

RESOLUTION 04-03-06

DIGEST

Common Interest Developments: Remedy for Inhabitability of Common Areas

Adds Civil Code sections 1369.610 through 1369.650 to provide a remedy for an association’s failure to maintain common areas in a habitable condition.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

Similar to Resolution 10-02-05, which was approved in principle.

Reasons:

This resolution adds Civil Code sections 1369.610 through 1369.650 to provide a remedy for an association’s failure to maintain common areas in a habitable condition. This resolution should be disapproved because it is not an effective solution to the problem it seeks to address.

An increasing number of Californians live in or own separate units in common interest developments. Owners within a common interest development need a low-cost, effective and expeditious means of enforcing the homeowner’s association duties, including especially the duties to maintain and repair the common areas, where the association is failing to do so. This resolution, however, would not fulfill that need.

The amounts of money and time periods provided by this proposal are not sufficient to address the majority of serious conditions of non-habitability. This resolution would create a significant risk of multiple owners performing different, conflicting and uncoordinated work in common areas while withholding dues from the association. A homeowner’s association is made up of the owners of the separate units, and its board of directors is subject to election and rejection by all of those owners as members of the association.

Owners in common interest developments, especially when in a minority and in small developments, have a problem enforcing an association’s duties of maintenance and repair of common areas when it is failing to perform. This resolution, however, is not the answer to that problem.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Civil Code Section sections 1369.610 thru 1369.650 to read as follows:

- 1 §1369.610
- 2 An association having control of the common area of a common interest development that is
- 3 intended for the occupation of human beings must put and keep the common area in a
- 4 condition such that (i) the common area is fit for such occupation, and (ii) the separate

5 interests can be made fit for such occupation without any further modification to the
6 common area; and shall repair all dilapidations of the common area, which render or
7 reasonably could have the potential to render any separate interest unfit for such occupation.

8
9 §1369.620.

10 A separate interest shall be deemed unfit for purposes of Section 1369.610 if it substantially
11 lacks any of the following affirmative standard characteristics or is a residential unit
12 described in Section 17920.3 or 17920.10 of the Health and Safety Code:

13 (a) Effective waterproofing and weather protection of roof and exterior walls,
14 including unbroken windows and doors.

15 (b) Plumbing or gas facilities that conformed to applicable law in effect at the time
16 of installation, maintained in good working order.

17 (c) A water supply approved under applicable law that is under the control of the
18 separate interest owner, capable of producing hot and cold running water, or a system that is
19 under the control of the association, that produces hot and cold running water, furnished to
20 appropriate fixtures, and connected to a sewage disposal system approved under applicable
21 law.

22 (d) Heating facilities that conformed with applicable law at the time of installation,
23 maintained in good working order.

24 (e) Electrical lighting, with wiring and electrical equipment that conformed with
25 applicable law at the time of installation, maintained in good working order.

26 (f) Building, grounds, and appurtenances at the time that the separate interest
27 owner acquired his or her separate interest, and all areas under control of the association,
28 kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish,
29 garbage, rodents, and vermin.

30 (g) An adequate number of appropriate receptacles for garbage and rubbish, in
31 clean condition and good repair at the time that the separate interest owner acquired his or
32 her separate interest, with the association providing appropriate serviceable receptacles
33 thereafter and being responsible for the clean condition and good repair of the receptacles
34 under the association's control.

35 (h) Floors, stairways, and railings maintained in good repair.

36
37 §1369.630.

38 (a) No duty on the part of the association to repair a dilapidation shall arise under
39 Section 1369.610 or 1369.640 if the separate interest owner is in substantial violation of any
40 of the following affirmative obligations, provided the separate interest owner's violation
41 contributes substantially to the existence of the dilapidation or interferes substantially with
42 the association's obligation under Section 1369.610 to effect the necessary repairs:

43 (1) To keep that part of the separate interest which he occupies and uses clean and
44 sanitary as the condition of the separate interest permits.

45 (2) To dispose from his separate interest of all rubbish, garbage and other waste,
46 in a clean and sanitary manner.

47 (3) To properly use and operate all electrical, gas and plumbing fixtures and keep
48 them as clean and sanitary as their condition permits.

49 (4) Not to permit any person on the separate interest, with his permission, to
50 willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or

51 separate interest or the facilities, equipment, or appurtenances thereto, nor himself do any
52 such thing.

53 (b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the association has
54 expressly agreed in writing to perform the act or acts mentioned therein.

55

56 §1369.640.

57 (a) If within a reasonable time (which shall not exceed 30 days) after written or
58 oral notice to the association or its agent of dilapidations rendering the separate interest unfit
59 which the association ought to repair, the association neglects to do so, (i) the obligation to
60 pay rent and make other payments to the association shall cease to accrue, and (ii) the
61 separate interest owner may make the repairs, or have the repairs made, so long as the cost
62 of such repairs does not require an expenditure of more than one month's aggregate
63 payments to the association, whether such payments are designated as rent, association dues
64 or otherwise. The separate interest owner may deduct such expenses of repair from
65 payments owed to the association. This remedy shall not be available to the separate interest
66 owner more than twice in any 12-month period.

