. It requires associations in applicable condo projects to perform a periodic inspection of condo balconies and other load bearing wood-based elements—such as decks, stairways, walkways, and their railings—elevated more than six-feet above the ground. The inspection of a "statistically significant sample" or such elements must be performed by a licensed architect or structural engineer no later than January 1, 2025, and thereafter at least once every nine years.

The purpose of the inspection is to determine whether the exterior elements are safe and performing properly. The inspector must issue a written report and may determine that further investigation is needed. Associations must maintain a copy of the written reports in their records for at least two inspection cycles. If the inspector finds that any element poses an immediate threat to safety, he or she must notify local code enforcement within 15 days.

New Civil Code §5986 abolishes pre-conditions and limitations to a board's authority to commence construction defect litigation against the community's developer. The new law provides that any limitation on or precondition to the board's commencement of a construction defect action contained in the CC&Rs (including but not limited to the requirement to hold a membership vote) is null and void, unless the provision was adopted solely by the non-developer affiliated members of the association as a CC&R amendment. As to limitations adopted by the non-developer affiliated members, the new law allows the board to commence construction defect proceedings, notwithstanding any such limitations, if the board has reason to believe that the statute of limitations will expire.

AB 670
Accessory Dwelling Units
Effective January 1, 2020

Enacts new Civil Code §4751.

The new law renders void any provision in an association's governing documents prohibiting the construction or use of an "accessory dwelling unit" (ADU) or "junior accessory dwelling unit" on a single-family lot. An association may enact reasonable restrictions regulating ADUs so long as they do not effectively prohibit or unreasonably increase the cost to construct an ADU or junior ADU.

An ADU is a second unit on a lot, either detached or contained within the walls of the house on the lot, up to 1,200 square feet, and including cooking, sleeping, and bathroom facilities. A junior ADU may be up to 500 square feet and must have an outside entrance and cooking facilities but may share a bathroom with the main house on the lot.

SB 754
Election by Acclamation
Effective January 1, 2020

Amends Civil Code §5100 and Corporations Code §7522.

The new law allows associations including 6,000 or more units to elect directors by acclamation when the number of director nominees at the close of the nomination period is not more than the number of vacant seats on the board. In order for such associations to deem the directors elected by acclamation, the association must comply with specified notice requirements and must permit all owners to run, except that the bill would require disqualification of non-members and allow associations to enact the four discretionary director qualifications specified in SB 323.

AB 885
Tax Relief for Disaster Victims
Effective January 1, 2020

Amends Revenue and Taxation Code §70.

AB 885 allows victims of disasters to repair or rebuild their homes without increasing the assessed value for property tax purposes, as long as the size or the full cash value of the rebuilt home does not exceed 120% of its size or full cash value prior to the disaster. The new law will allow disaster victims to upgrade and modernize as they rebuild without risking a jump in property taxes.

SB 652
Religious Items on Door Frames
Effective January 1, 2020

Enacts new Civil Code §§1940.45 and 4706.

SB 652 prohibits the governing documents of a common interest development from prohibiting the display of religious items, as defined, on the entry door or entry door frame of a member's separate interest residence. A religious item must be displayed because of a sincerely held religious belief and may not, individually or in combination with any other displayed religious item, exceed the lesser of 36x12 square inches or the size of the door.

The law includes an exception whereby associations can ask residents to temporarily remove religious items as necessary for maintenance, repair or replacement of an entry door or door frame. Additionally, associations may prohibit any religious item which threatens public health or safety, violates any federal, state or local law, or contains graphics, language or any display that is obscene or otherwise illegal.

SB 234
Family Day Care
Effective January 1, 2020

Amends, enacts, and repeals various sections of the Health and Safety Code.

Under existing law, small family day care homes that provide day care for eight or fewer children are deemed a residential use for purposes of CC&Rs and must be allowed within community associations. SB 234 expands the "residential use" protection to large family day care homes providing day care for up to 14 children. Accordingly, community associations cannot prohibit daycare facilities serving 14 or fewer children. The day care provider must reside in the day care home. The dwelling or dwelling unit may be rented, leased or owned.

