SOUTH COAST HOMEOWNERS ASSOCIATION

ANNUAL LEGISLATIVE FORUM

February 4th, 2013

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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LEGISLATION

I
Associations May Request Foreclosure Information on Units in Their Development

[*AB 2273; Civil Code 2924b (f) (1)*]

A. For each unit in a Development managed by an Association, the Association may request a copy of any Notice of Default, Notice of Foreclosure Sale and Trustee's Deed Upon Sale. The documents must be provided within 15 days following the foreclosure sale.

B. The Request must be recorded and contain the information required by Civil Code section 2924b (f) (1) which requires, among other information, the legal description or assessor's parcel number of each unit.

II
A Trustee's Deed Must be Recorded within 30 Days of Sale

[*AB 2273; Civil Code 2924.1 (a)*]

A. Within 30 days following a foreclosure sale in a Common Interest Development, the Trustee must record the Trustee's Deed transferring the property to the new owner (Civil Code section 2924.1).

B. Recordation of the Trustee's Deed does not impact the 90 day Right of Redemption (Civil Code section 1367.4 (c) (4)).

III
Fees Charged and Credits to be Allowed For Documents Provided Upon Sale

[*AB 1338; Civil Code 1368(b) (3)*]

A. Associations must provide to an owner those documents specified in Civil Code Section 1368.

B. Associations may charge a fee equal to the Association's actual cost to procure, prepare, reproduce and deliver the documents. This may include the amount charged by the Association itself to produce the documents or the amount charged to the Association by its management company producing the documents.

C. NEW: Cancellation Fee.

1. If an owner's request for documents is canceled, a cancellation fee may not be charged.

2. If an owner's request for the documents is canceled, the Association may only charge for services performed up to receipt of the written request for cancellation.

IV
Estimate of Charges for Producing Documents

[*AB 1838; Civil Code 1368.2*]

A. If requested, an estimate of the charges for producing documents as required by Civil Code 1368 must be provided to the owner.

B. The estimate must be given in the form required by Civil Code section 1368.2.

C. NEW: The Form must be in at least 10 point type.

CASES

I
Lingle v. Quail Ridge

[Election Rules and Procedures]

A. Associations must adopt election rules and procedures (Civil Code 1363.03).

B. Ballots sent to owners as required by Civil Code 1363.03 (e) should be marked "Ballot" NOT "Proxy." There is a difference between a "Ballot" and a "Proxy" (Civil Code 1363.03(d) (2)).

C. If cumulative voting is allowed, it must so indicate on Ballot.

D. Write-in candidates are still allowed on Ballots (Civil Code 1363.03 (j)).

E. Once received by the Inspector of Elections, Ballots can not be withdrawn.

F. Even though most votes are cast by owner Ballots prior to the owner's meeting where counted, and can not be withdrawn, nominations from the floor are still allowed (Civil Code 1363.03(j)).

G. If an owner's Ballot is received by the Inspector of Elections, an owner can not withdraw their Ballot to vote for a candidate nominated from the floor.

II
Quail Lakes Association v. Kozina (2012) 204 Cal. App. 4th 1132

[Amending CC&R's via Court Approval]

A. Associations may overcome super majority needed to amend CC&R's by petitioning court under Civil Code 1356.

B. Must prove all 6 requirements set forth in Civil Code 1356 (c).

C. Petition must be verified.

III
Mankowski v. La Cumbre Owners Assoc.

[Changing Designation of Separate Interest]

A. That which an Owner owns in a Common Interest Development is called the "Separate Interest" (i.e. Unit) (Civil Code 1351 (l)).

B. Without amending the Condominium Plan or Subdivision Map, an Association can not amend its CC&R's to change the boundries of the Separate Interest (e.g. designating a driveway located upon an owner's lot in a Planned Development Exclusive Use Common Area).

C. An Association may not amend its CC&R's to deem part of an owner's Separate Interest to be part of the Common Area Maintenance Responsibility.

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COMMON INTEREST DEVELOPMENTS

Existing Provision	New Provision(s)
1350	4000
1350.5	4005
1350.7	omitted, but see 4040, 4045, 4050
1351 (intro.)	4075
1351(a)	4080
1351(b)	4095
1351(c)	4100
1351(d)	4105
1351(e)(1)-(2)	4285
1351(e)(3) (except last ¶)	4285, 4290
1351(e)(last ¶)	4295
1351(f)	4125
1351(g)	4130
1351(h)	4135
1351(i)	4145
1351(j)	4150
1351(k)	4175
1351(*l*)	4185
1351(m)	4190
1352	4200
1352.5	4225(a)-(b), (d)
1353(a)(1) (1st & 2d sent.)	4250(a)
1353(a)(1)-(4) (except 1st & 2d sent.)	4255
1353(b)	4250(b)
1353.5	4705
1353.6	4710
1353.7	4720
1353.8	4735
1353.9	4745
1354	5975
1355(a)	4270(a)
1355(b) (1st sent.)	4260
1355(b)(1)	5115(e)
1355(b)(2)	4270(b)
1355(b)(3)	4270(a)(3)
1355.5	4230
1356	4275
1357(a)	4265(a)
1357(b) (except part of 1st sent.)	omitted
1357(b) (part of 1st sent.)	4265(b)
1357(c)	omitted
1357(d)	4265(c)
1357.100(a)	4340(a)
1357.100(b)	4340(b)
1357.110	4350
1357.120	4355
1357.130	4360
1357.140	4365
1357.150	4370
1358(a)	4625
1358(b)	4630
1358(c)	4635
1358(d)	4640
1358 (last ¶)	4650
1358 (next to last ¶)	4645
1359	4610
1360	4760
1360.2	4740
1360.5	4715

