SOUTH COAST HOMEOWNERS ASSOCIATION

ANNUAL LEGISLATIVE FORUM

January 26, 2012

The statements set forth below are provided to assist participants in following the program. They should not be interpreted as absolute statements of law. The actual application of any statute or court decision is dependent upon the facts and circumstances presented in each case.

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New Legislation 2012

I
Documents to be Provided by Seller to the Prospective Purchaser Prior to Sale of the Unit
[AB 771, Civ. Code, § 1368]

A. Existing law (California Civil Code section 1368) requires unit owners to obtain from their Association, and provide to prospective purchasers of their unit, a copy of those documents identified in section 1368.

B. Starting 2012, the following additional documents must provided:

1. Statement describing rental restrictions, if any;

2. If requested, minutes of Director meetings for past 12 months; and

3. If requested, an Association shall provide an estimate of fees to be charged for providing the documents.

C. An Association may charge for the cost to procure, prepare, reproduce, and deliver the requested documents. An Association may contract with any company to procure, reproduce, and deliver the documents. Until payment is made, an Association may withhold delivery of the documents.

II
Form to be Used for Identification of Documents to Be Produced and Estimate of Charges
[AB 771, Civ. Code, § 1368.2]

A. If requested by an owner in writing, an Association shall provide a written estimate of the cost for producing the documents requested under Civil Code section 1368.

B. The written estimate must be on the form required by Civil Code section 1368.2.

III
Amendment to Open Meeting Act; Electronic and Telephonic Board Meetings
[SB 563, Civ. Code, § 1363.05]

A. Existing law (California Civil Code section 1363.05) allows owners to attend and speak at Board meetings. Except for emergency meetings, and unless a longer period is

required by the Association's Bylaws, notice of Board meetings must be posted in the common area at least 4 days in advance.

B. Starting 2012, the following amendments have been made to section 1363.05:

1. A meeting of the Board, held solely in executive session, requires only a 2-day advance notice be posted in the common area as opposed to a 4-day advance notice.

2. No action may be taken by the Board outside of a meeting.

3. For purposes of section 1363.05, a meeting of the Board includes a congregation of a majority of the Board members at the same time and place to hear, discuss, or deliberate upon any item of business that is within the authority of the Board.

4. If all Board members consent in writing, Emergency Meetings of the Board may be held by electronic transmission (i.e., e-mail).

5. Meetings by telephonic conference (i.e., telephone) are allowed if:

a. A notice is posted in the common area at least 4 days in advance providing the location where members may attend.

b. At the location where members may attend a telephonic Board meeting, there must be present at least one Board member.

c. All participants at the telephonic Board meeting must be able to hear all others and speak.

IV
Statement by Common Interest Development
[AB 657, Civ. Code, § 1363.6]

A. Existing law (California Civil Code section 1363.6) requires every Association, whether or not incorporated, to file a Statement by Common Interest Development every 2 years. This is not to be confused with the Statement of Information which also must be filed every 2 years.

B. Starting 2012, there is additional information which must be included on the Statement by Common Interest Development. The form can be obtained from the Secretary of State's website. The form is identified as "SI-CID."

2011 CASES

I
Yan Sui v. Price (2011) 196 Cal App.4th 933

A. An Association may pass a rule to address a problem created by one owner.

B. A rule will be enforceable where it meets the following 6 requirements (Civ. Code, § 1357.100, and related cases):

1 Board has authority to adopt the rule;

2. The rule was adopted in good faith to address a legitimate purpose for which the Association exists;

3. The burden of the rule does not outweigh the benefit (i.e., it is reasonable);

4. The rule does not violate public policy;

5. The rule is not in conflict with any provision of the Articles of Incorporation, Bylaws, or CC&R's; and

6. The rule is passed as required by Civil Code section 1357.100 et seq.

II
Theroso Del Valle Master Homeowners Assoc. v. Griffin (2011) 200 Cal.App.4th 619

A. Provided there is compliance with Civil Code section 1378, and the Association's Architectural Guidelines, courts will enforce an Association's restrictions on owner alterations.

B. Associations must comply with section 1378 which requires adoption and distribution of procedures to be followed by an owner when requesting consent for an alteration.

C. Associations should adopt Architectural Guidelines. The Guidelines should be considered by the Board when reviewing an application for an alteration.

D. Associations must timely review an owner's application for an alteration. If denied, the denial must be based upon a determination that the application does not comply with the Association's procedural requirements or the modification does not comply with the Guidelines adopted by the Association.

III

Friedman v. Beach Crest Villas Homeowners Association (2011 Cal. App.) (unpublished)

A. An Association which has a judgment entered against it may be ordered to levy a Special Assessment against the owners to pay the judgment.