An association may still enforce its regular rules and regulation against family day care homes, but cannot prohibit such facilities from operating within the common interest development. Large and small family day care homes must comply with state licensing requirements and the physical facilities must meet specified fire and safety standards.

AB 5
Independent Contractors
Effective January 1, 2020

Amends Labor Code §3351, enacts new Labor Code §2750.3, and amends Unemployment Insurance Code §§606.5 and 621.

The new law codifies the decision of California Supreme Court in *Dynamex Operations W. v. Superior Court*, (2018) and applies the 3-part "ABC" test articulated in that decision to determining if a person is an employee or independent contractor for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission.

Under the “ABC” test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

SB 222
Veteran/Military Discrimination
Effective January 1, 2020

Amends various sections of the Government Code.

Existing law makes it unlawful to discriminate against individuals in the provision of housing on the basis of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or genetic information. SB 222 adds housing discrimination on the basis of veteran or military status to the list of prohibited housing practices and provides that the opportunity to seek, obtain, and hold housing without discrimination because of veteran or military status is a civil right.

Veteran or military status is now included in the list of protected classes for purposes of housing-related discrimination claims which an association may be required to investigate and address under existing federal law.

AB 1129
Privacy/Drones
Effective January 1, 2020

Amends §647 of the Penal Code.

Existing law makes it a misdemeanor to look through a hole or opening or otherwise view, by means of any instrumentality, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy. AB 1129 specifically adds electronic devices and unmanned aircraft systems in the list of instrumentalities which may give rise to a violation when used for peeping, making it a misdemeanor to capture drone footage of individuals in certain places.

FHA Condo Certification Rules
Effective October 15, 2019

In late 2019, the Fair Housing Administration (“FHA”) published a final regulation, and policy implementation guidance, which establish a new condominium approval process. FHA’s new condo rule allows certain individual condominium units to be eligible for FHA mortgage insurance even if the condominium project is not FHA approved. The new rule introduces a new single-unit approval process to make it easier for individual condominium units to be eligible for FHA-insured financing. It extends the recertification requirement for approved condominium projects from two to three years and allows more mixed-use projects to be eligible for FHA insurance.

Under the new rule, an individual unit may be eligible for Single-Unit Approval under the following conditions: (i) the individual condominium is located in a completed project that is not approved; and (ii) for condominium projects with 10

or more units, no more than 10% of individual condo units can be FHA-insured; and projects with fewer than ten units may have no more than two FHA-insured units.

As for approved condominium projects, the FHA will now require that approved condominium projects have a minimum of 50% of the units occupied by owners for most projects. FHA will only insure up to 50% of the total number of units in an approved condominium project, and FHA will require that the commercial/non-residential space within an approved condominium project not exceed 35% of the project's total floor area.

II. STATE AND FEDERAL COURT DECISIONS

Highland Greens Homeowners Assn. v. De Guillen

(2019) 604 B.R. 826

(Assessment Liens)

Facts: This case involved an appeal from an order of the Bankruptcy Court classifying a portion of an association's proof of claim filed in a Chapter 13 bankruptcy proceeding as unsecured. Pre-petition, the Debtor fell behind in the payment of assessments to her condominium association. The association recorded a Notice of Delinquent Assessment ("Notice") in April 2011, which purported to include, in the amount subject to the lien, future unpaid assessments and charges accruing after the date of the Notice. The association sued and obtained a judgment in April 2012. The Debtor filed a Chapter 13 Bankruptcy in February 2018. The association submitted a proof of claim for \$64,137.20, the amount of its judgment, plus post-judgment assessments, late fees, interest, attorney's fees and costs. The Bankruptcy Court held that only the portion of the claim included in the 2012 judgment, and interest thereon, was secured, and classified the \$34,166.55 balance of the debt as "unsecured". The association appealed.

