

## 2012 Statutory Changes to Civil Code section 1368 Disclosure Requirements

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Civil Code section 1368 requires the seller of a residence located within a common interest development to disclose certain information to his or her potential buyer. This article reviews the disclosures the seller may ask their community association to make on their behalf by law and the changes to that law effective January 1, 2012.

While an association is legally required to comply with a proper request under Civil Code section 1368, it may charge a fee for the costs incurred in doing so. Upon receipt of a proper request, the association has ten (10) days to provide the following (*changes effective January 1, 2012 indicated in bold italics*):

- (1) Copies of the governing documents;
- (2) If the association is an age-restricted community subject to Civil Code section 51.3, a statement regarding the application of that statute to the development.
- (3) Copies of the most recent documents distributed under Civil Code section 1365 (operating budgets, reserve funding plan, assessment collection policy, insurance, etc.);
- (4) A statement from an authorized representative of the association regarding the association's current regular and special assessments and fees including any unpaid assessments or fines levied against the seller's separate interest as well as any late charges, interest and costs of collection that may become a lien against that separate interest;
- (5) Copies of unresolved violation notices under Civil Code section 1363(g);
- (6) If the association is in construction deficiency proceedings, certain statutory disclosures regarding the *initial* construction defects identified in the matter or, if the matter is resolved, a copy of settlement agreement or judgment.
- (7) A list of changes in assessments approved but not yet levied by the Board;
- (8) *A statement describing any rental restrictions in the community; and*
- (9) *Upon request of purchaser, a copy of up to 12 months of minutes of the board.*

**What About Electronic Documents?** The requesting parties may receive the documents in electronic format if the association regularly maintains the documents in such form.

## 2012 Changes to 1368 Disclosures

**Reasonable Fees for Required Disclosures and Title Transfers.** An association may charge a reasonable fee "based upon the association's actual costs to procure, prepare and reproduce the requested items" under Civil Code section 1368(b). Additionally an association may charge its "actual costs" to change the association's records to transfer title under Civil Code section 1368(c).

Effective January 1, 2012, within ten (10) days of receipt of a request under Civil Code section 1368, the Association must provide on a form described in Civil Code section 1368.2 an estimate of fees that will be assessed for providing the requested documents. The association may not charge an additional fee for providing the documents in electronic format.

**What Are the Association's "Actual Costs"?** Civil Code section 1366.1 indicates "An association shall not impose or collect an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied." Thus, the association, as a nonprofit, may not "mark[] up the incurred charge to generate a profit for itself [however a] vendor is not similarly restricted". *Brown v. Professional Community Management, Inc.* (2005) 127 Cal.App.4th 532, 539. Thus, the charge imposed upon the association by the managing agent to provide the requested documents and disclosures and to effectuate the transfer of title is the association's "actual costs" for purposes of Civil Code section 1368 regardless of the fact that these costs include a profit to the managing agent. *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1552 (stating "[Civil Code section 1368] does not constrain the amount a managing agent may charge for these services. Competitive forces, not the statute, will constrain the vendors' fees and charges"). Effective January 1, 2012, Civil Code section 1368 clarifies this further and expressly indicates that an association may contract with third party vendors to facilitate compliance with the statutory requirements.

**May an Association Withhold Documents for Nonpayment of Fees?** Effective January 1, 2012, documents may be withheld if the fees requested in the statutory format are not prepaid.

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