SB-578 Vacation Ownership and Time-share Act of 2004: incentives. (2019-2020)

Date Published: 07/30/2019 09:00 PM

Senate Bill No. 578

CHAPTER 153

An act to amend Sections 11241, 11242, 11242.1, 11256, and 11267 of, and to add and repeal Section 11245.1 of, the Business and Professions Code, relating to time-shares.

[Approved by Governor July 30, 2019. Filed with Secretary of State July 30, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

SB 578, Jones. Vacation Ownership and Time-share Act of 2004: incentives.

(1) Existing law, the Vacation Ownership and Time-share Act of 2004 (VOTA), requires a person who sells a time-share interest or creates a time-share plan to register the time-share plan with the Real Estate Commissioner, except as specified. Existing law obligates a developer of a time-share plan for the expenses associated with unsold inventory and authorizes a developer of a time-share plan to satisfy that obligation by, among other methods, entering into a deficit subsidy agreement with an association, subject to certain requirements. Existing law also authorizes a developer to undertake to pay a portion of the assessments otherwise payable by each purchaser pursuant to a buy down subsidy contract with the association, as specified. Existing law requires the developer to furnish an assurance, or security, to ensure the fulfillment of the developer's obligations pursuant to those provisions. Existing law requires a deficit subsidy agreement or buy down subsidy agreement entered into after July 1, 2005, to provide that if there is a dispute between the parties, the issue shall be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Existing law also provides that, if there is a dispute between the developer and the association with respect to the questions of satisfaction of the conditions for exoneration or release of the security, the issue be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

This bill would authorize the issue to be submitted to arbitration in accordance with the rules of another third-party arbitration organization selected by the parties and in accordance with existing provisions governing arbitration.

(2) Existing law requires a contractual provision for a determination by arbitration that the developer is entitled to a disbursement or charge against purchase money as liquidated damages to be conducted in accordance with procedures that are equivalent in substance to the Commercial Arbitration Rules of the American Arbitration Association.

This bill would authorize that contractual provision for a determination by arbitration to be conducted in accordance with procedures that are equivalent in substance to another third-party arbitration organization selected by the parties and in accordance with existing provisions governing arbitration.

(3) Existing law requires a time-share instrument for certain time-share plans to contain a termination provision that includes a provision for arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, subject to certain conditions and requirements.

This bill would authorize those provisions to specify arbitration in accordance with the rules of another third-party arbitration organization selected by the parties and in accordance with existing provisions governing arbitration.

(4) Under existing law, specified acts, when used as part of an advertising plan or program, are considered deceptive and constitute unfair trade practices, including requesting a recipient, in order to utilize an incentive, to pay money to a person or entity named or referred to in the offer, or to purchase, rent, or otherwise pay that person or entity for any product or service. Under existing law, this prohibition does not apply to specified incentives to stay at a hotel or other resort, if certain conditions are met, including that the accommodations to be occupied by the recipient of the incentive are within a 20-mile radius of the property on which the accommodations offered for sale are located.

VOTA prohibits various deceptive activities in connection with the advertising and promotion of time-share plans, including offering certain travel-related incentives unless the offeror states the terms and conditions to utilize the incentive, as specified.

This bill would authorize a person subject to VOTA to offer temporary accommodations to a prospective purchaser of a time-share interest located beyond a 20-mile radius of the property on which the time-share interest offered for sale is located if the prospective purchaser has received prior written notice of the location of the temporary accommodations being offered as an incentive and an estimated travel time from the temporary accommodation to the property on which the time-share interest offered for sale is located and has consented to that location. The bill would repeal this provision on January 1, 2023.
Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

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THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 11241 of the Business and Professions Code is amended to read:

11241. (a) The developer is obligated for the expenses associated with unsold inventory held by the developer. The obligation can be fulfilled in either of the following ways:

(1) The developer shall pay the full maintenance fee for each of the interests owned by the developer.

(2) The developer shall enter into a subsidy agreement with the association to cover any shortfall between expenses incurred and assessments collected from other owners (“deficit subsidy”), and shall furnish the association with an executed copy of the agreement within 10 days after closing of escrow of the first sale or lease of a time-share interest. The department will not approve a deficit subsidy program unless provisions are made for the accumulation of reserves for replacement and major maintenance of the time-share property in accordance with accepted property management practices and the transfer of the reserve fund to the association on termination of the program.