Result: The Bankruptcy Appellate Panel held that neither the association's CC&Rs nor the Davis-Stirling Act ("Act") authorized a continuing lien. In reaching this conclusion, it found that a continuing lien was inconsistent with the Act's notice provisions and the expressed legislative purpose of the Act to protect homeowners. All assessment accruing after the judgment were classified as unsecured debt which would not be paid through the Chapter 13 plan.

Eisen v. Tavangarian

(2019) 36 Cal.App.5th 626

(View Protections/Interpretation of CC&Rs)

Facts: This case involved a dispute between neighboring owners over proposed construction. The CC&Rs limited construction to single-story dwellings, but provided that the architectural committee could approve a two-story dwelling where it would not detract from the view of any lot. The CC&Rs further provided that no building could be erected, placed, or altered upon any lot until the plans and specifications had been approved by the architectural committee as to conformity and harmony of exterior design with surrounding structures and topography. The CC&Rs provided, however, that the architectural committee's powers to approve property changes would cease after 1980.

Defendants proposed to remodel their home, including extending an existing second story over a portion of the home which was previously single story, and adding privacy hedges and rooftop equipment which would block the plaintiffs' views. Plaintiffs sued claiming that defendants could not add a second story over a portion of their home without an architectural committee to approve it and further claimed that the remodel violated other language in the CC&Rs stating: "No fences or hedges exceeding three feet in height shall be erected . . . nor shall any tree, shrub or other landscaping be planted or any structures erected that may at present or in the future obstruct a view from any lot."

Result: The appellate court found that the one-story limit did not apply once a second story was approved as part of the initial construction of a home. Future modifications to the home were subject only to the architectural review requirements which had expired in 1980. The court rejected the notion that the expiration of the architectural committee prevented defendants from modifying their home, holding that termination of the architectural committee nullified the requirement for plan approval. Finally, the court held that the term “any structures” as used in the CC&R section prohibiting view-blocking vegetation, was limited to outbuildings or similar objects surrounding the dwelling house and did not include improvements to the dwelling itself.

Eith v. Ketelhut
(2018) 31 Cal.App.5th 1
(Commercial Activity in HOAs)

Facts: This case considered the application of a CC&R prohibition against “business or commercial activity” to a homeowner’s vineyard. The Ketelhuts owned property within a community association in Thousand Oaks which was subject to CC&Rs. The CC&Rs contained the usual prohibition against “any business or commercial activity.” The Ketelhuts obtained architectural approval to plant a vineyard consisting of 600 plants on their property. The grapes from the vineyard were harvested and transported offsite where wine was made, bottled and shipped to internet customers. The only activities accomplished on the property were the cultivation, picking, and packing of the grapes.

When some homeowners complained about the vineyard to the HOA, the board investigated the vineyard operation, interviewed other homeowners, and conducted a public hearing at which the Ketelhuts answered questions. The board decided that the Ketelhuts were not using their property for nonresidential purposes. The homeowners sued.

Result: The Court of Appeal held that judicial deference applied to the board’s decision that the Ketelhuts were not in violation of the CC&Rs. The court also found that, as a matter of law, the Ketelhuts’ operation of the vineyard was not prohibited business or commercial activity because it did not affect the community’s residential character.

Orchard Estates Homes, Inc. v. The Orchard Homeowner Alliance
(2019) 32 Cal.App.5th 471
(Petition to Confirm CC&R Amendment)

Facts: This case involved a 93-unit planned residential development which sought member approval of a CC&R amendment banning short-term rentals. Over 91% of the owners participated in the vote. While approximately 62% of the members voted to prohibit short-term rentals, this was shy of the 67% approval required to amend the CC&Rs.

The Association files a petition under Civil Code §4275 to reduce the percentage of affirmative votes to adopt the amendment. The trial court granted the petition, and a group of homeowners opposing the amendment appealed, arguing that the trial court could not grant the Civil Code §4275 petition in the absence of a showing of voter apathy.

Result: The Court of Appeal affirmed, holding that while addressing voter apathy may have been part of the legislative purpose of §4275, the statutory language sets forth only five elements required to be established to authorize a reduction in the vote required to amend CC&Rs. Voter apathy is not among the listed elements.