B. If an Association refuses to pay a judgment, a court may appoint a Receiver to levy and collect an assessment to pay the judgment.

IV

Cadam v. Somerset Garden (2011 Cal. App.) (unpublished)

A. An Association is not required to maintain complex in perfect condition.

B. Regardless of severity of injures or damage, if caused by a "trivial defect," Association will not be held liable.

C. What constitutes a trivial defect is a matter of law for a judge to decide vs. a question of fact for a jury to decide.

Form No. 41
California Civil Code § 1368.2
(9/15/11)

CHARGES FOR DOCUMENTS

THIS DOCUMENT IS PROVIDED TO YOU
AS REQUIRED BY
CALIFORNIA CIVIL CODE §§ 1368 & 1368.2

Property Address: ____

Owner of Property: ____

Owner's Mailing Address: ____
(If known or different from property address.)

Provider of the section 1368 Items:

____

Print Name | Position or Title | Association or Agent | Date form Completed

Check or Complete Applicable Column or Columns Below:

DOCUMENTS	CIVIL CODE SECTION	INCLUDED	Not Available N/A) or Not Applicable (N/App)
Articles of Incorporation or statement that not incorporated	1368(a)(1)		
CC&R's	1368(a)(1)		
Bylaws	1368(a)(1)		
Operating Rules	1368(a)(1)		
Age restrictions, if any	1368(a)(2)		
Pro forma operating budget or summary, including reserve study	1365 and 1368(a)(3)		
Assessment and reserve funding disclosure summary	1365 and 1368(a)(3)		

Financial statement review	1365 & 1368(a)(3)		
Assessment enforcement policy	1365 and 1368(a)(4)		
Insurance summary	1365 and 1368(a)(3)		
Regular assessment	1368(a)(4)		
Special assessment	1368(a)(4)		
Emergency assessment	1368(a)(4)		
Other unpaid obligations of seller	1367.1 and 1368(a)(4)		
Approved changes to assessments	1365 and 1368(a)(4), (8)		
Settlement notice regarding common area defects	1368(a)(6), (7), and 1375.1		
Preliminary list of defects	1368(a)(6), 1375, and 1375.1		
Notice(s) of violation	1363 and 1368(a)(5)		
Required statement of fees	1368		
Minutes of regular meetings of the board of directors conducted over the previous 12 months, if requested	1368(a)(9)		

Total fees for these documents: $____________

*The information provided by this form may not include all fees that may be imposed before the close of escrow. Additional fees that are not related to the requirements of Section 1368 may be charged separately.

"Caution"

This form is provided as a courtesy by James H. Smith, Esq., of the law firm of Grokenberger & Smith. Telephone: (805) 965-7746. Your Association's Governing Documents and/or changes in the law may require this form to be modified.

State of California

Secretary of State

C

STATEMENT BY COMMON INTEREST DEVELOPMENT ASSOCIATION

Filing Fee $15.00 — If amendment, see instructions.

IMPORTANT — READ INSTRUCTIONS BEFORE COMPLETING THIS FORM

1. **NAME OF ASSOCIATION**

This Space For Filing Use Only

2. The above named association is formed to manage a common interest development under the Davis-Stirling Common Interest Development Act. (This statement is required by Civil Code section 1363.6(a)(1) and must not be altered.)

3. THIS ASSOCIATION IS: ☐ INCORPORATED ☐ UNINCORPORATED

Street Address of the Business or Corporate Office of the Association, If Any (Do not abbreviate the name of the city. Item 4 cannot be a P.O. Box.)

4. STREET ADDRESS	CITY	STATE	ZIP CODE

Street Address of Association's Onsite Office if Different from the Street Address of the Business or Corporate Office, or If There Is No Onsite Office, the Address of the Association's Responsible Officer or Managing Agent of the Association (Do not abbreviate the name of the city. Item 5 cannot be a P.O. Box.)

5. STREET ADDRESS	CITY	STATE	ZIP CODE

Name, Address and Either the Daytime Telephone Number or Email Address of the President of the Association (The address and telephone number **must be different** from the address and telephone number of the association's onsite office or managing agent. Do not abbreviate the name of the city.)

6. NAME		PHONE NUMBER OR E-MAIL ADDRESS	
ADDRESS	CITY	STATE	ZIP CODE

Name, Complete Street Address, and Daytime Telephone Number of the Association's Managing Agent, If Any (The address and telephone number **must be different** from the address and telephone number of the president of the association. Do not abbreviate the name of the city. Item 7 cannot be a P.O. Box.)

7. NAME		PHONE NUMBER	
STREET ADDRESS	CITY	STATE	ZIP CODE

Physical Location of the Development

8A. COUNTY OR COUNTIES

8B. CITY (If in an unincorporated area, enter the city closest in proximity.)

