

SENATE BILL REPORT

ESB 5377

As Passed Senate, March 3, 2011

Title: An act relating to homeowners' associations.

Brief Description: Concerning developer control of homeowners' associations.

Sponsors: Senators Morton, Swecker and Stevens.

Brief History:

Committee Activity: Financial Institutions, Housing & Insurance: 2/01/11 [DP].

Passed Senate: 3/03/11, 46-0.

SENATE COMMITTEE ON FINANCIAL INSTITUTIONS, HOUSING & INSURANCE

Majority Report: Do pass.

Signed by Senators Hobbs, Chair; Prentice, Vice Chair; Fain, Haugen and Litzow.

Staff: Alison Mendiola (786-7483)

Background: A homeowners' association (association) is a legal entity with membership comprised of the owners of residential real property located within a development or other specified area. An association typically arises from a declaration of covenants, restrictions, and conditions recorded by a developer against property in a subdivision. Once a developer relinquishes control, associations are managed by a board of directors, which is elected by association members. In general, the purpose of an association is to manage and maintain a subdivision's common areas and structures, to review design, and to maintain architectural control.

The Uniform Common Interest Ownership Act is a comprehensive act governing the formation, management, and termination of a common interest community, originally promulgated in 1982 and amended in 1994 by the National Conference of Commissioners on Uniform State Laws.

The Homeowners' Association Act (HOAA) was enacted by the Legislature in 1995 to provide consistent laws regarding the formation and legal administration of homeowners' associations. Associations are governed by (1) the HOAA, which identifies the duties and powers of an association, (2) restrictive covenants pursuant to which an association is established, and (3) the by-laws, rules and regulations adopted by a particular association. In

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addition, depending on how a particular association is legally organized, its activities and management may be governed by the state Business Corporation Act or Nonprofit Corporation Act. However, the HOAA does not require an association to be incorporated.

Association Powers. An association may:

- adopt and amend bylaws, rules, and regulations;
- adopt and amend budgets;
- impose and collect assessments;
- employ managing agents and contractors;
- engage in litigation or administrative proceedings on matters affecting the association;
- make contracts and incur liabilities;
- regulate and maintain common areas;
- acquire and convey any right or interest in real or personal property;
- grant easements and licenses and impose and collect fees related to use of common areas;
- impose and collect charges for late payments and levy reasonable fines; and
- exercise any other powers conferred by the bylaws or other applicable statutes necessary and proper for the governance and operation of the association.

Rules and Bylaws. The bylaws of an association provide for the powers, qualification and election of the board of directors and officers. The bylaws also provide for the method of amending bylaws and any other matters deemed necessary and appropriate.

Board of Directors. The board of directors must act at all times on behalf of the association. The board may not amend the articles of incorporation or take any unilateral action requiring the vote or approval of the owners except to fill vacancies of membership for the unexpired portion of any term. A majority of the owners, or other percentage provided in the governing documents, must ratify any budget adopted by the board within a specified time period. Any member of the board may be removed with or without cause through a majority vote of the owners.

Association Membership. The membership of an association consists exclusively of the owners of developed or undeveloped real property over which the association has jurisdiction.

Quorum. A quorum is present if 34 percent of the votes of the association are present in person or by proxy at the beginning of the meeting, unless the governing documents specify a different percentage.

Standards. Officers and members of the board must exercise the degree of care and loyalty required of an officer or director of a corporation organized under the Nonprofit Corporation Act. The Nonprofit Corporation Act requires a director to act in good faith and in the best interest of the corporation, with such care as an ordinarily prudent person in a like position would use under similar circumstances.

Summary of Engrossed Bill: Definitions of affiliate, developer, developer control, and special developer rights are added to HOAA.

An obligation of good faith is imposed in the performance and enforcement of all contracts and duties governed by the HOAA and in all other transactions involving developers, the board of directors, associations, and its members. Good faith means honesty in fact and the observation of reasonable standards of fair dealing.

Developer Control. The governing documents of an association may provide for a period of developer control of the association during which the developer may: (1) appoint and remove the officers and members of the board of directors; and (2) veto or approve a proposed action of the board or association.

A developer has a fiduciary duty in appointing and removing nonowner members of the board. A developer's failure to veto or approve a proposed action in writing within 30 days after receipt of written notice is deemed an approval by the developer board. The developer is to ensure that board meetings are held in a manner such that homeowners are reasonably likely to be able to attend.

Developer control of the board ends at the earlier of:

1. 60 days after the conveyance of 75 percent of the lots in the association to owners other than the developer, or
2. The date on which the developer records an amendment to the declaration where the developer voluntarily surrenders the right to further appoint and remove officers and members of the board.

Within 60 days after conveyance of 25 percent of the lots to owners other than the developer, at least one member and not less than 25 percent of the members of the board must be elected by owners other than the developer. Within 60 days after conveyance of 50 percent of the lots to owners other than the developer, not less than one-third of the members of the board must be elected by owners other than the developer.

Within 30 days of the termination of any developer control, the owners must elect a board of directors of at least three members, the majority of whom must be owners. The board must elect the officers.

Unless a governing document provides otherwise, the owners with a two-thirds vote at any meeting of the owners where a quorum is present, may remove a member of the board with or without cause, unless the member was appointed by the developer. The developer may not remove any member of the board elected by the owners.

Within 60 days after the termination of developer control, or in the absence of developer control within 60 days after the first conveyance of a lot subject to the governing documents, the developer must deliver to the association all property of the owners and of the association held or controlled by the developer. This includes, but is not limited to:

- the governing documents,
- minute books,
- financial records,
- association funds,
- insurance policies of the association,

- permits issued by governmental bodies within the year of the date of transfer,
- a roster of owners,
- any leases of which the association is a party, and
- any employment or other contracts to which the association is a party.

Special Developer Rights. Any special developer right created or reserved under the governing documents may be transferred except by an instrument showing the transfer executed by the developer or the developer's successor. The name of the transferee must be recorded in every county in which any portion of the real property subject to the governing documents is located.

Upon the transfer of any special developer right, a transferor developer is not relieved of any obligation or liability arising from the transfer. If a successor is an affiliate of the developer, the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the HOAA. If a successor is not an affiliate, the successor is still subject to all the obligations and liabilities under this act but is not liable for any misrepresentations of a previous developer, a breach of the previous developer's fiduciary obligation, or any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: The bill takes effect on August 1, 2011.

Staff Summary of Public Testimony: PRO: The Homeowners Association Act needs to be updated and provide protections similar to what is provided under the Condo Act. The Condo Act clarifies when a developer must relinquish control, unlike homeowners associations, resulting in some associations where a developer never relinquishes control. When there is no open process, no safeguards, and no owner presentation, this impacts the community, including negatively impacting property values. There isn't even an opportunity to go to court; there is no recourse so legislation is the only hope at resolving this issue.

Persons Testifying: PRO: Senator Morton, prime sponsor; Karen Olson, Lanitta Delk, Jeffrey Kavanaugh, Nine Mile Ranch Homeowners Association members.