Existing Provision	New Provision(s)
1361	4505
1361.5	4510
1362	4500
1363(a)	4800
1363(b)	omitted
1363(c)	4805
1363(d)	5000(a)
1363(e) (1st sent.)	5240(b)
1363(e) (2d sent.)	omitted
1363(f) (1st sent.)	5850(a)
1363(f) (2d sent.)	omitted
1363(g)	5855
1363(h)	4820
1363(i)	5865
1363.001	5400
1363.005	omitted
1363.03(a)	5105(a)
1363.03(b) (1st sent.)	5100(a)
1363.03(b) (2d & 3d sents.)	5115(b)
1363.03(b) (4th sent.)	5115(c)
1363.03(c)	5110
1363.03(d)	5130
1363.03(e)	5115(a)
1363.03(f)	5120(a)
1363.03(g)	5120(b)
1363.03(h)	5125(a)
1363.03(i)	5125(b)
1363.03(j)	5105(b)
1363.03(k)	5115(d)
1363.03(*l*)	5100(c)
1363.03(m)	5100(d)
1363.03(n)	5100(e)
1363.03(*o*)	omitted
1363.04	5135
1363.05(a)	4900
1363.05(b) (1st part of 1st sent.)	4925(a)
1363.05(b) (2d part of 1st sent.)	4935(a)
1363.05(b) (2d sent.)	4935(b)
1363.05(b) (3d sent.)	4925(a)
1363.05(c)	4935(e)
1363.05(d)	4950(a)
1363.05(e)	4950(b)
1363.05(f)	4920
1363.05(g)	4923
1363.05(h)	4925(b), 5000(b)
1363.05(i)	4930
1363.05(j)	4910
1363.05(k)(1)	4155
1363.05(k)(2)	4090
1363.07 (except (a)(3)(F))	4600
1363.07(a)(3)(F)	4202(a)(4)
1363.09 (re elections)	5145
1363.09(a)-(b) (re exclusive use grant)	4605
1363.09(a)-(b) (re open meetings)	4955
1363.1(a)	5375
1363.1(b) (except ¶ (1))	4158
1363.1(b)(1)	5385
1363.2(a)-(e)	5380(a)-(e)

ACQUISITION OF PROPERTY

Existing Provision	New Provision(s)
1363.2(f) (except 1st cl. of 2d sent.)	4158
1363.2(f) (1st cl. of 2d sent.)	5385
1363.2(g)	5380(f)
1363.5	4280
1363.6	5405
1363.810	5900
1363.820	5905
1363.830	5910
1363.840	5915
1363.850	5920
1364(a)	4775(a)
1364(b)	4780
1364(c)	4775(b)
1364(d)-(e)	4785
1364(f)	4790
1365 (intro. cl.)	5300(b) (intro. cl.), 5305 (intro. cl.)
1365(a)(1)	5300(b)(1)
1365(a)(2) (intro. cl.)	5300(b)(2)
1365(a)(2)(A)-(D)	5565
1365(a)(3)(A)	5300(b)(4)
1365(a)(3)(B)	5300(b)(5)
1365(a)(3)(C)	5300(b)(6)
1365(a)(3)(D)	5300(b)(8)
1365(a)(4) (1st ¶)	5300(b)(7)
1365(a)(4) (2d ¶)	5300(d)
1365(a)(4) (3d ¶)	5300(a)
1365(b)	5300(b)(3)
1365(c)	5305
1365(d)	5320
1365(e)	5310(a)(7)
1365(f)(1) (except 2d cl. of 1st sent.)	5300(b)(9) (1st & 2d sent.)
1365(f)(1) (2d cl. of 1st sent.)	5300(a)
1365(f)(2)	5810
1365(f)(3)	5300(b)(9) (3d sent.)
1365(f)(4)	5300(b)(9) (4th sent. & 2d ¶)
1365.1	4040(b), 5730
1365.2(a)(1) (except (I)(ii)-(iii))	5200(a)
1365.2(a)(1)(I)(ii)	5225
1365.2(a)(1)(I)(iii)	5220
1365.2(a)(2) (except last cl.)	5200(b)
1365.2(a)(2) (last cl.)	5205(g) (2d sent.)
1365.2(b)	5205(a)-(b)
1365.2(c)(1)-(4)	5205(c)-(f)
1365.2(c)(5)	5205(g) (1st & 3d sents.)
1365.2(d)	5215
1365.2(e)	5230
1365.2(f)	5235
1365.2(g)	5240(c)
1365.2(h)	5205(h)
1365.2(i)-(j)	5210(a)-(b)
1365.2(k)	5210(c)
1365.2(*l*)	5240(a)
1365.2(m)	5240(d)
1365.2(n)	omitted
1365.2.5	5570
1365.2.5(b)(3)	5300(e)
1365.3	5580

Existing Provision	New Provision(s)
1365.5(a)	5500
1365.5(b)	5510(a)
1365.5(c)(1)	5510(b)
1365.5(c)(2)	5515
1365.5(d)	5520
1365.5(e) (1)-(4), (5) (1st sent.)	5550
1365.5(e)(5) (except 1st sent.)	5560
1365.5(f)	4177
1365.5(g)	4178
1365.5(h)	omitted
1365.6	5350(a)
1365.7	5800
1365.9	5805
1366(a) (1st sent.)	5600(a)
1366(a) (2d sent.)	5605(a)
1366(a) (3d sent.)	5605(c)
1366(b) (1st sent.)	5605(b)
1366(b) (2d sent.)	5605(c)
1366(b) (3d & 4th sent.)	5610 (intro.)
1366(b)(1)-(3)	5610(a)-(c)
1366(c)	5620
1366(d)	5615
1366(e)	5650(b)
1366(f)	5650(c)
1366.1	5600(b)
1366.2(a)	4210
1366.2(b)	omitted
1366.4	5625
1367	omitted, but see 5740
1367.1(a) (1st sent.)	5650(a)
1367.1(a) (2d sent.)	5660 (intro.)
1367.1(a)(1)-(6)	5660(a)-(f)
1367.1(b)	5655
1367.1(c)(1)(A)	5670
1367.1(c)(1)(B)	omitted, but see 5705(b)
1367.1(c)(2)	5673
1367.1(c)(3)	5665
1367.1(d) (1st - 5th sent.)	5675
1367.1(d) (6th sent.)	5685(a)
1367.1(d) (7th & 8th sent.)	5725(a)
1367.1(e)	5725(b)
1367.1(f)	5680
1367.1(g) (1st sent.)	5735
1367.1(g) (2d sent.)	5700(a)
1367.1(g) (3d sent.)	5710(a)
1367.1(g) (4th sent.)	5710(c) (intro.)
1367.1(g)(1)-(2)	5710(c)(1)-(2)
1367.1(h)	5700(b)
1367.1(i)	5685(b)
1367.1(j)	5710(b)
1367.1(k)	4040(b)
1367.1(*l*)	5690
1367.1(m)	omitted, but see 5740
1367.1(n)	omitted
1367.4(a)	5705(a), 5715(a), 5720(a)
1367.4(b)	5720(b)
1367.4(c) (intro.)	omitted, but see 5705, 5715
1367.4(c)(1)	5705(b)
1367.4(c)(2)	5705(c)
1367.4(c)(3)	5705(d)

