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Serving HOAs and HOs throughout the State of California

SOUTHCOAST HOMEOWNERS ASSOCIATION
APRIL 28, 2012

MEETINGS, WHAT'S NEW?

Email meetings – **Stop taking action by email, except in emergencies.** No deliberation, discussion or decisions on any item within the authority of the board.

What can you do by email? Ask for information, investigation, reports, to be considered at the meeting. Provide information, give notice of meetings (if all board members consent in writing to email notice), suggest agenda items, give notice if cannot attend – informational things mostly.

How to set up email meeting? : All emails saved as record, agreement must be unanimous and must not have been foreseeable.

What are Boards doing to cope? Slow down, more meetings, giving authority, committees of fewer than majority of directors, delegating more authority.

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ELECTRIC CHARGING STATIONS [All New] CIVIL CODE SECTION 1353.9. ELECTRIC CAR CHARGING STATIONS.

Highpoints:

1. Any language in governing documents effectively prohibiting or restricting installation or use of electric charging station is void or unenforceable.

2. Reasonable restrictions (that do not significantly increase the cost or significantly decrease efficiency or performance) are okay but remember State promotes the stations and courts determine "reasonable".

3. Permitting requirements and health and safety standards apply.

4. HOA application similar to ACC required –if no denial within 60 days – application is deemed approved, unless delay is a result of reasonable request for additional information.

5. Homeowner must agree in writing to do all of the following [**hint: put in your application**]:

(A.) Comply with the common interest development's architectural standards for the installation of the station.
(B.) Engage a licensed contractor to install the station.

(C.) Within 14 days of approval, provide a certificate of insurance that names the common interest development as an additional insured under the homeowner's insurance policy.
(D.) Pay for the electricity usage associated with the station.

HOMEOWNER IS RESPONSIBLE FOR: [Hint: consider recordable agreement.]

(A) Costs for damage to the charging station, common area, exclusive use common area, or separate interests resulting from the installation, maintenance, repair, removal, or replacement of the charging station.
(B) Costs for the maintenance, repair, and replacement of the charging station until it has been removed and for the restoration of the common area after removal.
(C) The cost of electricity associated with the charging station.
(D) Disclosing to prospective buyers the existence of any charging station of the owner and the related responsibilities of the owner under this section.
(3) The owner and each successive owner of the charging station, at all times, shall maintain a homeowner liability coverage policy in the amount of one million dollars ($1,000,000), and shall name the association as a named additional insured under the policy with a right to notice of cancellation.

CONSIDER THAT (4) A homeowner shall not be required to maintain a homeowner liability coverage policy for an existing National Electrical Manufacturers Association standard alternating current power plug.

If owner installs in garage using HOA power, consider requiring separate reading device so association can charge for power used, whether overall system would have to be upgraded, whether power management system may be required.

DOES Civil Code Section 1363.07 require owner vote? Answer is NO.

Association risks:

For willful violations by HOA - $1,000 civil fine plus actual damages.
Prevailing party **shall** be awarded reasonable attorney fees.

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DOVER VILLAGE (VS JENNISON) CASE:

Who is responsible for exclusive use common area?

Civil Code 1364(a) says in a condo association HOA is responsible for common area and owner is responsible for unit and exclusive use common area, unless the declaration (CC&Rs) otherwise provides.

What is included in EUCA? Seems it should be easy, but it's not, to figure it out.

Civil Code Section 1351 says EUCA means the portion of the CA designated by the declaration for the exclusive use of one or more, but fewer than all of the owners and is "appurtenant" (meaning close by or attached) to the unit. AND

(1) Unless the CC&Rs otherwise provide, "exclusive use common area" includes shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, door frames and hardware, screens and windows (including glass) and window hardware, and other improvements that are located outside the boundaries of the units but that serve only a [separate interest] unit.

(2) Except when the CC&Rs state otherwise, internal and external telephone wiring serving a unit are considered "exclusive use common areas".

So the documents matter. **What happened in Dover Village case**?

Association repaired a leaky sewer pipe two feet beneath the concrete slab that was below Jennison's unit – the leak had caused intrusion of sewage into his unit. The Association cut through the floor and slab and replaced 50 feet of sewer pipe that connected the condo line to the main sewer line.

Owner was billed for the work. The HOA decided the water lines were EUCA and billed Jennison for the work (about $15,000) and the owner refused to pay. The Association sued.