(b) To ensure the fulfillment of the obligations of the developer of a time-share plan to either pay assessments as an owner of time-share interests in the time-share plan or to pay a deficit subsidy, the commissioner shall require that the developer furnish a surety bond, cash deposit, letter of credit, or other alternate assurance enforceable by the association and acceptable to the commissioner, and that assurance shall be in compliance with either paragraph (1) or (2) of subdivision (c).

(c) The amount of the assurance shall be in such an amount as may be approved by the commissioner, but shall not exceed the lesser of 50 percent of the anticipated cost of operation and maintenance of the time-share plan, including the establishment of reserves for replacement and major repair, for an operational period of one year or 100 percent of the assessments attributed to the total amount of the total unsold time-share interests owned by the developer and registered pursuant to this chapter. The security shall be delivered to a neutral escrow depository, or to the trustee if title to the time-share property has been delivered to the trustee, along with instructions signed by the developer for the benefit of the association which shall provide as follows:

(1) If the developer pays full maintenance fees on unsold inventory the security shall remain available to pay any assessments for which the developer is liable and delinquent until the depository or trustee has received both of the following:

(A) Written notice, from the developer that sales of 80 percent of the time-share interest in the time-share plan have been closed.

(B) Written notice from the association that the developer is not delinquent in the payment of assessments for which it is obligated.

(2) The amount of the assurance required by this section may be adjusted annually to an amount approved by the commissioner, but shall be not more than the smaller of 50 percent of the anticipated cost of operation and maintenance of the time-share plan, including the establishment of reserves for replacement and major repair, for an operational period of one year or 100 percent of the assessments attributed to the total amount of the total unsold time-share interests owned by the developer and registered pursuant to this chapter.

(d) A deficit subsidy agreement entered into after July 1, 2005, shall provide that if there is a dispute between the developer and the association with respect to the question of satisfaction of the conditions for exoneration or release of the security, the issue shall, at the request of either party, be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association or another third-party arbitration organization selected by the parties and in accordance with Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. Any fee to initiate the arbitration shall be remitted by the developer. The cost of arbitration shall ultimately be borne as determined by the arbitrator under these rules.

SEC. 2. Section 11242 of the Business and Professions Code is amended to read:

11242. (a) In any time-share plan, the developer may undertake to pay a portion of the assessments otherwise payable by each purchaser ("buy down subsidy"). Any developer undertaking to pay a buy down subsidy shall do both of the following:

(1) Enter into a contract with the association that specifies in detail the obligations of the developer and the methods to be used in valuing the goods and services furnished under the time-share plan.

(2) Furnish the association with an executed copy of the subsidization contract within 10 days after closing of escrow of the first sale or lease of a time-share interest.

(b) If the developer is paying a buy down subsidy, the developer shall provide an assurance for its buy down subsidy obligation in an amount acceptable to the commissioner, but not more than the aggregate amount by which annual assessments are to be reduced, for example, the number of interests to be sold in each unit type multiplied by the amount by which the annual assessment for such unit type is to be reduced, multiplied by the number of years in the term of the buy down subsidy.

(c) For any buy down subsidy agreements entered into after July 1, 2005, the subsidy agreements shall provide that if there is a dispute between the developer and the association with respect to the question of satisfaction of the conditions for exoneration or release of the security, the issue shall, at the request of either party, be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association or another third-party arbitration organization selected by the parties and in accordance with Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. Any fee to initiate the arbitration shall be remitted by the developer. The cost of arbitration shall ultimately be borne as determined by the arbitrator under those rules.

SEC. 3. Section 11242.1 of the Business and Professions Code is amended to read:

11242.1. (a) The assurance specified in Section 11241 and, if applicable, the assurance specified in Section 11242, shall be delivered to the trustee or an escrow depository acceptable to the department along with an executed copy of the subsidization contract and instructions to the escrow depository signed by the developer and on behalf of the association. The instructions shall provide for both of the following:

(1) The escrow agent shall not release or exonerate the security device until it has received written notice from the association that the developer has faithfully performed all of the developer's obligations under the subsidization contract, if applicable, and the escrow agent has received the written notices specified in paragraph (1) of subdivision (c) of Section 11241.

(2) If there is a dispute between the developer and the association with respect to the questions of satisfaction of the conditions for exoneration or release of the security, the issue or issues shall, at the request of either party, be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association or another third-party arbitration organization selected by the parties and in accordance with Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

(b) Any fee to initiate arbitration shall be submitted by the developer. The costs of arbitration shall be borne by the party as determined by the arbitrator.