9A. FRONT STREET	9B. NEAREST CROSS STREET

Type of Common Interest Development Managed by the Association (At least one of the types listed must be checked. Refer to Civil Code section 1351 for definitions.)

10. CHECK THE APPLICABLE BOX:

☐ A COMMUNITY APARTMENT PROJECT ☐ A CONDOMINIUM PROJECT

☐ A PLANNED DEVELOPMENT ☐ A STOCK COOPERATIVE

Separate Interests (Please note, "Zero" or "none" is not acceptable.)

11. THE NUMBER OF SEPARATE INTERESTS IN THE DEVELOPMENT

12. THE INFORMATION CONTAINED HEREIN IS TRUE AND CORRECT.

DATE	TYPE OR PRINT NAME OF PERSON COMPLETING THE FORM	TITLE	SIGNATURE

Instructions for Completing the Form SI-CID

Incorporated Associations

Every domestic nonprofit corporation formed to manage a common interest development under the Davis-Stirling Common Interest Development Act (for example, a homeowners' association) shall file a Statement by Common Interest Development Association (Form SI-CID) with the Secretary of State. The statement must be filed within 90 days after the filing of its original Articles of Incorporation, and biennially thereafter together with the Statement of Information (Form SI-100), filed pursuant to Corporations Code section 8210**. If the street address of the association's onsite office or the street address of the responsible officer or managing agent of the association changes, a corporation must file a complete Statement by Common Interest Development Association. A corporation is required to file this statement even though the corporation may not be actively engaged in business at the time this statement is due.

** The corporation must file Form SI-CID together with Form SI-100; however, it is an additional filing and must be accompanied by a separate $15.00 filing fee. Both forms are available on the Secretary of State's website at www.sos.ca.gov/business.

Unincorporated Associations

Although not currently required to register with the Secretary of State, every unincorporated association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act shall file a Statement by Common Interest Development Association, biennially, in the month of JULY. If the street address of the association's onsite office or the street address of the responsible officer or managing agent of the association changes, the association must file a complete Statement by Common Interest Development Association. Upon changing its status to that of a corporation, the association shall comply with the filing requirements for incorporated associations.

Statutory filing provisions are found in California Civil Code section 1363.6, unless otherwise indicated. Please refer to Civil Code section 1350, et seq., for additional provisions relating to common interest development associations. Failure to file this Statement by Common Interest Development Association may result in the assessment of a $50.00 penalty and suspension of the association's rights, privileges, and powers as a corporation, to the same extent and in the same manner as the penalty and suspension imposed pursuant to Corporations Code section 8810. (Civil Code section 1363.6(d); Revenue and Taxation Code section 19141.)

Filing Fees: The fee for filing the Statement by Common Interest Development Association is **$15.00**. Checks should be made payable to the Secretary of State. If this statement is being filed to amend any information on a previously filed statement and is being filed outside the applicable filing period, **no fee** is required.

Copies: The Secretary of State will endorse file one copy of the statement if an exact copy is submitted along with the statement to be filed. Copies submitted with the statement to be filed can be certified upon request and payment of the $8.00 per copy certification fee.

Complete the Statement by Common Interest Development Association (Form SI-CID) as follows:

Item 1. Enter the name of the association or the name of the corporation **exactly** as it is of record with the California Secretary of State.

Item 2. This statement is required by Civil Code section 1363.6(a)(1) and must not be altered.

Item 3. Check the appropriate box indicating whether the association is INCORPORATED or UNINCORPORATED.

Item 4. Enter the complete street address of the business or corporate office of the association, if any. Please do not enter a P.O. Box or abbreviate the name of the city.

Item 5. Enter the complete street address of the association's onsite office if different from the street address of the business or corporate office, or if there is no onsite office, the address of the association's responsible officer or managing agent of the association. Please do not enter a P.O. Box or abbreviate the name of the city.

Item 6. Enter the name, address <u>and</u> either the daytime telephone number or e-mail address of the president of the association. The address and telephone number of the president of the association **must be different** from the address and telephone number of the association's onsite office or managing agent. *This information will not be subject to public inspection and will be provided only for governmental purposes and only to members of the Legislature and the Business, Transportation and Housing Agency upon written request.*

Item 7. Enter the name, complete street address, <u>and</u> daytime telephone number of the association's managing agent, if any. The address and telephone number of the managing agent **must be different** from the address and telephone number of the president of the association. Please DO NOT enter a P.O. Box or abbreviate the name of the city.

Items 8A-8B. Enter the county in which the development is physically located. If the boundaries are physically located in more than one county, enter each county. Enter the name of the city in which the development is physically located. If in an unincorporated area, enter the name of the city closest in proximity to the development. Please do not abbreviate the name of the county(ies) or city.

