

# SENATE BILL REPORT

## ESB 6745

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As Passed Senate, February 18, 2008

**Title:** An act relating to homeowners' associations.

**Brief Description:** Concerning homeowners' associations.

**Sponsors:** Senator Fraser.

**Brief History:**

**Committee Activity:** Consumer Protection & Housing: 1/24/08, 2/1/08, 2/5/08 [DPS, DNP].

Passed Senate: 2/18/08, 48-0.

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### SENATE COMMITTEE ON CONSUMER PROTECTION & HOUSING

**Majority Report:** That Substitute Senate Bill No. 6745 be substituted therefor, and the substitute bill do pass.

Signed by Senators Weinstein, Chair; Kauffman, Vice Chair; Haugen, Jacobsen and Kilmer.

**Minority Report:** Do not pass.

Signed by Senators Honeyford, Ranking Minority Member; Delvin and Tom.

**Staff:** Vanessa Firnhaber-Baker (786-7471)

**Background:** A homeowners' association (HOA) is an organization consisting of the homeowners and property owners within a residential development. HOAs are usually created by a land developer or builder of a planned residential development pursuant to a declaration of covenants, conditions, and restrictions. That land developer or builder may also be referred to as the declarant. HOAs may be organized in different ways, including incorporation under the Business Corporation Act or the Nonprofit Corporation Act, or as an unincorporated association. The duties and powers of an HOA are defined by the Homeowners' Association Act (HOAA), the HOA's declaration and other governing documents, and the law governing the HOA's legal entity (e.g., nonprofit corporation law).

Powers. Under the HOAA, an HOA may exercise the following powers: adopt and amend bylaws and rules; adopt and amend budgets; impose assessments on homeowners; involve itself in litigation; enter into contracts; improve and maintain the common areas; acquire and convey property; levy reasonable fines on members for late payment of assessments or violations of rules; and any other power necessary and proper to carry out its duties.

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However, these powers may be supplemented or superceded by an HOA's governing documents and by the law governing the HOA's legal entity.

Meetings. An HOA must hold meetings annually. Additional special meetings may be called by the HOA board president, a majority of the board, or by homeowners holding 10 percent of the votes in the HOA. HOA meetings must be open to homeowners and minutes must be taken. The HOA board may go into closed session if it votes to do so in an open meeting and only does so to consider personal matters, discuss legal matters, prepare for litigation, or to discuss a possible violation of the governing documents. Notice of meetings must be given to homeowners between 14 and 60 days before the meeting is held. Notice must be by either hand delivery or firstclass mail to the homeowner's designated address. Meeting quorum requires the presence of owners representing 34 percent of the votes of the HOA; unless the HOA's governing documents provide for a different percentage.

Duties. HOA governing documents must provide for the number, duties, and terms of the HOA's officers and directors, procedures for electing the officers, and the directors and officers' delegation powers. HOA officers and directors must act with loyalty and care when acting on behalf of the HOA. In addition, an HOA's officers and directors must carry out the following duties: provide homeowners with notice and a ratification process for the annual budget; keep sufficient records; prepare annual financial statements; provide homeowners with notice and an opportunity to be heard before levying a fine. Other duties may be required by the HOA's governing documents and the law governing the HOA's legal entity.

Task Force. In 2006, the Legislature passed SSB 6201, which created a HOAA committee. The committee consisted of two legislators, a representative from the Community Association Institute, a representative from the Washington Homeowner's Coalition, a representative of the residential development industry, a lawyer experienced in representing HOAs, a lawyer experienced in representing homeowners, a person with expertise in HOA law, and two members of an HOA who are not on the HOA's board of directors.

The committee was directed to review the HOAA, the Uniform Common Ownership Interest Act, and current issues concerning HOAs. Moreover, the committee was charged with specifically considering these issues: the method of amending declarations; voting; alternative dispute resolution mechanisms; communication between HOAs and homeowners; the budget ratification process; conflicts of law; the process of placing liens on property for a previous homeowners' unpaid association dues; and disclosures on the sale of real property within the association. After a review of the relevant law and statutes, the committee was required to report back to the Legislature with its findings and its proposed legislation for amending the HOAA in September 2007.

**Summary of Engrossed Bill:** Many portions of this bill are based on recommendations by the HOAA committee.

General Provisions.