What the Court did. Looked at Civil Code 1364(a) and because the statute defers to an association's CC&Rs, the court looked at the Dover Village CC&Rs. They were silent on the maintenance responsibility for the sewer lines. The CC&Rs did define patios and garages as EUCA to be maintained by owners. By exclusion of any definition of the sewer lines, the court decided that the pipes were the responsibility of the Association.

What can an HOA do to solve this problem in the future? Seek owner approval to amend the CC&Rs to make the owner responsible for all pipes, ducts, flues and wires that serve the separate interest from the point of separation. Why would owners approve? To avoid having to reserve for these items.

See also article at end of handout from March 2011 E-News discussing need for corrective action when a chronic backup problem is reported to the Board (**Affan** Case)

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NEW RENTAL RESTRICTIONS –

Who is grandfathered? On all new (post 1/1/2012) provisions, all current owners plus basically their family members (husband to wife or wife to husband, parents to children, children to parents) and those who take under a trust or through probate will effectively be grandfathered. So will business partners and anyone who is not subject to a tax when the property transfers hands. These are identified on a county property transfer form.

What about existing lease limitation restrictions? If definitions are given as to who is grandfathered, they control. If not defined, then an argument arises as to what successor owners are grandfathered – probably the new law would control.

1. Ex of defined: <u>"Grandfathered Owners"</u> refer to all current record Owners as of the date this measure is recorded (the effective date). These Owners, as to the Units currently owned, are considered exempt from the quota limitation for the current Owner's term of ownership. This "grandfather" ***exception ends when title of the Unit is transferred to another person or entity, whether by a trust, bequest, sale or gift, or for a business, when ownership in the business is transferred to another party. (Transferring the property into a family trust where the current Owner is Trustor is not considered a transfer terminating the "grandfather" status.)***

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ASSOCIATION IS A CORPORATION, BUSINESS OR TRUST, WHO EXERCISES RIGHTS OF OWNER?

CORPORATION/BUSINESS:

- Board may require designee form be completed for purposes of receiving notice and election materials, use of common area.
- Best to discuss with board and possibly association attorney as to whether any individualcan be designated to run for the board.

TRUST:

- Trustor if alive, and trust is revocable. Trustor would normally be the “owner” for exercising rights. Trustee could be designated.
- Trustee if Trustor is deceased or trust is irrevocable. In family trust board could allow designation by Trustee of a beneficiary.

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CAN/SHOULD MANAGER SERVE AS RENTAL AGENT AND HOA MANAGER?

Can work, but there are many potential conflicts and sources of cross over liability.

HOA Contract – it is important to define:

Specific duties as HOA Manager
Separation of Liability
Indemnification
What is required if conflict arises

Areas of Potential Liability/Problems

For manager’s discrimination in rentals
For manager’s mishandling of deposits and collected rents
Manager paying bills related to rentals from association funds
Commingling of funds
Owner complaints of favoritism/favors

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WHO FIXES WHAT IN AN HOA? (MARCH 2011 FREE E-NEWS)
By Beth A. Grimm, Attorney

How Has the Lamden Standard of Giving Deference to Board Decisions Been Affected?

What is Lamden About and How Was It Affected by 2010 Cases?

This is a long E-newsletter. My apologies. But there is a lot to say. There is quite a bit of guidance to be gleaned from the HOA cases last year, but as for new legislation for HOAs, not so much. 2010 was the first year in a very long time when nothing substantive was added to ***The Davis Stirling Act***. But here are some things you should definitely consider from the cases:

Two cases in particular (***Affan*** and ***Dover Villas***) dealt with maintenance obligations of associations and affected the way to think about the 1999 ***Lamden vs. La Jolla Shores Clubdominium HOA*** case which earlier set a "board deference standard" for HOAs in California. Coupled with the ***Ritter*** case from the prior year, the real question becomes: how much of ***Lamden*** still stands?

