

Date of Hearing: April 27, 2011

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

Norma Torres, Chair

AB 771 (Butler) – As Amended: April 25, 2011

SUBJECT: Common interest developments: requests for documents: fees

SUMMARY: Requires a homeowners association (HOA) in a common interest development (CID) to provide each owner of a separate interest in a CID with a statement of the fees that may be charged for providing documents to a prospective buyer. Specifically, this bill:

- 1) Defines "agent of the association" as any person or entity providing the documents at the time of sale to a buyer on behalf of a HOA.
- 2) Adds a form listing documents a seller of a separate interest must provide to a prospective buyer as soon as practicable before transfer of title of the separate interest or execution of the sales contract.
- 3) Requires an HOA to provide a statement and form to the members of an HOA as part of the existing disclosure requirements describing the fees that may be charged to a seller to procure, prepare, reproduce, and deliver specified documents required to be provided to a buyer.
- 4) Requires an HOA to update the statement and form if the fees or information change.
- 5) Requires a seller to provide a copy of the last 12 months of approved HOA board minutes to a prospective buyer.
- 6) Provides that the disclosure documents that are required to be provided to the prospective buyer before the transfer of title or execution of the sales contract may be made available electronically or posted on the HOA Web site or the "agent of the association's" website and must be accessible to a seller or any other recipient authorized by the owner.
- 7) Allows an HOA to charge a reasonable fee for the procurement, preparation reproduction or delivery of the documents required to be provided to a prospective buyer before the transfer of title or execution of a sales contract.
- 8) Prohibits an HOA from charging additional fees for the electronic delivery of the documents required to be provided to a prospective buyer before the transfer of title or execution of a sales contract.
- 9) Provides that documents required to be provided under this section, must be distinguished from other fees, fines or assessments billed as part of the sales transaction.
- 10) Provides that delivery of the documents required by this section shall not be conditioned upon or required to be combined with any other documents, items or services.

- 11) Provides that an HOA may contract with any person or entity to procure, prepare reproduce, and deliver the documents required to be provided to a prospective buyer before the transfer of title or execution of a sales contract.
- 12) Requires an HOA to provide a prospective purchaser with a copy of the completed form detailing the list of documents that are required to be provided to a prospective buyer before the transfer of title or execution of a sales contract when the documents are delivered.

EXISTING LAW

- 1) Requires HOAs to provide the members of the CID with specified documents including:
 - a) a pro forma operating budget;
 - b) a summary of the reverse funding plan;
 - c) a statement describing the HOA's policies requiring enforcing lien right; and
 - d) a summary of the HOA's insurance policies.

(Civil Code Section 1365)
- 2) Requires an owner of a separate interest to provide the following documents as soon as practicable before the transfer of title or the execution of a real property sales contract to a prospective buyer:
 - a) a copy of the governing documents of the CID;
 - b) restrictions on occupancy based on age;
 - c) copies of documents required by Civil Code Section 1365 (see above);
 - d) a statement of the current and special assessments;
 - e) a summary of any alleged violations that are unresolved against the owner of the separate interest; and
 - f) a list of any construction defects, and any pending special assessments that have been approved by the board of directors but have not been made due.

(Civil Code Section 1368)
- 3) Provides that a HOA may hire a "managing agent" to operate the day-to-day functions of the CID (Civil Code Section 1363.1).
- 4) Defines a "managing agent" as a person or entity who for compensation exercises control over the assets of the CID (Civil Code Section 1363.1).

FISCAL EFFECT: None.

COMMENTS:

There are over 49,000 CIDs in the state that range in size from three to 27,000 units. CIDs make up over 4.9 million housing units which represents approximately one quarter of the state's housing stock. CIDs include condominiums, community apartment projects, housing cooperatives, and planned unit developments. They are characterized by a separate ownership of dwelling space coupled with an undivided interest in a common property, restricted by covenants and conditions that limit the use of common area, and the separate ownership interests and the management of common property and enforcement of restrictions by a HOA. CIDs are governed by the Davis Stirling Act as well as the governing documents of the association including bylaws, declaration, and operating rules.