Existing Provision	New Provision(s)
1367.4(c)(4)	5715(b)
1367.4(d)	5720(c)(2)-(3)
1367.5	5685(c)
1367.6	5658
1368(a)	4525
1368(b)	4530
1368(c)(1)	4575
1368(c)(2)	4580
1368(c)(3)	4110
1368(d)	4540
1368(e)	4545
1368(f)	4535
1368(g)	omitted
1368.1	4730
1368.2	4528
1368.3	5980
1368.4	5985
1368.5	6150
1369	4615
1369.510	5925
1369.520	5930
1369.530	5935
1369.540	5940
1369.550	5945
1369.560	5950
1369.570	5955
1369.580	5960
1369.590	5965
1370	4215
1371	4220
1372	4020
1373	4202
1374	4201
1375	6000
1375.1	6100
1376	4725
1378	4765

Form No. 48
California Civil Code § 1368.2
(1/8/13)

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.

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NEW LAWS FOR 2013

By: David A. Loewenthal
Robert D. Hillshafer

During the last decade, those of us who are involved in the homeowner association field, i.e., property managers, Board of Directors and attorneys, have been inundated with substantial and significant changes in the law on an annual basis. For the first time in almost a decade, we can breathe a sigh of relief since the laws that have been enacted in 2012 will not significantly alter the method and manner in which most homeowners associations function on a daily basis. Rather, the new laws are generally limited to "clean up" i.e., clarifying or slightly modifying existing statutes.

The biggest change to occur in the legislation is the entire overhaul of the *Davis Stirling Act* which will go into effect in 2014.

AB2273 -- Notice to Association of Foreclosure:

As you will recall, a few years ago, the California legislature enacted *Civil Code* Section 2924(b) which has been known as a "Request for Notice" or a "Blanket Notice". Specifically, this legislation was enacted to assist associations in promptly being able to bill a new owner of a property which was highly problematic as a result of the recent real estate collapse and the resulting voluminous lender foreclosures. Often times, lenders would foreclose on a property but fail to notify the Association of such a foreclosure, as well as not provide the name or contact information of the new owner which may have been the bank itself or a new third party owner.

Civil Code Section 2924(b) "Blanket Notice" allowed associations to record a "Request for Notice" which thereby requires a trustee to mail to the Association a copy of the Trustee's Deed once a foreclosure sale has taken place. In addition, the trustee is obligated to mail a Deed within 15 days of recordation. As such, this law provided the Association with a methodology of determining when a lender had foreclosed on its lien which would thereby allow the association to begin billing the new owner of the property for assessments. Unfortunately, many lenders delayed the recordation of their Trustee's Deed Upon Sale for extended periods of time

following the trustee's sale. As a result, the association would not timely learn of who the actual owner of the unit was and thereby impair their ability to collect assessments.

Pursuant to AB2273, if an association has recorded its "Request for Notice" pursuant to *Civil Code* Section 2924(b) prior to the Notice of the Default being recorded, the foreclosing lender has an obligation to provide a copy of the requested information to the association within 15 business days following the date of the Trustee Sale. In addition, AB2273 requires that the recordation of the Trustee's Deed Upon Sale be recorded within 30 days of the sale.

The intent of AB2273 taken in conjunction with *Civil Code* Section 2924(b) is to help ensure that common interest developments can more rapidly update their records regarding ownership and thereby send their assessment billings to the correct owner after a foreclosure sale. Unfortunately, there is no penalty if the foreclosing lender fails to perform these functions, i.e., there is neither a monetary penalty nor any other penalty for the failure to comply with the law. Only time will tell whether this legislation actually has the desired effect. AB2273 is effective as of January 1, 2013.

SB880 – Electric Vehicle Charging Stations:

As you will recall, commencing on January 1, 2012, *Civil Code* Section 1353.9 went into effect pertaining to the installation of electric vehicle charging stations within homeowner associations. Unfortunately, almost immediately after its implementation, it was determined that there were issues involving the statute including inconsistencies with other Civil Code statutes, insurance related issues, etc. As a result of these issues, the California Legislature passed immediate clean up legislation, i.e., SB880 which went into effect on February 29, 2012.

One of the original flaws with *Civil Code* Section 1353.9 was that as written, it appeared to allow a Board, on its own, to grant to an owner of an electric vehicle exclusive use of the common area to install a charging station. However, this would have been violative of *Civil Code* Section 1363.07 which prohibits a board from granting exclusive use of a common area to an owner without the prior approval of 67% of the owners. SB880 revises *Civil Code* Section 1363.07 to specifically exempt the requirement that the membership vote and approve grants of exclusive use common area for electric vehicle charging stations under specific circumstances. As such, SB880 resolves this contradiction by confirming that the permitting of an electric vehicle charging station does not require 2/3 vote of the membership, but can be unilaterally granted by the Board of Directors.