In ***Lamden***, the Board's plan for dealing termite issues in a condominium-type of development was to do spot treatment while repairing areas where termites were causing damage. One of the owners (Lamden) wanted the board to tent the building and take more extreme measures to eradicate the termites. She had an expert report that recommended this treatment. She sued the association asking the court to order the HOA to tent the building to eradicate the termites. The Superior Court found for the HOA. Lamden appealed and the Court of Appeal reversed and found in her favor. The Supreme Court of California reversed the

appellate court, agreeing with the trial court and held that: "the board's decision to use secondary, rather than primary, treatment in addressing the development's termite problem was subject to deferential review." The judges said:

"Courts should defer to a duly constituted community association board's authority and presumed expertise, regardless of the association's corporate status, where the board, upon reasonable investigation, in good faith and with regard for the best interests of the association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas. ***West's Ann.Cal.Civ.Code § 1354."***

This gives really broad powers to the boards and since ***Lamden***, HOA attorneys have assuring boards they have considerable discretion when it comes to maintenance decisions, and it did! So have some HOAs taken it too far? Recent cases would indicate the judges are taking a closer look. The key words in the Lamden decision seem to be: ***"upon reasonable investigation, in good faith*** *and* ***with regard for the best interests of the association*** *and its members,* ***exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions*** *to* ***select among means for discharging an obligation to maintain and repair a development's common areas." (My emphasis.)***

So let's take a look at what the 2010 cases and tell us that Boards should not do.

Neither boards nor HOA managers should underestimate the importance of properly addressing persistent problems.

Boards that choose simple post-event repairs for persistent plumbing (or other) problems as opposed to seeking real and permanent solutions may end up in trouble. In **AFFAN v. PORTOFINO COVE HOMEOWNERS ASSOCIATION,** October 2010, the HOA attempted to use Lamden as a "shield" (defense) and the appellate court recognized the ***Lamden*** standard described above [begin-ning]: "Where a duly constituted community association board, upon reasonable investigation, [and ending] ... courts should defer to the board's authority and presumed expertise." So what's the rub? The court found a problem: the association did not prove it had properly **investigated** the situation and adopted a means of **discharging its duty** - in other words, it did not have a real **plan**. The court in ***Affan*** gave us two very clear holdings: "***(1)*** the ***Lamden*** judicial deference standard applicable to the ordinary maintenance decisions of homeowners associations **did not apply to condominium association's managing agent,** and ***(2)*** evidence **did not establish a maintenance decision** by defendant condominium association, as a predicate for association's assertion of the ***Lamden*** judicial deference standard.

Why did this happen? In ***Affan***, from 1999 to 2005, the owners reported sewage residue in their kitchen sink or in the sink and tub in their master bathroom whenever they visited their unit (their vacation home). This happened nine times in a six year time span. Each time the owners reported the problem management would have the drains snaked. Other board members with units on the first floor had similar problems. The owner told management and the board that the HOA plumber had said snaking the drains was not enough, and the owner asked the board to consult with a master plumber. The manager simply referred to it as a "very chronic problem." Eventually, the Board did ask its plumber for a bid for annual maintenance and hydrojetting but apparently did sign a contract with the plumber. Eventually the board did enter into a 5 year contract for "annual routine maintenance" with Rescue Rooter and RR did hydrojet (May 3, 2005). A few weeks later (May 14) a more serious backup event occurred with real damage to Affan's unit (over $30,000 in damage). They wanted everything taken care of and apparently the board said it would take care of things, but in submitting an insurance claim "encountered a 'snag'". Since the nagging complaints and snaking remedy spanned several years and the HOA had changed insurers during that time, the insurers fought over which company was responsible for the damage.

As for using "***Lamden***" as a shield and winning on the "judicial-deference defense", the board's so called "plan" to discharge its duty came too little and too late.

KEY POINTS (in case you missed them): Adopting a reactionary mode of treating a chronic problem is not a sufficient "plan". Managers can't count on Lamden as a defense - it only applies to the HOA. And, it's a risk to change insurance carriers in the middle of a time period when a "chronic" problem has arisen. Boards may not ignore the law and governing documents when they define areas of responsibility.

In ***Dover Village vs. Jennison*** the HOA was intending to charge an owner for sewer repairs to lines that ran under the condominium. In this case, the Association attempted to use ***Lamden*** as a "sword" claiming it supported the argument that the board's decision on maintenance responsibility should be accepted based on an argument that the sewer pipes were "exclusive use common area". The court called ***Lamden***: "a nice illustration of matters genuinely within a board's discretion," but didn't find it controlling.

