

Introduced by Senator Corbett

February 17, 2011

An act to amend Sections 1367.1 and 1367.4 of the Civil Code, relating to common interest developments.

LEGISLATIVE COUNSEL'S DIGEST

SB 561, as introduced, Corbett. Common interest developments: delinquent assessments.

The Davis-Stirling Common Interest Development Act provides for the establishment and regulation of common interest developments. Existing law authorizes an association to levy regular and special assessments, and, if an assessment is delinquent, authorizes the association to recover reasonable costs and attorney's fees incurred in collecting the assessment in accordance with certain requirements.

This bill would require any 3rd party acting to collect payments or assessments on behalf of an association to comply with the same requirements imposed on the association. The bill would specify that a waiver by an owner of his or her rights and a waiver by an association of the association's responsibilities under the act is void as contrary to public policy, and would prohibit a foreclosure proceeding from being initiated or proceeding if it is based on an agreement that is void. The bill would prohibit a third party from acting as a trustee in a foreclosure proceeding. The bill would make a related statement of legislative intent.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. (a) The Legislature finds and declares all of the
2 following:

3 (1) The Davis-Stirling Common Interest Development Act was
4 enacted to provide protections to homeowners that have purchased
5 residences in common interest developments.

6 (2) There are over 41,000 common interest developments in the
7 state that range in size from three to 27,000 units. Common interest
8 developments make up over four million total housing units which
9 represents approximately 25 percent of the state's housing stock.
10 In the 1990s, over 60 percent of all residential construction starts
11 in the state were common interest developments, and the American
12 Association of Retired Persons estimates there are 11 million
13 households in the nation in common interest developments.

14 (3) The Davis-Stirling Common Interest Development Act
15 establishes procedures to be followed by homeowners' associations
16 in the collection of delinquencies of regular and special
17 assessments.

18 (4) To collect these delinquencies, many associations contract
19 with third parties who require the homeowner to enter into payment
20 plans that prevent the association from accepting any payments
21 from the homeowner. In turn, the third-party debt collectors contact
22 homeowners and convince them to waive their rights to the
23 protections provided by the Davis-Stirling Common Interest
24 Development Act, including the right to have all payments first
25 applied to the assessments owed.

26 (5) By waiving these rights, many homeowners are coerced into
27 payment plans that require the payment to be first applied to costs
28 of collection, attorney's fees, late charges, and interest, all of which
29 continue to accrue each month, without lowering the underlying
30 assessment that serves as the basis for computing these charges,
31 and forcing the homeowner to sink deeper into debt. These payment
32 plans make it extremely difficult, if not impossible, for a
33 homeowner who is making partial payments on an outstanding
34 balance to pay off a delinquent assessment in its entirety within
35 12 months. After 12 months, state law allows foreclosure on
36 homeowners who have not paid off delinquent assessments in their
37 entirety.

1 (6) As a result, many homeowners are losing their homes in
2 foreclosure proceedings. A recent study of five Northern California
3 counties (Alameda, Contra Costa, San Mateo, Santa Clara, and
4 Sacramento) found that homeowners' associations filed about one
5 of every eight foreclosures in those counties. The median amount
6 owed in foreclosures not filed by homeowners' associations was
7 approximately \$190,000. In sharp contrast, the median amount
8 owed in foreclosures by homeowners' associations was only
9 \$2,557, including costs of collection, such as attorney fees. The
10 underlying debts, not including collection costs, late fees, and
11 attorney costs, were in general a small fraction of the underlying
12 debt, sometimes less than \$200. Pursuing a foreclosure in such a
13 situation is not only an unsound business practice, but also
14 financially and personally devastating to the homeowner.

15 (7) The Legislature has established procedures that are designed
16 to protect homeowners from losing their homes for such small
17 debts, including the requirements that any payments by the
18 homeowners be applied first to any outstanding assessments. When
19 third-party debt collectors force homeowners to waive these
20 statutory protections, they destroy the protections put in place to
21 protect homeowners, contravening legislative intent.

22 (8) The Legislature recognizes that while foreclosure is
23 devastating to any homeowner, it has a doubly devastating impact
24 on the elderly because it is the rare senior who can reenter the
25 workforce and make enough money to replace a home lost through
26 foreclosure. The loss of a home through foreclosure also means
27 the loss of equity which, once lost, can almost never be recaptured.

28 (9) The National Law Center on Homelessness and Poverty has
29 reported a dramatic increase in the percentage of heavy users of
30 emergency shelters who are individuals older than 50 years of age,
31 from 30.6 percent in 2008 to 40.5 percent in 2009.