Additionally, SB880 has revised *Civil Code* Section 1353.9, with respect to the installation of an electric vehicle charging station in an owner's designated parking space. The revision to 1353.9 now states that any provision of an association's governing documents are void and unenforceable if it either effectively prohibits or unreasonably restricts the installation or use of an electric vehicle charging station in an owner's designated parking space including,

but not limited to, a deeded parking space, a parking space in an owner's exclusive use common area, or a parking space that is specifically designated for use by a particular owner.

In addition, with respect to the installation of an electric vehicle charging station in the common area for an owner's exclusive use, an owner shall have a right to install in the common area an electric vehicle charging station for such owner's exclusive use only if installation in the owner's designated parking space is impossible or unreasonably expensive. In such cases, the association shall enter into a license agreement with the owner for the use of the space in the common area, subject to the owner's duty to comply with the requirements of 1353.9(f), i.e., installation by a licensed contractor, proper insurance, approved plans, etc.

Further, with respect to the installation of an electric vehicle charging station in the common area for use of all members, either the association or owners may install such a charging station in the common area for the use of all members of the association and, in that case, the association shall develop appropriate rules for the use of the charging station. Also, an association may create a new parking space where one did not previously exist to facilitate the installation of an electric vehicle charging station.

As was true with the original laws passed pursuant to *Civil Code* Section 1353.9, an association can still impose reasonable restrictions on electric vehicle charging stations as long as such restrictions do not significantly increase the cost of the station or significantly decrease its efficiency or specified performance. Willful violations of this statute can make the Association liable to the applicant or other party for actual damages, as well as a civil penalty to the applicant or other party up to an amount of $1,000. Further, the prevailing party in any such enforcement action is entitled to the recovery of reasonable attorneys fees.

In addition, an application for an electric vehicle charging station must be processed in the same manner as the association would process any other architectural request. Pursuant to *Civil Code* Section 1353.9, if an application is not denied in writing within 60 days from the date of receipt of the application, it will be deemed approved unless the delay is based upon a reasonable request for additional information from the association.

The law still allows an association to require as a precondition of approval that the applicant owner agree in writing to comply with the association's architectural standards for installation of the electric vehicle charging station; that the applicant uses a licensed contractor to install the station; as well as pay for the electricity usage arising from the station.

A notable change in *Civil Code* Section 1353.9 pertains to insurance. Specifically, the association can still require that the owner provide within 14 days of approval of a request to install an electric vehicle charging station that they provide a certificate of insurance evidencing that the owner has in effect umbrella liability coverage in an amount of no less than $1 million which names the association as an additional named insured under such policy and that the policy must specifically state that the association is to be provided notice of any cancelation.

Unfortunately, a modification arising out of SB880 is that an owner shall not be required to maintain such insurance for an existing National Electrical Manufacturers Association standard alternating current power plug. The NEMA is the most popular set of standards used in the United States and Canada for the construction of power cords and their respective connection. The NEMA plug and power cord connectors are organized by maximum power consumption requirements beginning with up to 15 amps at 125 volts all the way up to 50 amps at 250 volts.

SB880 does not change the duties and obligations of the owner and their successors regarding the maintenance, repair, damage arising from the construction and existence of an electrical vehicle charging station. In addition, the owner remains responsible for the cost of electricity arising therefrom.

Some associations are starting to create recordable covenants with the owners who wish to install electric vehicle charging stations setting forth all of the owners duties and obligations arising from the construction and maintenance of the charging station, as well as to place any future purchaser on notice of the continuing obligation.

AB1838 – Association Records:

Civil Code Section 1368 requires the owner of a separate interest, as soon as practicable, before transfer of title to the separate interest or execution of a real property sales contract thereof to provide various documents to a perspective purchaser. Such items include, but are not necessarily limited to, a copy of the governing documents of the association; a copy of any rental restrictions included within the governing documents; a copy of the most recent documents distributed pursuant to *Civil Code* Section 1365; a true statement regarding the amount of the association's current regular and special assessments and fees; any monetary fines or penalties that have been levied upon the owners interest that are unpaid; a summary of any notices pertaining to alleged violations of the governing documents that remain unresolved by the current owner at the time of the request; a copy of the initial list of defects provided to each member of the association pursuant to *Civil Code* Section 1375; any approved changes in the current regular and special assessments and fees which are not yet due and payable; rental restrictions contained within the governing documents; copies of minutes if requested by the perspective purchaser.

In addition, pursuant to *Civil Code* Section 1368, the Association shall within 10 days of the mailing or delivery of the request, provide the owner of a separate interest or any other recipient authorized by the owner, with a copy of the requested documents. Upon receipt of a written request, the association shall provide on a form that is compliant with *Civil Code* Section 1368.2, a written or electronic estimate of the fees that will be assessed for providing the requested documents. The documents required to be made available pursuant to this section may be maintained in electronic form and may be posted on the association internet website. Requesting party shall have the option of receiving the documents by electronic transmission if

the association maintains the documents in an electronic form. The association may collect a reasonable fee based upon the association's actual costs for the procurement, preparation, reproduction and delivery of the documents requested pursuant to the provisions of this section.

Pursuant to AB1388 the document fee disclosure required by *Civil Code* Section 1368.2 must be in at least 10 point type font. In addition, associations may not charge a cancellation fee if documents are ordered for transmittal to a perspective buyer, if the work on the document order had not commenced prior to the cancellation of the order. Further, the association must refund all fees, except those fees for services rendered, prior to the cancellation of the request.

AB805 and AB806 – David Stirling Common Interest Development Act Rewrite Legislation and Relocation and Reorganization:

As everyone in the common interest development field knows, homeowner associations in California are governed by the Davis Stirling Common Interest Development Act which was adopted in 1985 and is codified in *Civil Code* Sections 1350 through 1378. For several years, the California Law Review Commission has been working to revamp the Davis Stirling Act and replace it with new laws that generally encompasses those statutes already in existence under the Davis Stirling Act and by attempting to organize the codes into a more logical format, as well as to remedy inconsistent provisions that exist within the act and add clarity. Though the Act was passed this year, it will not go into effect until January 2014. The new Act will commence with *Civil Code* Section 4000 et seq.