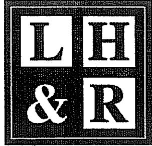
Items 9A–9B. Enter the front street and nearest cross street of the physical location of the development.

Item 10. Check the appropriate box that describes the type of common interest development (refer to California Civil Code section 1351 for definitions). At least one of the types listed must be checked.

Item 11. Enter the number of separate interests, as defined in California Civil Code section 1351(l). "Zero" or "none" is not acceptable.

Item 12. Type or print the name and title of the person completing this form and enter the date this form was completed.

Completed forms along with the applicable fees can be mailed to Secretary of State, Statement of Information Unit, P.O. Box 944230, Sacramento, CA 94244-2300 or delivered in person to the Sacramento office, 1500 11th Street, Sacramento, CA 95814. If you are not completing this form online, please type or legibly print in black or blue ink. This form must not be altered.



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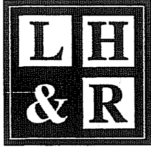
South Coast Homeowners Association

Annual Legal Update

2011/2012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2011 LEGISLATURE UPDATE

By: David A. Loewenthal

AB771 (Butler): Request for Documents/Fees: This law will amend *Civil Code* Section 1368 and add Section 1368.2. Currently, the Davis-Stirling Common Interest Development Act requires that an owner of a separate interest in a Common Interest Development provide specific documents to prospective purchasers of that property. In addition, homeowners associations are to provide those documents to the owner of the separate interest within ten (10) days of the mailing or delivery of the requests, as well as limiting the amount of fees that may be charged by the Association for providing those documents. Such fees are to be limited to the Association's actual costs to produce, prepare and reproduce the requested documents.

AB771 will now require that the seller of a separate interest provide a copy of specified minutes of the meetings of the Association's Board of Directors, if requested by the prospective purchaser, including 12 months of non-executive session board meeting minutes. Also, if the Association has a rental restriction in their governing documents, the owner must also include a statement identifying the restriction. In addition, the bill requires that an Association provide to the seller a written or electronic estimate of the fees to be assessed to provide the specific documents. The Association will be allowed to collect reasonable fees based upon the Association's actual costs for procuring, preparing, reproducing and delivering the documents; however, it would preclude the charging of additional fees for electronic delivery of said documents. The Association will be allowed to contract with any person or entity to provide the documents on its behalf. Further, AB771 will require the current owner to provide a form for billing disclosures to a prospective purchaser and also require the Association to provide this form to a recipient authorized by the owner of the separate interest. It is important to note that there will <u>not</u> be any cap on third party provider fees. The law will also allow the owner to designate someone other than themselves to be the recipient of the documents issued by the Association. Thus, the owner/member could direct the Association to send the documents to the prospective purchaser, realtor, lender, etc.

SB150: Rental Restrictions and Requirements: One of the most discussed bills signed into law in 2011 is SB150 pertaining to rental restrictions and requirements. This law, which goes into effect on January 1, 2012, will prohibit the owner of a separate interest in a Common Interest Development from being subject to a provision in their governing documents or an amendment to the governing documents prohibiting the rental or leasing of all or any of the separate interest in that Common Interest Development to a renter, lessee, or tenant <u>unless</u> the governing documents/amendment was effective <u>prior</u> to the date the owner acquired title to his or her separate interest. SB150 does authorize that

owner to expressly consent to be subject to a governing document provision/amendment with that specified prohibition.

As a result of SB150, numerous homeowners associations have rushed to attempt to amend their governing documents to add a rental restriction so that it is in effect prior to January 1, 2012, thus making it enforceable as to all owners. For those associations who do not have rental restrictions in place prior to January 1, 2012, the potential benefit of such a restriction will likely be lost since there will be now 2 classes of homeowners, i.e., those homeowners that a rental restriction will be applicable to, i.e., they purchased after the rental restriction was in place and those who it is not applicable to, i.e., those members who owned prior to the effective date of such an amendment.

SB183: Carbon Monoxide Devices: Commencing on July 1, 2011, SB183 will require all single family homes with an attached garage or a fossil fuel source to install carbon monoxide alarms within their homes. Owners of multifamily leased or rental dwellings, such as apartment buildings, hotels, motels, condominiums are also subject to this new legislation. As such, by January 1, 2013, condominiums will be required to have carbon monoxide alarms installed in each unit. Pursuant to SB183, a carbon monoxide device is to be installed outside of each sleeping area. The remedy for failing to install a carbon monoxide device is actual damages not to exceed $100, exclusive of any court costs and attorneys fees.

It is our general impression that the individual owners will be responsible for installing the carbon monoxide devices in either their single family home or in their own condominium unit and that it will not be an association responsibility to so install.