Why? Because the court found the sewer pipes to be common area and the association's responsibility finding that: "Under a natural reading of the CC & R's, the sewer pipe was a genuine common area to be maintained and repaired by the association, as distinct from 'an exclusive use common area appurtenant' to an individual owner's separate interest." The court examined Civil Code Section 1364 of the Davis-Stirling Act which defines "exclusive use common area [as]... a portion of the common areas designated by the declaration for the exclusive use of one or more, but fewer than all, of the owners of the separate interests and which is or will be appurtenant to the separate interest or interests." And went on pointing out: "(1) Unless the declaration otherwise provides, any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patio, exterior doors, doorframes, and hardware incident thereto, screens and windows or other fixtures designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common areas allocated exclusively to that separate interest." (Italics added.)

The court also reviewed the CC&Rs and found that although there were some areas designated "exclusive use common area", the sewer pipes were not. Thus, the judges decided: "There is no question under the CC & R's that sewer pipes are not within any individual owner's separate interest. Article I, section 6 of the CC & Rs for Dover Village says: 'The following are not a part of the Unit: roofs, foundations, below finished pad elevation, pipes, ducts, flues, chutes, conduits, wires and other utility installations wherever located, except the portions thereof located within the physical boundaries of the Unit." (Italics added.)"

The court said: "A sewer system is a series of interconnected pipes which ultimately feed into one common line. Differentiating parts of that interconnected system is unreasonable. The portion of piping coming from one unit is no more affixed to that unit than it is to the sewer system and other pipes or piping within that system. ... Some pipes-for example, drain pipes exclusively servicing one unit and not connected to any other system of piping-might indeed come within the category, because they can be said to be, like shutters and window boxes, "designed to serve a single separate interest." But a piece of a system of interconnected sewer piping does not fit: It is, literally, physically connected to every other piece of the system."

So here, the use of ***Lamden*** as a sword failed. The court's bottom line: "There is an obvious difference between a legal issue over who precisely has the responsibility for a sewer line and how a board should go about making a repair that is clearly within its responsibility. But we know of no provision in the Davis-Stirling Act or the CC & R's that makes the Association or its board the ultimate judge of legal issues affecting the development."

KEY POINTS: Determining exclusive use common areas and the responsibility for maintenance takes careful legal analysis considering both the governing documents and the CC&Rs and Lamden does not provide discretion to the board to decide contrary to those authorities.

Boards cannot ignore a building condition that presents a safety, hazardous or serious nuisance situation.

There is another case worthy of discussion in this context of how ***Lamden*** has been diluted by the courts in the past few years.That case is ***Ritter vs. Churchill Condominium Association***. In this case, ***Lamden*** was asserted by a condo association as a shield (defense) to support its decision not to make building-wide slab repairs. The problem involved a defect in the building. There were excuses given by the board, including cost concerns and the need for owner approval of a special assessment to pay for the repair work. The Ritters were really upset about the fact that the neighbors' cigarette smoke and other odors penetrated the slab and that the board pushed the cost of the slab repair off on them since they were performing some unit remodeling, and they were both lawyers. It wasn't a stretch to sue the association. They attempted not only to get judgment against the association, but also the individual board members.

The facts of ***Ritter v. Churchill*** have some very distinct differences from ***Lamden***, and although the court found that the individual board members should not have liability for the decision, the HOA should be required to do some things as demanded by the owners. The directors were not held personally liable for failure to resolve a slab penetration issue, but the HOA as an entity was and would have to resolve the slab penetration issue, at least as to the owners who sued (two separate Ritter individuals).

Here are some things I gleaned from the ***Ritter*** case.

Where there is a health or safety issue concerned, the HOA should investigate solutions and in some cases, must take action, even if there is a cost involved the owners might not want to pay.

(1) Is a ***Board*** safe when it acts on experts' advice in any given situation, and there is no malice involved? ***(It would appear so, at least as it relates to personal individual liability)***.

(2) Is the HOA safe when the Board relies on experts' advice in any given situation? **(Not necessarily - if the decision of the Board is found to be harmful to members - or for that matter - residents, vendors, etc. as well as has been the experience in other serious cases.)**

(3) Should all HOA board decisions be given the benefit of the doubt under the "Business Judgment Rule" in the Corporations Code or deference to Board decisions under Lamden when being reviewed by a court? **(The clear answer is "no".)**

Hindsight is clearer than foresight, of course, and the above boards should not be condemned as they were acting on the advice of some experts and attorneys. However, what can and should be taken away from these case decisions are that there is likely a distinction between the way courts analyze decisions of corporate boards whenever (1) health and safety issues are at stake, (2) the board has not investigated matters sufficiently to devise a reasonable means of discharging its duties, or (3) the maintenance responsibility is determined by the CC&Rs and/or the law.

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