32 (b) It is the intent of the Legislature, by enacting this act, to
33 clarify and guarantee that the requirements of the Davis-Stirling
34 Common Interest Development Act, with respect to the collection
35 of delinquencies, shall apply to the collection of any delinquent
36 assessments and fees of the homeowners' association, regardless
37 of whether the homeowners' association collects the delinquent
38 assessment or assigns the job of collecting delinquent assessments
39 and fees to a third party. It is also the intent of the Legislature to
40 clarify that only a homeowners' association, and not a third party

1 collecting delinquent fees or assessments owed to the homeowners’
2 association on behalf of the association, may enforce or foreclose
3 a lien based upon delinquent assessments.

4 SEC. 2. Section 1367.1 of the Civil Code is amended to read:

5 1367.1. (a) A regular or special assessment and any late
6 charges, reasonable fees and costs of collection, reasonable
7 attorney’s fees, if any, and interest, if any, as determined in
8 accordance with Section 1366, shall be a debt of the owner of the
9 separate interest at the time the assessment or other sums are levied.
10 At least 30 days prior to recording a lien upon the separate interest
11 of the owner of record to collect a debt that is past due under this
12 subdivision, the association shall notify the owner of record in
13 writing by certified mail of the following:

14 (1) A general description of the collection and lien enforcement
15 procedures of the association and the method of calculation of the
16 amount, a statement that the owner of the separate interest has the
17 right to inspect the association records, pursuant to Section 8333
18 of the Corporations Code, and the following statement in 14-point
19 boldface type, if printed, or in capital letters, if typed:
20 “IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS
21 PLACED IN FORECLOSURE BECAUSE YOU ARE BEHIND
22 IN YOUR ASSESSMENTS, IT MAY BE SOLD WITHOUT
23 COURT ACTION.”

24 (2) An itemized statement of the charges owed by the owner,
25 including items on the statement which indicate the amount of any
26 delinquent assessments, the fees and reasonable costs of collection,
27 reasonable attorney’s fees, any late charges, and interest, if any.

28 (3) A statement that the owner shall not be liable to pay the
29 charges, interest, and costs of collection, if it is determined the
30 assessment was paid on time to the association.

31 (4) The right to request a meeting with the board as provided
32 by paragraph (3) of subdivision (c).

33 (5) The right to dispute the assessment debt by submitting a
34 written request for dispute resolution to the association pursuant
35 to the association’s “meet and confer” program required in Article
36 5 (commencing with Section 1363.810) of Chapter 4.

37 (6) The right to request alternative dispute resolution with a
38 neutral third party pursuant to Article 2 (commencing with Section
39 1369.510) of Chapter 7 before the association may initiate
40 foreclosure against the owner’s separate interest, except that

1 binding arbitration shall not be available if the association intends
2 to initiate a judicial foreclosure.

3 (b) Any payments made by the owner of a separate interest
4 toward the debt set forth, as required in subdivision (a), shall first
5 be applied to the assessments owed, and, only after the assessments
6 owed are paid in full shall the payments be applied to the fees and
7 costs of collection, attorney's fees, late charges, or interest. When
8 an owner makes a payment, the owner may request a receipt and
9 the association shall provide it. The receipt shall indicate the date
10 of payment and the person who received it. The association shall
11 provide a mailing address for overnight payment of assessments.

12 (c) (1) (A) Prior to recording a lien for delinquent assessments,
13 an association shall offer the owner and, if so requested by the
14 owner, participate in dispute resolution pursuant to the association's
15 "meet and confer" program required in Article 5 (commencing
16 with Section 1363.810) of Chapter 4.

17 (B) Prior to initiating a foreclosure for delinquent assessments,
18 an association shall offer the owner and, if so requested by the
19 owner, shall participate in dispute resolution pursuant to the
20 association's "meet and confer" program required in Article 5
21 (commencing with Section 1363.810) of Chapter 4 or alternative
22 dispute resolution with a neutral third party pursuant to Article 2
23 (commencing with Section 1369.510) of Chapter 7. The decision
24 to pursue dispute resolution or a particular type of alternative
25 dispute resolution shall be the choice of the owner, except that
26 binding arbitration shall not be available if the association intends
27 to initiate a judicial foreclosure.

28 (2) For liens recorded on or after January 1, 2006, the decision
29 to record a lien for delinquent assessments shall be made only by
30 the board of directors of the association and may not be delegated
31 to an agent of the association. The board shall approve the decision
32 by a majority vote of the board members in an open meeting. The
33 board shall record the vote in the minutes of that meeting.