AB1720 – Access to Gated Communities by Licensed Private Investigators for Service of Process:

A long standing issue with respect to gated communities is who is allowed to enter the property for the purpose of process service. *Civil Code* Section 415.21 has historically applied only to registered process servers and grants access to gated communities upon four preconditions (1) the access is for a reasonable time; (2) access is for the purpose of performing lawful service or service of a subpoena; (3) the person must identify to the guard the person to be served, and (4) the person seeking access must display identification and appropriate evidence of being licensed.

AB1720 will extend these same conditions and allows access to licensed private investigators. It is also clear that the licensed private investigators are granted access to a gated community for the sole purpose of service and they are not allowed to conduct investigative work while entering the property for the purpose of service of process.

This new statute is consistent with the case of *Bein v. Brechtel-Jochim Group*, (1992) 6 Cal.App.4th 1387 where the Court of Appeals held that the service of legal process upon a guard at the entrance of a gated community is sufficient to meet the requirements for substituted service pursuant to *Civil Code* Section 415.20. The Court held in the *Bein* case that while

"litigants have the right to choose their abodes, they do not have the right to control who may sue or serve them by denying them physical access." In the *Bein* case, the Court of Appeals stated that after good faith attempts of physical service on the residence of the gated community had been unsuccessful, it was appropriate to allow substituted service on the residential gate guard pursuant to *Civil Code* Section 415.20.

As such, AB1720 is an important statute for those who live in gate guarded communities or condominium projects where access is controlled by a security guard.

Title III of the ADA – Pool Lift Rules:

An ongoing issue that plagues associations is whether or not the Americans With Disabilities Act (ADA) applies to them. This can come in the context of access to buildings via ramps, access and usability of bathrooms, common facilities and swimming pools. Recently, the U.S. Department of Justice (DOJ) published revised regulations regarding the ADA. This pertained to whether or not associations are required to install a lift on its swimming pool or comply with other ADA requirements. The issue is whether or not the facility, i.e., swimming pool in this case, is a "public accommodation".

The Department of Justice's ADA Technical Assistance Manual covering public accommodations in commercial facilities states as follows: "Although Title III does not apply to strictly residential facilities, it covers places of public accommodation within residential facilities. Thus, areas within multifamily residential facilities that qualify as places of public accommodation are covered by the ADA if use of the area is not limited exclusively to owners, residents and their guests."

As such, if the association's facilities are made available to the outside world, i.e., beyond owners, residents and their guests, those facilities may very well be required to be ADA compliant.

As an example, but without limitation, if the Association allows its pools to be used for area or high school swim meets, sells memberships for pool use, or has a clubhouse and rents it out to individuals outside of their owners, residents and their guests, then it is very likely that the ADA will in fact apply since it will have become a place of public accommodation.

If a component of the association is in fact deemed to be a place of public accommodation and the association fails to comply with Title III of the ADA, the association could become open to lawsuits by individuals for violation of Title III, as well as claims brought by the Department of Justice. It should be noted that under the ADA, the prevailing party in a lawsuit may recover attorneys fees and relief available under a DOJ enforcement lawsuit includes civil penalties not to exceed $50,000 for the first violation and $100,000 for any subsequent violation.

As such, if your association has a swimming pool and it has been made open as a place of public accommodation, you will likely be required to install a pool lift or other access points for disabled persons.

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REVIEW OF COURT DECISIONS IMPACTING COMMUNITY ASSOCIATIONS IN 2012

Pinnacle Museum Tower Association v. Pinnacle Market Development (2012) 55 Cal. 4th 223

Facts:

The developer of a condo project included in the recorded CCRs a provision which required that all construction defect claims by the Association against the developer be resolved through binding arbitration rather than through a Superior Court jury trial. The CCRs made specific reference to the Federal Arbitration Act. The Association filed a construction defect lawsuit and the developer filed a motion to compel arbitration pursuant to the CCR provision, contending that the Association was bound to the provisions of the recorded CCRs. Association opposed the motion based on the fact that the CCRs were put in place before the corporation (Association) was even in place and no negotiation of terms was possible and that it fundamentally deprived the Association of its constitutional right to a jury trial. The trial court and the Court of Appeal held that the arbitration provision was unenforceable, following the rationale in several prior appellate decisions, because the Association had not consented to limit its constitutional rights.

Decision by the Supreme Court:

The Supreme Court reversed the decision and determined that the mandatory arbitration provision was binding on the Association. The basis for this decision was fundamentally based on the wording of the provision in the CCRs with its specific reference to the Federal Arbitration Act, which preempts California law and policies favoring preservation of the right to a jury trial without the express consent of all parties to an agreement. The several prior decisions which voided the mandatory arbitration provisions did not involve provisions specifically invoking the FAA.

However, in an attempt to rationalize its application of the preemption doctrine in this context, the Supreme Court backed in to an analysis that concluded that the Association's "consent" to arbitration was implied through its member's agreeing to purchase subject to the recorded CCRs. The Court basically ignored the fact that the Association is a legal entity separate and apart from its members that has legal rights and obligations, including the right to sue on its own behalf and to have a jury trial and

determined that the combination of the recorded CCRs, the fact that arbitration was not inherently unconscionable to the Association and was not inconsistent with the Davis Stirling Act, was sufficient to justify enforcing a contractual provision that the Association never consented to.