(c) The agreement for the deficit subsidy, described in subdivision (a) of Section 11241, and the agreement for the buy down subsidy, described in subdivision (a) of Section 11242 may, at the option of the developer, be contained in one instrument.

SEC. 4. Section 11245.1 is added to the Business and Professions Code, to read:

11245.1. Notwithstanding paragraph (3) of subdivision (f) of Section 17537.2, a person subject to this chapter may offer as an incentive to a prospective purchaser of a time-share interest temporary accommodations that are located beyond a 20-mile radius of the property on which the time-share interest offered for sale is located, if all of the following conditions are met:

(a) The offeror has provided the prospective purchaser with prior written notice of the location of the temporary accommodations being offered as an incentive, including, but not limited to, (1) information identifying the distance of the temporary

accommodations from the property on which the time-share interest offered for sale is located and (2) an estimated travel time from the temporary accommodation to the property on which the time-share interest offered for sale is located.

(b) The prospective purchaser has acknowledged their consent to the location of the temporary accommodations in writing or electronically.

(c) The offeror has complied with Section 11245.

(d) This section shall remain in effect only until January 1, 2023, and as of that date is repealed.

SEC. 5. Section 11256 of the Business and Professions Code is amended to read:

11256. (a) The contract proposed to be used by a developer applying for a public report for the sale or lease of time-share interests shall provide that if the escrow for sale or lease of a time-share interest does not close on or before the date set forth in the contract, or a later closing date mutually agreed to by the developer and the prospective purchaser or lessee, within 15 days after the closing date set forth in the contract or an extended closing date mutually agreed to by the developer and the prospective purchaser or lessee, the developer shall, except as provided in subdivisions (c) to (h), inclusive, order all of the money remitted by the prospective purchaser or lessee under the terms of the contract for acquisition of the time-share interest (purchase money) to be refunded to the prospective purchaser or lessee. Any extension of the closing of escrow shall be in writing and shall clearly and conspicuously disclose that the purchaser is not obligated to extend the closing of escrow.

(b) The contract may provide for disbursements or charges to be made against purchase money for payments to third parties for credit reports, escrow services, preliminary title reports, appraisals, and loan processing services by the parties if the contract includes the following:

(1) Specific enumeration of all of the disbursements or charges that may be made against purchase money.

(2) The developer's estimate of the total amount of the disbursements and charges.

(c) Any contractual provision that calls for disbursement or a charge against purchase money based upon the prospective purchaser's or lessee's alleged failure to complete the purchase of the time-share interest shall conform with Sections 1675, 1676, 1677, and 1678 of the Civil Code.

(d) Except for a disbursement made following substantial compliance with the procedures set forth in subdivision (f) or pursuant to a written agreement of the parties that either cancels the contract or is executed after the final closing date specified by the parties, a disbursement or charge against purchase money as liquidated damages may be done only pursuant to a determination by a court of law, or by an arbitrator if the parties have so provided by contract, that the developer is entitled to a disbursement or charge against purchase money as liquidated damages.

(e) A contractual provision for a determination by arbitration that the developer is entitled to a disbursement or charge against purchase money as liquidated damages shall require that the arbitration be conducted in accordance with procedures that are equivalent in substance to the Commercial Arbitration Rules of the American Arbitration Association or another third-party arbitration organization selected by the parties and in accordance with Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure that any arbitration include every cause of action that has arisen between the prospective purchaser or lessee and the developer under the contract, and that the developer remit the fee to initiate arbitration with the costs of the arbitration ultimately to be borne as determined by the arbitrator.

(f) The contract of sale may include a procedure under which purchase money may be disbursed by the escrowholder to the developer as liquidated damages upon the prospective purchaser's or lessee's failure to timely give the escrowholder the prospective purchaser's or lessee's written objection to disbursement of purchase money as liquidated damages. This procedure shall contain at least the following elements:

(1) The developer shall give written notice, in the manner prescribed by Section 116.340 of the Code of Civil Procedure for service in a small claims action, to the escrowholder and to the prospective purchaser or lessee that the prospective purchaser or lessee is in default under the contract that the developer is demanding that the escrowholder remit _____ dollars ($____) from the purchase money to the developer as liquidated damages unless, within 20 days, the prospective purchaser or lessee gives the escrowholder the prospective purchaser's or lessee's written objection to the disbursement of purchase money as liquidated damages.