34 (3) An owner, other than an owner of any interest that is
35 described in Section 11212 of the Business and Professions Code
36 that is not otherwise exempt from this section pursuant to
37 subdivision (a) of Section 11211.7, may submit a written request
38 to meet with the board to discuss a payment plan for the debt
39 noticed pursuant to subdivision (a). The association shall provide
40 the owners the standards for payment plans, if any exist. The board

1 shall meet with the owner in executive session within 45 days of
2 the postmark of the request, if the request is mailed within 15 days
3 of the date of the postmark of the notice, unless there is no regularly
4 scheduled board meeting within that period, in which case the
5 board may designate a committee of one or more members to meet
6 with the owner. Payment plans may incorporate any assessments
7 that accrue during the payment plan period. Payment plans shall
8 not impede an association's ability to record a lien on the owner's
9 separate interest to secure payment of delinquent assessments.
10 Additional late fees shall not accrue during the payment plan period
11 if the owner is in compliance with the terms of the payment plan.
12 In the event of a default on any payment plan, the association may
13 resume its efforts to collect the delinquent assessments from the
14 time prior to entering into the payment plan.

15 (d) The amount of the assessment, plus any costs of collection,
16 late charges, and interest assessed in accordance with Section 1366,
17 shall be a lien on the owner's separate interest in the common
18 interest development from and after the time the association causes
19 to be recorded with the county recorder of the county in which the
20 separate interest is located, a notice of delinquent assessment,
21 which shall state the amount of the assessment and other sums
22 imposed in accordance with Section 1366, a legal description of
23 the owner's separate interest in the common interest development
24 against which the assessment and other sums are levied, and the
25 name of the record owner of the separate interest in the common
26 interest development against which the lien is imposed. The
27 itemized statement of the charges owed by the owner described in
28 paragraph (2) of subdivision (a) shall be recorded together with
29 the notice of delinquent assessment. In order for the lien to be
30 enforced by nonjudicial foreclosure as provided in subdivision (g),
31 the notice of delinquent assessment shall state the name and address
32 of the trustee authorized by the association to enforce the lien by
33 sale. The notice of delinquent assessment shall be signed by the
34 person designated in the declaration or by the association for that
35 purpose, or if no one is designated, by the president of the
36 association. A copy of the recorded notice of delinquent assessment
37 shall be mailed by certified mail to every person whose name is
38 shown as an owner of the separate interest in the association's
39 records, and the notice shall be mailed no later than 10 calendar
40 days after recordation. Within 21 days of the payment of the sums

1 specified in the notice of delinquent assessment, the association
2 shall record or cause to be recorded in the office of the county
3 recorder in which the notice of delinquent assessment is recorded
4 a lien release or notice of rescission and provide the owner of the
5 separate interest a copy of the lien release or notice that the
6 delinquent assessment has been satisfied. A monetary charge
7 imposed by the association as a means of reimbursing the
8 association for costs incurred by the association in the repair of
9 damage to common areas and facilities for which the member or
10 the member's guests or tenants were responsible may become a
11 lien against the member's separate interest enforceable by the sale
12 of the interest under Sections 2924, 2924b, and 2924c, provided
13 the authority to impose a lien is set forth in the governing
14 documents. It is the intent of the Legislature not to contravene
15 Section 2792.26 of Title 10 of the California Code of Regulations,
16 as that section appeared on January 1, 1996, for associations of
17 subdivisions that are being sold under authority of a subdivision
18 public report, pursuant to Part 2 (commencing with Section 11000)
19 of Division 4 of the Business and Professions Code.

20 (e) Except as indicated in subdivision (d), a monetary penalty
21 imposed by the association as a disciplinary measure for failure
22 of a member to comply with the governing instruments, except for
23 the late payments, may not be characterized nor treated in the
24 governing instruments as an assessment that may become a lien
25 against the member's subdivision separate interest enforceable by
26 the sale of the interest under Sections 2924, 2924b, and 2924c.

27 (f) A lien created pursuant to subdivision (d) shall be prior to
28 all other liens recorded subsequent to the notice of assessment,
29 except that the declaration may provide for the subordination
30 thereof to any other liens and encumbrances.

31 (g) (1) An association may not voluntarily assign or pledge the
32 association's right to collect payments or assessments, or to enforce
33 or foreclose a lien to a third party, except when the assignment or
34 pledge is made to a financial institution or lender chartered or
35 licensed under federal or state law, when acting within the scope
36 of that charter or license, as security for a loan obtained by the
37 association; ~~however, the foregoing provision may not restrict the~~
38 ~~right or ability of an association to assign any unpaid obligations~~
39 ~~of a former member to a third party for purposes of collection.~~
40 Subject.