Why this is significant:

Developers will now include the "magic words" Federal Arbitration Act in the context of construction defect dispute resolution in CCRs, thereby removing a fundamentally powerful tool of Association's legal counsel to settle such cases for their clients. Attorneys who represent Associations as plaintiffs in these cases universally prefer the option of a level playing field created by a trial by a jury of ordinary citizens over the arbitration procedure where a single person (generally a retired judge) decides all the issues, and is paid hourly by both sides to do so. Developers put these provisions in CCRs because they believe it substantially benefits their position because it forces Association's to spend more money and because arbitrators (who the developer has to consent to) are inherently more conservative in awards than juries.

It is also a significant decision because it will probably embolden developers to seek to compel arbitration even when the provision doesn't mention the FAA, in reliance on the Court's analysis that the corporation's consent can be implied through its member's constructive knowledge of the terms of the CCRs through recording. This will necessarily slow down the process and increase the costs to the Association to prosecute a claim, both of which benefit developers.

Glen Oaks Estates Homeowners Association v. Re Max Premier Properties, Inc.
(2012) 203 Cal. App. 4th 913

Facts:

Association filed a lawsuit for damages caused by a slope failure on Association common area against the real estate brokers for the developers of the project. The suit was based on allegations that the brokers were privy to soils reports and information regarding same that the reports were unreliable, and withheld such reports from the Association and its members. The Association claimed that its members would not have purchased in the project had they been provided the information and hence would not have been responsible for the costs of repairing the damage. The Brokers challenged the Association's standing to assert such claims because the Association had no contractual privity with the Brokers and did not owe any duty to the Association. The trial court agreed with the Brokers and the Association appealed.

Decision by the Appeals Court:

The Court of Appeals reversed the decision based on its interpretation of Civil Code Section 1368.3, which provides Associations with legal standing to assert claims and file lawsuits in certain types of matters. Prior to this decision, Civil Code Section 1368.3

had not been the basis for suits in the construction defect context against parties other than the developer, general contractor and subcontractors that built the project. The Court interpreted this statute as not having limits as to "whom" was being sued, but rather just limited the types of matters which the Association could pursue independently. The Court held that because the matter sued over involved damage to the common areas which is specifically identified in the statute, that provided standing to the Association against any party even absent contractual privity.

Why is this significant?

Although it does not expand the duty of care of brokers, the decision does eliminate one technical challenge to an Association's attempt to broaden the scope of responsibility for construction defects beyond the conventionally responsible parties such as builders and contractors pursuant to Civil Code Section 1368.3.

Girardi v. San Rafael Homeowners Association (2012) Cal. Unpub. Lexis 1421

Facts:

Association was sued by a member whose home had been burglarized several times resulting in a claimed loss of over $1,000,000.00 in jewelry and a watch. The suit alleged that the Association was negligent in providing security to the development because of its failure to hire a security guard, install security gates, security cameras, and replace broken street lights. Association filed a motion for summary judgment based partially on the lack of evidence as to whether the unidentified burglars were authorized to enter onto Association property. The Association's argument was that if the criminals were authorized to enter into the development, no amount of security to keep criminals out would have prevented the burglary and theft. The Association also argued that it owed the Association no duty to protect Girardi's property from criminal acts of third parties. The only evidence presented by Girardi was an expert opinion by a security expert who opined that had there been appropriate security, the burglaries would not have occurred. The trial court granted the Association's motion for summary judgment.

Decision by the Appeals Court:

The Court affirmed the granting of the Association's motion for summary judgment because Girardi had failed to raise a triable issue of fact as to causation. It was Girardi's burden to establish that the negligence of the Association in failing to provide a certain level of security was a legal cause of the injury to the Girardi's. The Court found that the expert opinion was insufficient to attribute the cause of the loss to the Association's failure to provide a certain level of security measures. If Girardi was unable to determine who the criminals were or when the crimes were committed, there is no factual basis for an opinion that any failure of the Association caused or contributed to the injury caused by the burglaries.

Why is this significant?

Association members who have been injured are always looking for a way to blame the Association for their misfortune and over the years, claims for lack of security have increased substantially against Associations. There have been some cases in which Association's have been held responsible for not taking reasonable steps to protect members in light of potentially serious threats of harm and as such, Boards and managers must take reasonable steps to address security issues, including communications with members concerning the Association's limited resources for security and the need for individual diligence.

Quail Lakes Owners Association v. Kozina (2012) 204 Cal. App. 4th 1132

Facts:

Association filed a petition seeking approval of a CCR amendment by the Superior Court under Civil Code Section 1356 that was not approved by the requisite percentage of homeowners. A member of the Association opposed the petition on the ground that the Association had denied him due process because it had not provided the requisite 15 days notice to the members such that other owners were not given adequate time to file opposition to the petition. The Association argued that the objecting member's due process rights were not violated because he timely filed opposition and because a member does not have standing to assert due process rights of other members. The trial court granted the petition and the member appealed.

Decision by the Appeals Court:

The Court affirmed the trial court's granting of the Association's petition. The Court found that Kozina's due process rights were not violated because he did file an opposition. The Court further found that the Association is the *de facto* representative of its members, and other members could have achieved standing for themselves by moving to vacate the order granting the petition. The Court ruled that due process rights must be asserted by an individual and that one member cannot assert a violation on behalf of other members.

Why is this significant?

While in certain instances one member can assert "claims" against the Association on behalf of other members, violations of due process are not included.

Dinh Ton That v. Alders Maintenance Association (2012) 206 Cal. App. 4th 1419

Facts:

Association was sued by a member who was challenging an election. In addition, the lawsuit alleged that the Association was a "business establishment" that was subject to

the Unfair Competition Law set forth in the Business and Professions Code (Section 17200 et. seq.). This set of laws allows civil penalties to be imposed against violating businesses. The Association sought to have the case dismissed because it was brought beyond the one year statute of limitations and because the Association was not a "business" for purposes of the Unfair Competition Law. The trial court agreed with the Association and dismissed the action. The member appealed.