(2) The prospective purchaser or lessee shall have a period of 20 days from the date of receipt of the developer's 20-day notice and demand in which to give the escrowholder the prospective purchaser or lessee written objection to the disbursement of purchase money as liquidated damages.

(g) The contract may not make the prospective purchaser's or lessee's failure to timely give the escrowholder the aforesaid written objection a waiver of any cause of action the prospective purchaser or lessee may have against the developer under the contract unless the waiver is conditioned upon service of the developer's 20-day notice and demand in a manner prescribed by Section 116.340 of the Code of Civil Procedure for service in a small claims action.

(h) If the developer has had the use of purchase money pending consummation of the sale or lease transaction under authorization by the department pursuant to Section 11243, the developer shall immediately upon alleging the default of the prospective purchaser or lessee, transmit to the escrowholder, funds equal to all of the purchase money paid by the prospective purchaser or lessee.

SEC. 6. Section 11267 of the Business and Professions Code is amended to read:

11267. (a) The time-share instruments shall require the use of a managing entity for the time-share plan or component site pursuant to a written management agreement that shall include all of the following provisions:

(1) Delegation of authority to the managing entity to carry out the duties and obligations of the association or the developer to the time-share interest owners.

(2) Authority of the managing entity to use subagents, if applicable.

(3) A term of not more than five years with automatic renewals for successive three-year periods after expiration of the first term unless the association by the vote or written assent of a majority of the voting power residing in members other than the developer determines not to renew the contract and gives appropriate notice of that determination. However, in those time-share plans where the association is controlled by owners other than the developer, the management agreement shall not be subject to the term limitations set forth in this section, and any longer term shall not be grounds for denial of a public report, unless the longer term of the management contract is the result of the developer exercising control.

(4) Termination for cause at any time by the governing body of the association. If the single site time-share plan or the component site of a multisite time-share plan is located within the state, then that termination provision shall include a provision for arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association or another third-party arbitration organization selected by the parties and in accordance with Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure if requested by or on behalf of the managing entity.

(5) Not less than 90 days' written notice to the association of the intention of the managing entity to resign.

(6) Enumeration of the powers and duties of the managing entity in the operation of the time-share plan and the maintenance of the accommodations comprising the time-share plan.

(7) Compensation to be paid to the managing entity.

(8) Records to be maintained by the managing entity.

(9) A requirement that the managing entity provide a policy for fidelity insurance or bond for the activities of the managing entity, payable to the association that shall be in an amount no less than the sum of the largest amount of funds expected to be held or controlled by the managing entity at any time during the year, pursuant to the budget. The commissioner may provide a reduction in the insurance policy or bond amounts required by this paragraph.

(10) Errors and omissions insurance coverage for the managing entity, if available.

(11) Delineation of the authority of the managing entity and persons authorized by the managing entity to enter into accommodations of the time-share plan for the purpose of cleaning, maid service, maintenance and repair including emergency repairs, and for the purpose of abating a nuisance or dangerous, unlawful, or prohibited activity being conducted in the accommodation.

(12) Description of the duties of the managing entity, including, but not limited to, the following:

(A) Collection of all assessments as provided in the time-share instruments.

(B) Maintenance of all books and records concerning the time-share plan.

(C) Scheduling occupancy of accommodations, when purchasers are not entitled to use specific time-share periods, so that all purchasers will be provided the opportunity for use and possession of the accommodations of the time-share plan, that they have purchased.

(D) Providing for the annual meeting of the association of owners.

(E) Performing any other functions and duties related to the maintenance of the accommodations or that are required by the time-share instrument.

(b) Any written management agreement in existence as of the effective date of this chapter shall not be subject to the term limitations set forth above.

(c) For single site time-share plans and component sites of a multisite time-share plan located outside of the state, the time-share instruments shall include the subject matter set forth in subdivision (a). The time-share instruments shall be in compliance with the applicable laws of the state or jurisdiction in which the time-share property or component site is located, and if a conflict exists between laws of the situs state and the requirements set forth in this section, the law of the situs state shall control. If the time-share instruments provide for the matters contained in subdivision (a), the time-share instruments shall be deemed to be in compliance with the requirements of subdivision (a) and the developer shall not be required to make revisions in order to comply with subdivision (a) and this subdivision.