SB209: Electric Vehicle Charging Stations: Another controversial bill is SB209 pertaining to electric vehicle charging stations. This bill will be codified as *Civil* Code Section 1353.9. SB209 will void and deem unenforceable any provision of an association's governing documents of a Common Interest Development that effectively prohibits or restricts the installation or use of an electric vehicle charging station. The Bill will authorize an association to impose reasonable restrictions on the placement of such stations, as well as requirements with respect to an association's approval process for same as long as the restrictions do not significantly increase the costs or reduce its efficiency. The Association must respond to an owner's application regarding an electric vehicle charging station within sixty (60) days; otherwise, it will be deemed automatically approved .

In those instances where an electric vehicle charging station is to be placed on common area or exclusive use common area, the homeowner would be responsible for the costs associated with maintaining and repairing the station, as well as the cost for any damage to the common area and adjacent units resulting from the installation and maintenance of the station. The Bill also places additional duties and responsibilities on an owner including maintaining an umbrella liability insurance policy of no less than $1,000,000 (one million dollars) that names the association as an additional insured. It should be noted that an association that violates these provisions would be liable for damages and a civil penalty not to exceed $1,000 (one thousand dollars), as well as reasonable

attorney's fees. The electric bills must be paid by the member and the member must also disclose these conditions to any purchasers.

This controversial bill has many problems including a potential issue that if the electric vehicle charging station is to be placed on common area or exclusive use common area, whether such construction would constitute a "taking" of real property since generally two-thirds vote of the membership of an association must vote in favor of granting an exclusive use common area for such installations. Though signed, issues still remain with this statute that will likely be dealt with over the ensuing months.

SB563: Notice/Meetings: SB563, which will be codified into *Civil* Code Section 1363.05, will likely be the new law that affects Board of Directors, managers and the overall operation of an association the most going into 2012. As we are all aware, current law sets forth requirements for meetings of the Board of Directors of the Association and requires notice of the time and place of a meeting of the Board of Directors to be given to the membership of the association at least 4 days prior to the meeting, except under very specific circumstances, i.e., an emergency meeting. SB563 will require a notice of the time and location for a meeting that will be held solely in executive session to be given to members of the association at least 2 days prior to the meeting, except for emergency meetings (1360.05(g). The executive session board meeting must have an agenda; however, we would recommend that the agenda be very general, i.e., use the language of Section 1363.05 regarding executive session, i.e., litigation, contracts, member discipline, personnel matters, member assessment payments. Executive session board agendas will now be available to a member for inspection and copying if requested. The Bill also provides that if a member consents, notice may be given to the member electronically. The Bill also deletes provisions that would generally allow the Board of Directors to consider any proper matter at a meeting even if it had not been noticed as an action item for the meeting.

This Bill is also being viewed as the end of Boards conducting business via the use of emails. Since the inception of emails, many boards have operated and made decisions without a meeting via unanimous written consent of the entire board. As has been the case over the last decade, many statutes that are now signed into law pertain to the issue of transparency with respect to the information available to the member as to the governance of the association, obtainment of documentation, books, records, etc. SB563 is a progression of these earlier transparency laws.

SB563 does not necessarily preclude Board members from limited communication via email; however, the bills' clear intent is to prohibit decision making through the use of email meetings, with the exception of emergency meetings. Thus, it confirms that Boards may not take action outside of a duly noticed Board meeting, except as to those actions that have been delegated to the manager, officers or board committee (less than a majority of the Board).

Emails may still be used as a method of conducting an emergency meeting if all members of the Board, individually or collectively, consent in writing to that action, and if the written consent or consents were filed with the minutes of the meeting of the Board. Written consent to conduct an emergency meeting may be transmitted electronically.

Interestingly, SB563 will allow meetings to be conducted by the Board via a teleconference as long as it is an open meeting and would allow owners to attend the meeting via telephone or video conference. As such, in the event that a meeting will be conducted via a teleconference, there must be a minimum of one physical location that members may go to in order to listen and participate in the meeting and at least one member of the Board of Directors must be physically present at that teleconference site. (*Civil Code* Section 1363.05(b)).

Violation of any of these provisions could allow a civil claim by an owner. If an owner prevails, he would be entitled to reasonable attorneys fees and costs and up to a $500 per violation penalty. An Association is not entitled to attorneys fees and costs if it prevails, unless it can show that the lawsuit was frivolous.