(2) *An association shall not voluntarily assign, sell, or pledge the association's right to collect payment or assessments to a third party, unless the third party agrees in writing to collect payments or assessments on behalf of the association in the manner set forth in this chapter, including, but not limited to, the requirement that the application of homeowner payments shall first be applied to outstanding assessments prior to being applied to any other fees or costs.*

(3) *Any agreement that purports to confer a right on a third party to collect assessments, fees, or payments, or to enforce or foreclose a lien in a manner inconsistent with the provisions of this chapter is void as contrary to public policy. However, this section does not restrict the right or ability of an association to assign any unpaid obligations of a former member to a third party for purposes of collection.*

(4) *Subject to the limitations of this subdivision, after the expiration of 30 days following the recording of a lien created pursuant to subdivision (d), the lien may be enforced by the association or by a financial institution or lender chartered or licensed under state or federal law in any manner permitted by law, including sale by the court, sale by the trustee designated in the notice of delinquent assessment, or sale by a trustee substituted pursuant to Section 2934a. Any sale by the trustee shall be conducted in accordance with Sections 2924, 2924b, and 2924c applicable to the exercise of powers of sale in mortgages and deeds of trust. The fees of a trustee may not exceed the amounts prescribed in Sections 2924c and 2924d, plus the actual cost of service for either of the following:*

~~(1)~~
(A) *The notice of default pursuant to subdivision (j) of Section 1367.1.*

~~(2)~~
(B) *The decision of the board to foreclose upon the separate interest of an owner as described in paragraph (3) of subdivision (c) of Section 1367.4.*

(5) *A third party that has contracted with an association to collect assessments, fees, or payments, or to enforce or foreclose a lien shall not act as trustee in foreclosure proceedings.*

(h) *Nothing in this section or in subdivision (a) of Section 726 of the Code of Civil Procedure prohibits actions against the owner*

1 of a separate interest to recover sums for which a lien is created
2 pursuant to this section or prohibits an association from taking a
3 deed in lieu of foreclosure.

4 (i) If it is determined that a lien previously recorded against the
5 separate interest was recorded in error, the party who recorded the
6 lien shall, within 21 calendar days, record or cause to be recorded
7 in the office of the county recorder in which the notice of
8 delinquent assessment is recorded a lien release or notice of
9 rescission and provide the owner of the separate interest with a
10 declaration that the lien filing or recording was in error and a copy
11 of the lien release or notice of rescission.

12 (j) In addition to the requirements of Section 2924, a notice of
13 default shall be served by the association on the owner's legal
14 representative in accordance with the manner of service of
15 summons in Article 3 (commencing with Section 415.10) of
16 Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure. The
17 owner's legal representative shall be the person whose name is
18 shown as the owner of a separate interest in the association's
19 records, unless another person has been previously designated by
20 the owner as his or her legal representative in writing and mailed
21 to the association in a manner that indicates that the association
22 has received it.

23 (k) Upon receipt of a written request by an owner identifying a
24 secondary address for purposes of collection notices, the
25 association shall send additional copies of any notices required by
26 this section to the secondary address provided. The association
27 shall notify owners of their right to submit secondary addresses to
28 the association, at the time the association issues the pro forma
29 operating budget pursuant to Section 1365. The owner's request
30 shall be in writing and shall be mailed to the association in a
31 manner that shall indicate the association has received it. The
32 owner may identify or change a secondary address at any time,
33 provided that, if a secondary address is identified or changed during
34 the collection process, the association shall only be required to
35 send notices to the indicated secondary address from the point the
36 association receives the request.

37 (l) (1) An association that fails to comply with the procedures
38 set forth in this section shall, prior to recording a lien, recommence
39 the required notice process.

(2) Any costs associated with recommencing the notice process shall be borne by the association and not by the owner of a separate interest.

(m) This section only applies to liens recorded on or after January 1, 2003.

(n) This section is subordinate to, and shall be interpreted in conformity with, Section 1367.4.

SEC. 3. Section 1367.4 of the Civil Code is amended to read:

1367.4. (a) Notwithstanding any law or any provisions of the governing documents to the contrary, this section shall apply to debts for assessments that arise on and after January 1, 2006.

(b) An association that seeks to collect delinquent regular or special assessments of an amount less than one thousand eight hundred dollars (\$1,800), not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, may not collect that debt through judicial or nonjudicial foreclosure, but may attempt to collect or secure that debt in any of the following ways:

(1) By a civil action in small claims court, pursuant to Chapter 5.5 (commencing with Section 116.110) of Title 1 of the Code of Civil Procedure. An association that chooses to proceed by an action in small claims court, and prevails, may enforce the judgment as permitted under Article 8 (commencing with Section 116.810) of Title 1 of the Code of Civil Procedure. The amount that may be recovered in small claims court to collect upon a debt for delinquent assessments may not exceed the jurisdictional limits of the small claims court and shall be the sum of the following:

(A) The amount owed as of the date of filing the complaint in the small claims court proceeding.