Decision by the Appeals Court:

The Court affirmed the decision on both grounds asserted by the Association, finding that the statute of limitations had expired and that the Association did not qualify as a business under the Unfair Competition Law because the activity (election) in dispute was not commercial and the Association did participate as a business in the commercial market. The Court ruled that the one year statute of limitations regarding elections starts to run on the date that the disputed election occurred.

Why is this important?

Because it clearly eliminates an unfair business practice claim against Associations, which is probably not covered under the Association's master insurance policy or Directors and Officers policy.

Silk v. Feldman (2012) 208 Cal. App. 4th 547

Facts:

An incumbent director of an Association running for re-election sent a letter to all Association members which accused another candidate (a former director) of engaging in self-dealing while on the Board relative to obtaining parking spaces for her personal use. Specifically the letter alleged that the former director "cut secret deals" to purchase parking spaces without the knowledge of the Association's attorney and other board members. The former director sued the incumbent director for defamation.

The incumbent director claimed that the statements in his letter were protected free speech in relation to an issue of public interest and moved to dismiss the lawsuit as a strategic lawsuit against public participation ("SLAPP"). California has a statute, known as the Anti-SLAPP statute which is designed to protect persons from being sued for activities which are in furtherance of the person's right of petition or free speech under federal or state Constitutions in connection with a public issue, unless the court determines that the party suing has a probability of prevailing on the claim.

Decision by the Appeals Court:

Generally the Court held that the statements in the letter against the former director may qualify for protection as free speech within the meaning of the Anti-SLAPP statute, the court denied the motion to dismiss because the former director introduced compelling

evidence that the allegations were false and as such stood a probability of prevailing on the claim on its merits. The former director (who was an attorney) submitted evidence which completely disproved the allegations against her.

Why is this important?

Because it is not uncommon for Association members to make unfounded allegations against each other or against sitting directors, often accusing them of criminal activities such as embezzlement or fraud, it is important for Boards and managers to be proactive in attempting to prevent this from occurring and to avoid "re-publication" of defamatory material so as to avoid potential financial liabilities for defamatory statements. For example, if the Association's election process allows each candidate to submit a "candidate statement" for distribution by the Association to all members, if the candidate statement submitted by the candidate contains defamatory material and the Association distributes it to the membership, the Association could be found liable as a "republisher" of defamatory material. Although Civil Code Section 1363.03 prohibits censorship of election material by the Association, this does not mean that the Association is obligated to "re-publish" potentially defamatory accusations submitted by one candidate. If such a situation were to arise, the Association should decline to disseminate any candidate materials to its members and require that candidates do that on their own.

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Civil Code Section 1365.05 – The Open Meeting Act: Where Are We Now?

By: David A. Loewenthal, Esq.
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By now, all Association board members should be fully aware that on January 1, 2012, *Civil Code* Section 1363.05, (commonly known as the Open Meeting Act), was amended in such a way that could dramatically change how many board's operate. Specifically, the amendment largely eliminated what had historically been one of the ways that association's board of directors met and conducted Association business: discussions and decisions via emails between directors.

Effective January 1, 2012, a Board of Directors ability to meet, conduct business and make decisions via email has been limited to "emergency situations."

For those of us who have been involved in the homeowner association industry for a number of years, it is well understood that the purpose of the Open Meeting Act was and is to ensure that most board meetings and transactions, are to be conducted transparently in noticed meetings in front of the membership. Specifically, *Civil Code* Section 1363.05(b) states as follows: "Any member of the association may attend meetings of the board of directors of the Association, except when the board adjourns to executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments." Thus, Board meetings and decision making were to be made in open, with the limited exception of those topics appropriately dealt with in an executive session.

That statute further requires the association provide at least four (4) days notice prior to any meeting, other than an emergency or executive session meeting. Commencing on January 1, 2012, even executive session meetings require two (2) days notice to the membership. In addition, the agendas for both a regular meeting and executive session meeting must be provided along with the notice of the meeting.

Despite the established statutory provisions governing how meetings were to be conducted and decisions made, many associations have discussed, conferred, and made decisions in a less formalistic way through the use of email. A typical example would be a non-emergency issue arising between the regular scheduled meetings, where a board member would transmit the issue to the other board members via email and a discussion would ensue. Generally agreements would be reached during these email discussions and action would be taken based upon those discussions. The benefit to the members of the Board was that it allowed for convenient and quick discussions on items without having to have a

formal meeting which would require coordination of a date, time and location. However, the obvious issue with such a decision making process was that it excluded the membership from having notice that such a topic or issue was under consideration. As a result, the members ability to comment regarding the topic or issue, or receiving notice as to what the decision was that was made on that topic or issue would be forthcoming long after the fact.

The purpose of the amendment to the Open Meeting Act in 2012 was to explicitly ensure that transparency existed with respect to board discussion and decision making by dramatically limiting the ability to discuss and make decisions via the use of email, except for emergency situations.

Specifically, amended Section 1363.05(j)(1) states as follows:

"The board of directors shall not take action on any item of business outside of a meeting.

(2)(A) Notwithstanding Section 7211 of the *Corporations Code*, the board of directors shall not conduct a meeting via a series of electronic transmissions, including, but not limited to, electronic mail, except as specified in subparagraph (B).

(B) Electronic transmissions may 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 are filed with the minutes of the meeting of the board. Written consent to conduct an emergency meeting may be transmitted electronically.

(K) As used in this section:

(1) "Item of Business" means any action within the authority of the board, except those actions that the board has validly delegated to any other person or persons, managing agent, officer of the association, or committee of the board comprising less than a majority of the board of directors.

(2) "Meeting" means either of the following:

(A) A congregation of a majority of the members of the board at the same time and place to hear, discuss or deliberate upon any item of business that is within the authority of the board.

(B) A teleconference in which a majority of the members of the board, in different locations, are connected by electronic means, through audio or video or both. A teleconference meeting shall be conducted in a manner that protects the rights of members of the Association and otherwise complies with the requirements of this title. Except for a meeting that will be held solely in executive session, the notice of the teleconference meeting shall identify at least one physical location so that members of the association may attend and at least one member of the board of directors shall be present at that location. Participation of board members in a teleconference meeting constitutes a

presence at the meeting as long as all board members participating in the meeting are able to hear one another and members of the association speaking on matters before the board."