BILLS TO WATCH IN THE FUTURE

SB561: Delinquent Assessments: This two year bill would affect an association's ability to collect assessments. Specifically, the law, as it currently stands, allows an association to levy regular and special assessments and, if an assessment is delinquent, authorizes the association to recover reasonable costs and attorneys fees incurred in collecting the assessment, as long as the *Civil Code* and governing documents are complied with. SB561, as currently contemplated, would prohibit an association from assigning or pledging the association's rights to collect payments for assessments to a third party or to contract with a third party to collect delinquent payments or assessments unless that third party also agrees to comply with the same requirements imposed on the association. The Bill would also prohibit a third party from acting as a trustee in a foreclosure proceeding. SB561 would also require that a delinquent owners payments be credited to the homeowners association prior to the debt collector. This will obviously impact the entire collection process since associations are generally not in a position to collect the delinquent assessments and those entities that are may very will not be willing to perform such services if their fees are to be the last one paid.

AB805: Comprehensive Reorganization of the Davis-Stirling Act: As has been discussed for many years, the legislature is continuing reviewing and considering a dramatic overhaul to the Davis-Stirling Act and the recodification of the statutes governing Common Interest Developments. This Bill, if ultimately adopted, would take effect on January 1, 2014 and would re-write and revise numerous issues pertaining to Associations including the issue of notices and delivery, definitions, enforceability of governing documents and the amendments of same. The Bill would also define potential conflicts of interest among Board members that could disqualify them from voting on certain matters. The revision also contemplates modifications to elections and voting, record retention and the release of liens recorded by the association in error. Again, this Bill has not been voted into law and will likely not be reconsidered until 2013 for possible implementation in 2014.

LEGISLATION THAT WAS VETOED BY GOVERNOR BROWN

SB759: Artificial Turf: The issue of requiring homeowner associations to allow artificial turf was again debated in 2011. Currently, existing law requires local agencies to adopt specified ordinances regarding water efficient landscaping that is at least as effective as the model ordinance with respect to water conservation. SB759 would have provided that any provision of an association's governing documents that prohibits, or includes conditions that have the effect of prohibiting, the use of artificial turf or other synthetic surfaces that resemble grass would have been void and unenforceable. The proposed legislation would have allowed an association to apply certain landscaping rules and regulations with respect to design and quality standards for the installation of artificial turf to the extent that it did not prohibit the actual use of artificial turf or other synthetic surfaces that resemble grass.

In vetoing Senate Bill 759 Governor Brown stated as follows: "Under this Bill, homeowners associations that govern Common Interest Developments would be forced to approve the installation of Astroturf. The decision about choosing synthetic turf instead of natural vegetation should be left to individual homeowners associations, not mandated by State law. For this reason, I am returning this Bill."

STATUS OF FEDERAL HOUSING ADMINISTRATION (FHA) MORTGAGE INSURANCE

The Federal Housing Administration (FHA) recently announced plans to begin disqualifying condominium association for FHA financing if an association charges a deed based transfer at the time of sale. Generally, these fees help fund reserves and operation and are levied at the time of sale. Generally, the fees are less than $500 and are based upon the formula contained within the CC&Rs, i.e., a percentage of a sale price, fixed sum or a specific number of monthly assessments. The difficulty with the FHA position is that the deed based transfer fees are CC&R provisions and requires a vote of the membership to remove it.

2011 Appellate Case Review

By: Robert Hillshafer

Tesoro del Valle Master Homeowners Association v. Griffin

This case involves the enforcement of architectural restrictions in an association's governing documents as against proposed installation of solar panels by an owner of a home within a planned unit development.

Griffin was the owner of a home within the Association who submitted an application to be allowed to install 22 solar panels on his lot on a slope which was outside a perimeter wall enclosing part of his property. The Association's architectural committee rejected the Owner's application on a number of grounds which were both procedural and substantive. Procedurally, the committee denied the application because it did not provide all the requisite information called for in the guidelines, such as location, set backs, size of panels and related information. Substantively, the committee denied the application because the panels were to be located on a slope outside the enclosed yard of the owner (which the CCRs precluded modification of), visible from the common area entry into the project and other homes therein.

The Owner proceeded to install the solar panels despite the denial of the application so the Association filed a lawsuit seeking an injunction to compel removal and for breach of the CCRs for installation of the system without express committee approval. The Owner filed a cross-complaint, alleging that the Association had violated California Civil Code Section 714, because part of the reason the application had been denied related to aesthetic considerations which were part of the architectural review process and guidelines and because the Association had not proposed a comparable alternative system.

Civil Code Section 714 prohibits restrictions on installation of solar energy systems which "significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or which allow for an alternative system of comparable costs, efficiency, and energy conservation...." At trial, the Association introduced expert testimony demonstrating that locating 16-20 panels on a guest house roof within the enclosed yard, would cost less and only reduce output by 14%, would be easier to install and avoid interference with the slope. A jury found that the CCRs imposed reasonable restrictions that did not violate Section 714 generally or because aesthetic considerations were part of the analysis.