- The HOAA supersedes any conflicting provisions in the law governing the HOA's legal entity.
- Good faith must be exercised by all participants in transactions relating to HOAs.
- The HOAA applies to cooperatives.

- Adoptions and amendments of bylaws and rules must be consistent with the HOA's declarations.

HOAs may give statutorily required notices via email or other means if they choose.

Fines. An HOA board may fine a homeowner for a violation of its governing documents if it provides the homeowner with adequate notice and an opportunity to be heard and the fine is in accordance with a previously established schedule. This supersedes any conflicting provision in an HOA's governing documents.

The HOA will be deemed to have provided adequate notice and hearing if it: (1) provides the homeowner with a notice that includes the rule that was allegedly violated, statement of the evidence, name of the person with firsthand knowledge of the evidence, the action the HOA intends to take, procedures for the homeowner to request a hearing, and a statement of the homeowner's rights at the hearing; (2) holds a timely hearing; (3) allows the homeowner to be represented at the hearing; (4) provides the homeowner with the copies of the evidence supporting the allegation of a violation and a copy of the hearing procedures in advance of the hearing; and (5) provides the homeowner with a written decision after the hearing.

An HOA's declarations may authorize the HOA to place a lien on a homeowner's lot to secure the payment of assessments. However, an HOA may not place a lien on a homeowner's lot to secure the payment of a fine even if the HOA's governing documents purport to give it that authority.

Governance. Bylaws adopted, amended, or rescinded by the board are not enforceable or valid until approved by the homeowners. A bylaw adoption or amendment is approved if, after timely notice, a majority of the votes of the HOA approve the adoption or amendment.

The HOA board may adopt and amend rules and policies. Rules adopted by the board are valid and enforceable only if the board substantially complies with the HOAA, including that the rule must be in writing, consistent with the governing documents, and within the authority of the board as conferred by law or the declaration. Rules adopted or amended by the board are effective 30 days after the board action so long as the homeowners are given notice of the rule and an opportunity to be heard. However, homeowners comprising 20 percent of the total votes may demand that the rule be ratified by the other homeowners. The board will be deemed to have substantially complied with the requirements of the HOAA if it follows specific rulemaking procedures contained in the HOAA.

Emergency rules are rules that are necessary for the immediate preservation of health and safety or that are necessary to comply with law. Emergency rules go into effect immediately upon HOA board adoption; however, homeowners may demand ratification procedures.

HOA members may vote in any manner allowed by their governing documents or other law that is applicable to their legal entity. Mail-in voting is permitted.

There is a six year statute of limitations for the collection of assessments. If a collection action has not been filed within six year, any associated liens are also extinguished.

An HOA's budget may be rejected by a majority vote in person, by proxy, or by mail at a meeting regardless of whether there is quorum.

Amendment of Declarations. If a declaration exists before the effective date of the HOAA and requires approval of more than 75 percent of the total votes in the HOA to amend a declaration, then homeowners comprising 67 percent of the votes may demand that the HOA seek a court order to reduce the percentage required to amend the declarations. A court may reduce the percentage to not less than 67 percent if it finds that the current percentage of votes required is an unreasonable burden.

If a declaration is recorded after the effective date of the HOAA, then the HOA may amend the declarations upon approval by homeowners comprising 67 percent of the total votes or by any other larger percentage specified in the HOA's declaration.

A declaration recorded after the effective date may allow the declarant to unilaterally amend the declaration in certain circumstances including: adding or withdrawing property from the declaration, to comply with applicable law, and to enable title insurance to be issued for a lot.

The legal validity of a declaration may only be challenged within one year of its adoption or amendment.

Seller Disclosures. Sellers of real estate that is subject to an HOA must provide non-commercial buyers with two disclosures in addition to the residential resale disclosure under RCW 64.06 (the Form 17).

First, before executing any contract, a seller must provide a buyer with a disclosure notifying the buyer that he or she will become a member of an HOA if he or she buys the property. The disclosure's exact content is statutorily prescribed. This disclosure is not waivable.

Also, the seller must provide the buyer with a pamphlet that provides answers to frequently asked questions about homeowners' associations. The form and content of the pamphlet is statutorily prescribed. The buyer may not waive receipt of this pamphlet.

The Form 17 is amended to require the seller to disclose contact for the property's HOA, if applicable.