An owner in a CID is required to provide a prospective purchaser with specified documents listed in Civil Code Section 1368 as soon as practicable before the transfer of title or the execution of a real property sales contract to a prospective buyer. Sellers, who do not have current documents to provide to a prospective buyer, can request the documents from the HOA which has 10 days to provide copies to the seller. In some CIDs, the HOA contracts with a management company or other agent to collect the documents, reproduce them and provide them to the seller. Existing law provides the HOA may only charge a reasonable fee based on the actual cost of to procure, prepare and reproduce the items for the owner.

In the recent case of *Berryman v. Merit Property Management* (152 Cal App 4th 1544, 2007) the court determined that an agent of the HOA was not subject to the provision requiring that the HOA charge only the actual cost to procure, prepare and reproduce the documents for the owner. The court determined that although an HOA is prohibited by charging above the actual costs and making a profit, a managing agent is not.

The sponsor of this bill is concerned that a prospective buyer may be charged for documents, fees or assessments that are not required by Civil Code Section 1368. The purpose of this bill is to provide greater transparency for the seller who is providing the documents and the prospective buyer about what fees they will be charged for the disclosure documents required by Civil Code Section 1368 by adding a disclosure form that both the seller and the prospective buyer will receive.

This bill allows an HOA to continue to contract with a managing agency to procure, prepare, reproduce and delivery the documents required by the seller while attempting to provide greater transparency to the seller and prospective buyer. By adding a disclosure form, which details the documents and the associated fees, and providing it to both the seller as an annual disclosure, and to the prospective buyer and the time of sale, both will be aware of the costs.

Another issue that the sponsor is attempting to address in this bill, is to separate out the fees charged for delivering the documents required by Civil Code §1368 from other fees or assessments that a purchaser may pay during the sales transaction. This bill attempts to resolve this issue by specifying that the form listing the disclosure documents must be provided to a buyer separate from any other fees or assessments.

Arguments in Opposition:

According to the California Association of Community Managers (CACM), "the sponsor has indicated to CACM that it does not want "bundling" of fees for other requested services outside of Civil Code § 1368 during the escrow/transfer of title process. The other services/documents typically requested during the sales process are requested of the association by escrow, title, lenders, realtors, etc. For example, lenders may require the association to complete and deliver a "certification" document (sometimes over 40 questions in length and time consuming to complete) so that financing can be approved for the purchaser. The association is not obligated to complete this or other related services outside of Civil Code §1368.

However, the management company does respond and provides the requested documents and services, for a fee, to assure the sale can be completed. An itemized list of documents, services, and fees for services provided are then delivered to escrow from the management firm. From the statewide research we have completed, it appears the "bundling" of fees that CAR opposes occurs after delivery of documents and services, on the settlement statement prepared by escrow. Neither the community management firm nor the association has any control over this activity. Once the management company provides the itemized information in accordance with Civil Code §1368 and/or the additional services as requested, it is no longer involved in the transaction. Our observation is that in most cases neither the buyer nor the seller is aware of these necessary services and transactions until escrow provides settlement statements with a list of fees due in escrow."

Staff comments:

It is somewhat unclear if this bill will accomplish greater transparency for both the seller and the prospective buyer of the fees they should be charged for delivery of the disclosure documents required by Civil Code Section 1368. Although the process for the seller to receive a copy of the fees the HOA can charge for the disclosure documents when they sell their home is clear, the process for the prospective buyer is a more indirect. As CACM points out the managing agent is responsible for delivering the documents to the seller and in some cases to the escrow company directly, bypassing the seller. Once the managing agent passes the documents off to the escrow company, it will be left to the escrow company to ensure that the fee for providing the disclosure documents is separate from other fees. The managing agent cannot be at the closing to ensure that the form and documents are provided separately from other fees and assessments it will be up to the escrow agent to do so.

Double referred: The Assembly Committee on Rules referred AB 771 to the Committee on Housing and Community Development and Judiciary. If AB 771 passes this committee, the bill must be referred to the Committee on Judiciary.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Realtors (CAR)

Opposition

California Association of Community Managers (CACM)

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