The Court of Appeals affirmed the jury's decision in favor of the Association, relying on a prior appellate decision in Palos Verde Homes Assn. v. Rodman wherein guidelines primarily involving aesthetic considerations were found to be reasonable and

met the standards of Section 714 (related to costs and efficiency.) The court ruled that the mere fact that the guidelines included aesthetic considerations did not make them unreasonable and further ruled that the Association was not obligated under the statute to propose a comparably priced alternative system.

IMPORTANCE OF THIS CASE: That aesthetic considerations in guidelines for approval of solar energy installations are not per se violations of Section 714 and may be enforced.

Larson v. Las Posas Hills Homeowner Association

This case deals with a unique situation where an Association member affirmatively intervenes in a lawsuit by another member against the Association which contests the Architectural Committee's denial of an architectural application and the Board's denial of the owner's appeal.

Larson submitted an application to the Association's architectural committee to construct a two story house on his lot. The committee denied the application because the proposed residence would block the view of his neighbor, Michael Rolls. The denial was appealed to the Board, which also denied the application. Larson then sued the Association, alleging breach of fiduciary duty, negligence and nuisance. The Association's legal counsel suggested that Rolls might want to intervene in the case, since his view interests could be directly impacted by the outcome of the case.

Intervention is a legal process whereby a third party is allowed by the court to become a party to a pending action between others based on an inherent interest in the outcome of the case. The intervention was permitted by the court based on Rolls' interest in preserving his views, which were protected by the CCRs of the Association.

At trial, the Association and Rolls prevailed and both sought attorneys fees and costs from Larson, based on Civil Code Section 1354 which provides that reasonable attorneys fees shall be recoverable by the prevailing party in an action to enforce the CCRs. There is no specific provision authorizing recovery by an intervening party.

Larson argued that Rolls was not entitled to recover fees because he was not enforcing the CCRs, that was handled by the Association, who would adequately protect his interests. The trial court ruled that Rolls was entitled to fees as a prevailing party because as an individual, Rolls, as a party to the CCRs was entitled to concurrently enforce the CCRs protecting his views along with the Association. The court ruled that the function of intervening is to reduce multiple lawsuits and delays by inclusion of affected parties in a single action. When Rolls was found to have a legitimate basis to intervene, he was entitled to the same procedural remedies of the other parties.

IMPORTANCE OF DECISION: The concept of individuals, either on the same side or against an Association adds an entirely new dimension to potential liability for attorney's

fees in cases concerning approvals or denials of architectural applications and other enforcement actions.

Schuman v. Ignatin (2010) 191 Cal. App. 4th 255.

This case involves a dispute between two owners concerning a view restriction. Two neighbors sought to prevent approval of proposed construction by another owner because the construction would impair a scenic view. The owner who proposed new construction contended that the Association's CCRs were no longer valid because a document purporting to extend the term of the CCRs in 1998 was not signed by all the owners within the common interest development. The owners who objected to the construction contended that all owners did not have to execute the extension document.

The Court ruled that the CCRs remained enforceable because the challenge to the validity of the extension was not made within 4 years after the extension was recorded. Relying upon the 2009 case Costa Serena Owners Coalition v. Costa Serena Architectural Committee, 175 Cal. App. 4th 1175, the Court held that the statute of limitations of four years on challenging the effectiveness of the extension had expired nearly six years prior.

IMPORTANCE: Challenges to the enforceability of CCRs or provisions therein must be made within four years of recording or they will be forever barred.

Yan Sui v. Price (2011) 196 Cal. App. 933

Sui filed a lawsuit against his neighbor and his Association alleging that a parking restriction in the Association's rules prohibiting inoperable vehicles being kept on assigned owner parking spaces was discriminatory, provided an unreasonable enforcement remedy (towing) and were unenforceable because the rules were not recorded.

The Court of Appeals rejected each of these arguments, ruling that "there is nothing unreasonable about prohibiting the open, long-term parking of disabled vehicles. The association was perfectly reasonable in prohibiting this unsightly intrusion upon the aesthetics of their common interest development." Further, the court found that it was not inappropriate to tow violating vehicles since Vehicle Code Section 22658 specifically provided just such a means of enforcement. The court also rejected the argument that the rules had to be recorded to be enforceable.

IMPORTANCE: The test for the enforceability of an operating rule is the same for a CCR provision: reasonableness.

Ferwerda v. Bordon (2011) 193 Cal. App. 4th 1178

This case involved a challenge to a denial of an architectural application. Pursuant to the CCRs, the committee adopted a set of guidelines which included a provision that the committee could recover its reasonable attorney's fees and costs if it was required to enforce the provisions of the architectural guidelines. However, the CCRs did not contain a provision authorizing the recovery of attorney's fees.