Meetings. A special meeting may be called by homeowners with 5 percent of the votes in an HOA. The HOAA's provisions on special meetings supersede any conflicting provisions in an HOA's governing documents. The person or group that calls a special meeting determines the first piece of business on the agenda; the board may put additional items on the agenda, but they must be heard last.

The person or group calling a meeting must provide notice to each homeowner via hand delivery or first class mail between 10 and 60 days before the meeting.

Quorum requires the presence of homeowners representing 25 percent of the votes of the HOA. However, an HOA's governing documents may provide a smaller percentage.

Dispute Resolution. Disputes between homeowners and disputes between homeowners and their HOA must be submitted to mediation before either party may file a lawsuit. The expenses of the mediation services must be shared equally by the parties to the dispute. Certain claims are exempt from this requirement including claims in which the statute of limitations will soon expire, claims for equitable relief, assessment collection claims, defective construction claims, and claims that are unrelated to the HOA's governing documents. An

HOA may adopt its own mediation process through its declarations or by majority vote of its homeowners as long as it is reasonable. If the HOA does not adopt a reasonable mediation process, the mediation process described in the HOAA must be followed.

Declarant Control. The definition of declarant includes someone who executes the declaration creating the HOA or a builder or developer who owns real property that is subject to the declaration creating an HOA.

The declaration may provide for a time period during which the declarant controls the HOA. The declarant must relinquish control in the same time frame as required under the Condominium Act.

Architectural Authority Associations: Organizations which do not meet the definition of an HOA but that assert authority over homeowners by regulating the owner's use land are required to be elected by the homeowners who are subject to their authority, that there be periodic open meetings, and that the board exercise the care and loyalty required of the boards of nonprofit corporations.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: This bill addresses the major issues in homeowner's associations (HOAs): accountability, elections, open meetings, and notice to buyers that they are joining an HOA. Under the bill, homeowners will have the same rights no matter what legal the HOA is. The mandatory mediation provisions are very helpful to homeowners because it is so expensive to go to court. In drafting this bill, we tried to achieve balance between homeowner's rights and burdens on the HOA board; it is not perfect, but it goes a long way. Homeowners will have greater power in governing their communities and will be afforded due process rights. Seller disclosure is not a problem because it can always be waived by the buyer. Seller disclosures are needed because all of the HOA's rules and bylaws are not included in the covenants in the title. If the HOA declarant reserves the right to control the board, homeowners must pay dues but they have no rights. We need a way to ensure that HOAs have open meetings and take minutes; this bill provides that. The HOA Act Committee spent hundreds of hours trying to balance homeowner rights and boards' responsibilities. The current HOA Act is very hard to understand and difficult to enforce; this bill is easy to understand and provides roadmaps for enforcement. Only known violations of the HOA's governing documents must be disclosed on the resale certificate. The budget provision should stay as it is because the board has a legal duty to act with reasonable care in fulfilling its responsibilities in the covenants, if it doesn't have the money it can't discharge its duties.

CON: There should be a government entity that homeowners can go to when a board is overreaching or acting illegally; going to court is too expensive. Agendas for special meetings called by a homeowner should include both the homeowner's business and any business that the board wishes to discuss. The board should set the time and place of all meetings, regardless of who calls them. The resale disclosures may be a problem if a board does not

respond to requests for the documents. The HOA Act Committee did not care about homeowners and just worked to maintain the boards' powers. Homeowners need more protections than this bill provides because HOAs have lawyers and homeowners cannot afford them. A provision to educate HOA boards should be included; they don't understand the law. The dispute resolution provisions need more work; need to make sure that the board is bound by the mediation decision. HOAs should not be able to assess dues against homeowners unless a majority agrees. The budget provisions in the bill are the same as in the existing HOA act; this is disappointing because it doesn't address the inequities of powers between board members and homeowners.

**Persons Testifying:** PRO: Senator Karen Fraser, prime sponsor; Clydia Cukykendall, Karen Veldheer, Cooper Crest homeowners; Josh Whited, Innis Arden Club Inc.; Marion Morgenstern, HOA Act Committee Chair; Terrence Leahy, Community Association Institute.

CON: Nancy Rust, homeowner, HOA Act Committee member; Peter Foy, Brookmoore Estates homeowner; Donald Odenborg, homeowner; John Reisinger, homeowner; Robert McConnell, homeowner; Janet McConnell, homeowner; Carl Kanz, homeowner; Daniel E. Greene, Archbishop, C.O.S..

OTHER: David Harrison, homeowner.