(B) In the discretion of the court, an additional amount to that described in subparagraph (A) equal to the amount owed for the period from the date the complaint is filed until satisfaction of the judgment, which total amount may include accruing unpaid assessments and any reasonable late charges, fees and costs of collection, attorney's fees, and interest, up to the jurisdictional limits of the small claims court.

(2) By recording a lien on the owner's separate interest upon which the association may not foreclose until the amount of the delinquent assessments secured by the lien, exclusive of any accelerated assessments, late charges, fees and costs of collection,

1 attorney's fees, or interest, equals or exceeds one thousand eight
2 hundred dollars (\$1,800) or the assessments secured by the lien
3 are more than 12 months delinquent. An association that chooses
4 to record a lien under these provisions, prior to recording the lien,
5 shall offer the owner and, if so requested by the owner, participate
6 in dispute resolution as set forth in Article 5 (commencing with
7 Section 1363.810) of Chapter 4.

8 (3) Any other manner provided by law, except for judicial or
9 nonjudicial foreclosure.

10 (c) An association that seeks to collect delinquent regular or
11 special assessments of an amount of one thousand eight hundred
12 dollars (\$1,800) or more, not including any accelerated
13 assessments, late charges, fees and costs of collection, attorney's
14 fees, or interest, or any assessments secured by the lien that are
15 more than 12 months delinquent, may use judicial or nonjudicial
16 foreclosure subject to the following conditions:

17 (1) Prior to initiating a foreclosure on an owner's separate
18 interest, the association shall offer the owner and, if so requested
19 by the owner, participate in dispute resolution pursuant to the
20 association's "meet and confer" program required in Article 5
21 (commencing with Section 1363.810) of Chapter 4 or alternative
22 dispute resolution as set forth in Article 2 (commencing with
23 Section 1369.510) of Chapter 7. The decision to pursue dispute
24 resolution or a particular type of alternative dispute resolution shall
25 be the choice of the owner, except that binding arbitration shall
26 not be available if the association intends to initiate a judicial
27 foreclosure.

28 (2) The decision to initiate foreclosure of a lien for delinquent
29 assessments that has been validly recorded shall be made only by
30 the board of directors of the association and may not be delegated
31 to an agent of the association. The board shall approve the decision
32 by a majority vote of the board members in an executive session.
33 The board shall record the vote in the minutes of the next meeting
34 of the board open to all members. The board shall maintain the
35 confidentiality of the owner or owners of the separate interest by
36 identifying the matter in the minutes by the parcel number of the
37 property, rather than the name of the owner or owners. A board
38 vote to approve foreclosure of a lien shall take place at least 30
39 days prior to any public sale.

(3) The board shall provide notice by personal service in accordance with the manner of service of summons in Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure to an owner of a separate interest who occupies the separate interest or to the owner's legal representative, if the board votes to foreclose upon the separate interest. The board shall provide written notice to an owner of a separate interest who does not occupy the separate interest by first-class mail, postage prepaid, at the most current address shown on the books of the association. In the absence of written notification by the owner to the association, the address of the owner's separate interest may be treated as the owner's mailing address.

(4) A nonjudicial foreclosure by an association to collect upon a debt for delinquent assessments shall be subject to a right of redemption. The redemption period within which the separate interest may be redeemed from a foreclosure sale under this paragraph ends 90 days after the sale. In addition to the requirements of Section 2924f, a notice of sale in connection with an association's foreclosure of a separate interest in a common interest development shall include a statement that the property is being sold subject to the right of redemption created in this paragraph.

(d) The limitation on foreclosure of assessment liens for amounts under the stated minimum in this section does not apply to assessments owed by owners of separate interests in timeshare estates, as defined in subdivision (x) of Section 11112 of the Business and Professions Code, or to assessments owed by developers.

(e) Any waiver by a homeowner of his or her rights, and any waiver by an association of its responsibilities under this chapter is void as contrary to public policy.

(f) Any debt collector, agent, or third party acting to collect payments or assessments on behalf of an association shall be subject to all of the provisions of this chapter regarding collecting delinquent assessments, costs, and fees, including, but not limited to, the application of payments and the enforcement of liens.

1 (g) *A foreclosure proceeding shall not be initiated or proceed*
2 *against an owner if it is based on an agreement that is void*
3 *pursuant to any provision of this chapter.*

O