The trial court ruled in favor of the committee on the merits of the denial and awarded the committee its attorney's fees. On appeal, the Court determined that the committee, taking its authority to promulgate rules from the CCRs which did not provide for attorney's fees, did not have the power to create a remedy that was not already in the CCRs.

IMPORTANCE: Operating rules can be used to interpret or effectuate provisions or remedies contained in the CCRs but cannot expand on the available remedies. The only way to modify or expand on remedies for a violation is through a CCR amendment.

Dover Village Association v. Jennison (2010) 191 Cal. App. 4th 123

This case involves a dispute over whether a building component should be considered "common area" or "exclusive use common area" for purposes of determining responsibility for costs of repairing the component and related damage. In this case, the Association classified a sewer pipe embedded in the building foundation beneath an owner's unit as exclusive use common area and billed the owner for the cost of repairing the sewer pipe. The owner refused to pay for the repairs and the Association filed a lawsuit to collect.

The basis for the Association's position was that this sewer pipe exclusively serviced the owner's condominium unit. At trial, the court found that the sewer pipe was common area and not exclusive use common area. Its reasoning was that the CCRs only identified two building components as exclusive use, patios and garages and if the sewer pipe was intended to be exclusive use, it would have been specifically identified. Further, the court held that the sewer pipe was not a "fixture" of a single unit because it was connected to other units. The Association had argued that pursuant to Civil Code Section 1351, the sewer was a "fixture" serving only the owners unit. The court found that reliance of Section 1351 was not appropriate because the CCRs provided otherwise in limiting exclusive use common areas to garages and patios. In other words, the items listed in Section 1351 do not become exclusive use common areas if the CCRs specifically identify what constitutes exclusive use common areas.

IMPORTANCE: Many associations, in an attempt to delegate financial responsibility for maintenance, repair and replacement, inappropriately torture the term and concept of exclusive use common area to accomplish that. Many attorneys, in an attempt to appease their clients do the same, at least partially because it is a largely undefined concept. This case clearly identifies the proposition that if CCRs identify components

which are exclusive use, then Section 1351 items cannot also be exclusive use common area components. This issue also arises commonly when the term "utility installation" is used in CCRs such that Association's improperly interpret "utility installation" to include water supply pipes, waste lines or electrical conduit within walls.

Astralis Condominium Association v. Secretary, US Dept. of Housing and Urban Development, (2010) 620 F. 3d 62

This federal case out of Puerto Rico involved an alleged violation of the Federal Fair Housing Amendments Act by a condominium association that refused to "reasonably accommodate" handicapped persons who wanted the Association to allow them to exclusively use designated handicapped parking spaces closer to his unit instead of the deeded parking spaces for his unit which were farther away. As in most complexes, the handicapped spaces are required by local statute and are available on a first come, first served basis for visitors. It appears that the plaintiffs were already afflicted with their handicaps when they purchased their unit, thus knowing that their parking was going to be limited to their assigned spaces.

One argument made by the Association was that under applicable law, the Association could not legitimately transfer common area (handicapped spaces) to owners without the consent of the owners within the development. The court rejected this argument indicating that the federal law preempted local statutes and that the Association had to comply with the federal law of accommodation, even if to do so would violate a local law.

IMPORTANCE: In California, complaints made under the FHAA are handled by the California version of the federal agency, because the state law regarding disability and discrimination are relatively the same. Consequently, this situation is likely to come up and Boards/Managers need to be aware that they may be forced to violate the governing documents in order to comply with the requirement of "reasonable accommodation."

Cabrera v. Alam 197 Cal.App.4th 1077 (2011); **Countryside Villas HOA v. Ivie**

The actual fact patterns of these two cases are not as important as the legal principles which are addressed therein. These cases both involve application of Code of Civil Procedure Section 425.16, which prohibits litigation that infringes upon constitutional rights of free speech. (anti-SLAPP—STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION) Cabrera involved an action by one candidate for the board against another for defamatory comments (slander) made in the course of an election debate. Countryside involved an action by an Association against an owner who was particularly critical of the Board's decision to have the Association assume significant exterior maintenance responsibility which previously was that of the owners of units. The Association sought to confirm the correctness of the Board's interpretation of the governing documents and related change in the Association's maintenance policies through a declaratory relief action. The anti-SLAPP statute is designed to eliminate

lawsuits brought in order to quash the exercise of free speech, very early in the process and with significant sanctions.

The essence of both these cases illustrates that courts have treated and will treat "speech" that occurs in the context of an Association meeting or communication, as constitutionally protected because Association meetings and communications are public and because Boards of Directors are considered "quasi-governmental bodies."

IMPORTANCE: Boards of Associations must be cognizant that criticisms made by members against the Board or its policies may be constitutionally protected and as such the Board cannot use litigation as leverage to stop or quiet such criticism, even if the speech is false or nasty.