67 (b) For the purposes of this section, if a separate interest owner acts to repair and
68 deduct after the 30th day following notice, he is presumed to have acted after a reasonable
69 time. The presumption established by this subdivision is a rebuttable presumption affecting
70 the burden of producing evidence and shall not be construed to prevent a separate interest
71 owner from repairing and deducting after a shorter notice if all the circumstances require
72 shorter notice.

73 (c) The separate interest owner's remedy under subdivision (a) shall not be available if the
74 condition was caused by the violation of 1369.630.

75 (d) The remedy provided by this section is in addition to any other remedy
76 provided by this chapter, any rental agreement, other applicable statutory or common law or
77 any applicable agreement to which the separate interest owner and the association are
78 subject.

79

80 §1369.650.

81 Any agreement by a separate interest owner of a dwelling waiving or modifying his rights
82 under this Article shall be void as contrary to public policy with respect to any condition
83 which renders the premises unfit.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Under current law, owners of condominiums and other units in common interest developments, though owners of their dwelling, have little or no control over areas beyond the painted walls of their unit, including structural, roofing and other systems. Notwithstanding that relative lack of control, with respect to most matters that affect basic habitability, owners have fewer rights with respect to their associations than tenants have with respect to their landlords.

This Resolution: Seeks to add to Title 6 of the Civil Code, Sections 1369.610 thru 1369.650, to give owners in common interest developments the same rights with respect to their association as a tenant has against its landlord for violations of habitability statutes.

The Problem: As California cities become more and more populated, common interest developments, with shared common areas, are becoming more and more popular. Additionally, with housing prices increasing at rates that exceed income growth, common interest developments afford many the opportunity of home ownership who, but for existence of these types of developments, might never have that opportunity. Notwithstanding the benefits of home ownership, owners in common interest developments do not have the levels of control or ability to fix problems on their own as home owners have in traditional single family developments. Additionally, with the exception of cooperative housing owners¹, owners have a continuing obligation to pay association dues even if their dwelling is not habitable as a result of their association's failure to make repairs to common areas. These "owners" are not afforded the habitability protections afforded tenants.

Much has been made of the difference between tenants and owners in common interest developments. However, that analysis ignores basic fundamental problems with corporate democracy as applied to housing and habitability matters. Simply stated, an owner with a leaky roof and mold is only one vote in the election of association board members, and if a board member, only one vote on that board. No matter how wrong the decision is, from a corporate governance perspective, majority rules, and the wronged owner can be forced to live in sub-standard dangerous conditions with no-self help remedies, with the courts being their only recourse. A tenant, on the other hand, may withhold rent until the habitability violation is cured (with no obligation to pay back rent during the period of the violation) and may use up to 1 month's rent to repair the problem (deducting that cost from a month's rent). Owners in a common interest development do not have these rights. Even if the association's failure causes a dwelling to become uninhabitable, owners must continue to pay association dues to their delinquent association, and continue to make mortgage and insurance payments, and pay real property taxes—their only recourse being the initiation of a lawsuit. While a tenant may be able to obtain results within a few months through the weight of deprived rent upon the landlord, an owner must continue to make payments, engage an attorney and wait for a court award, incurring both delay and substantial attorney's fees. This resolution seeks to afford the wronged owner with a modest self-help remedy in an effort to effect resolution of these types of habitability problems more expeditiously.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT

Mark J. Pearl, Fredman Lieberman LLP, 1875 Century Park East, Suite 2200, Los Angeles, CA 90067 (310) 286-2035 mpearl@pklaw.net

¹ Cooperative housing owners typically own stock in a corporation and occupy their dwelling unit through a 'proprietary lease' with that corporation.

RESPONSIBLE FLOOR DELEGATE: Mark J. Pearl

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The San Diego County Bar is sensitive to this issue and would support a reasonable resolution aimed at fixing the problem of Board stasis. This resolution is not the answer. Common interest owners have a host of rights that tenants do not have. For one thing, they can elect a new board that can change the way the common area is maintained. Condominium boards already have a duty to maintain the common area, and the law already provides for a simple mediation remedy. Landlord/tenant law permits a simple solution for a non-paying tenant – eviction. Such a solution is not feasible in a common interest development.

Withholding two months' dues a year accomplishes next to nothing when it comes to major common area repairs for most condominium projects. The better result is to elect a better board of directors, and get on with the needed repairs. This is a bad idea, aimed at a few small condominium projects. If passed, the damage to hundreds of thousands of condominium/common interest projects would be staggering. Worse, the remedy proposed (withholding condominium assessments) would not solve the problem and would result in less common interest funds being available to fix the problem.

Additionally, the resolution would result in a trap for the unwary. The resolution seeks to amend the Davis-Sterling Act, which Act provides for attorneys fees for the prevailing party. Thus, a well intended homeowner could find herself owing a substantial amount of money to the Association and still not have the property repaired.

Resolution 4-03-06 is also fatally flawed in its drafting. It speaks in terms of “rent” or “rental agreement” (see e.g. § 1369.640). These terms do not apply to common interest subdivisions under the Davis-Sterling Act.