The primary exception to the statutory limit on use of emails in this context is an emergency meeting. However, to prevent Board's from characterizing everything as an emergency, *Civil Code* Section 1363.05(g) sets forth clear requirements in order to hold an emergency meeting. Specifically, this section states as follows: "An emergency meeting of the board may be called by the president of the association, or by any two members of the governing body other than the president, if there are circumstances that could not have been reasonably foreseen which require immediate attention and possible action by the board, and which of necessity makes it impracticable to provide notice as required by this section."

Consequently, only an emergency meeting as defined under Section 1363.05(g) may be conducted electronically pursuant to Section 1363.05(j)(2)(B). Essential in determining whether or not a board can confer and make decisions via the use of email requires the following objective analysis:

1. Is the circumstance actually an emergency? (*Civil Code* Section 1363.05(g)).

2. Is the meeting being called by either the president or two other members of the board of directors? (*Civil Code* Section 1363.05(g)).

3. Are the circumstances constituting the "emergency" such that it could not have been reasonably foreseen?

4. Does the circumstance require immediate attention and possible action by the board and which, by necessity, make it impracticable to provide notice? (*Civil Code* Section 1363.05(g)).

5. Did all of the members unanimously consent in writing to both the fact that the situation was an emergency and to hold the meeting electronically? (*Civil Code* Section 1363.05(j)(2)(B).

In order to be legitimately characterized as an emergency meeting, the above questions must each be answered in the affirmative to authorize an email board meeting and decision making.

It should be noted that emails between less than a majority of a board of directors may not violate of the language of the Open Meeting Act since a meeting cannot be conducted if there is less than a quorum present. However, Directors should avoid attempting to circumvent the intent of the email restrictions by manipulating this quorum requirement through an intentional "chain" of emails that are between directors less than a quorum. It is not worth the risk of having a business decision unwound because of an attempt to manipulate the statutory language.

However, there is no limitation in the statute concerning email transmission of information or documents by management or vendors to directors. Vendors and management can certainly email the

board members with updates and other information without violating the Open Meeting Act since the Act pertains only to board meetings and decisions. Distribution of materials via email that will be on the agenda for discussion at the next open meeting is perfectly appropriate. Similarly, management recommendations to the Board concerning topics to be discussed at a meeting are also not inappropriate. However, the line is crossed if the management email solicits comments or feedback that constitutes a discussion amongst the board or solicits a decision which would trigger a potential violation of the Open Meeting Act unless the parameters for an "emergency" are met.

This "restrictive environment" associated with conducting Association business in transparent open meetings adds to the already significant burden placed on the volunteer director who has a busy life and schedule outside of doing the board's business. A legitimate way for Board's to mitigate these restrictions and resulting burdens is for Board's to take advantage of its power of delegation in favor of executive committees or management, which are not subject to the same requirement of open meetings. *Civil Code* Section 1363.05(k)(1) authorizes the creation of executive committees to conduct certain items of Association business. Specifically, Association business is defined as "any action within the authority of the Board, except those actions that the Board has validly delegated to any other person(s), managing agent, officers of the Association or committee of the Board comprising less than a majority of directors." The actions of properly authorized delegates are not subject to the requirements of the Open Meeting Act.

California *Corporations Code* Section 7212 allows a board of directors to create an executive committee if all of the following terms and conditions are met:

1. That a majority of the board of directors votes to create an executive committee, provided that a quorum is present at the time of creation;

2. Executive committee must consist of at least two (2) members of the board of directors, but less than a quorum;

3. The executive committee exists at the discretion of the board for as long as the board so chooses;

4. The executive committee will have the power of the board of directors, to the extent that the board has delegated such authority through their board resolution, except for those non-delegable duties as set forth under *Corporations Code* Section 7212(a)(1)-(8).

If certain duties are delegated, it is important that the parameters and limitations of such delegation are specifically identified so as to both protect the committee, officers or managing agent and to prevent abuse. Board's should be very circumspect about how far they go in delegating when it is primarily for the sake of convenience, because the fact that duties and decision making have been delegated does not relieve the Board of its legal and fiduciary obligations and generally will not qualify for protection under the Business Judgment Rule.

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BOARD MEMBER'S CONFLICT OF INTEREST
WHEN DOES A BOARD MEMBER CROSS A LINE?

By: David A. Loewenthal, Esq.
Loewenthal, Hillshafer & Carter, LLP

A growing concern within Associations is the issue of potential Board conflicts. Several issues must be evaluated including the board members volunteer status; board members personal or financial interest in a contract; receipt of gifts from vendors and litigation involving a board member against their association.

The volunteer status of a board member is essential to this discussion. Pursuant to *Civil Code* §1365.7 and *Corporations Code* §7231.5(a) there is no monetary liability on the part of, and no cause of action for damages shall arise against a voluntary director or voluntary executive officer of a non-profit corporation based upon alleged failure to discharge their duties as a director or officer if the duties are performed in good faith; performed in a manner that the director or officer believes to be in the best interest of the corporation and performed with such care, including reasonable inquiry, as an ordinarily prudent person in a similar circumstance would use. Volunteer is defined as rendering of services without compensation and compensation means remuneration whether by way of salary, fee, or other consideration for services rendered. It should be noted that payment of per diem, mileage or other reimbursement expenses to a director or officer does not affect that person's status as a volunteer. As long as volunteer board members conduct themselves in this manner, they may avoid any personal liability pursuant to the Business Judgment Rule.

However, these statutory protections fail when a director changes from a voluntary status to one wherein the board member receives compensation. Such compensation can occur in several forms including, but not limited to, receiving monetary or nonmonetary payments from a vendor who is performing or wishes to perform services on behalf of the association for compensation; a bribe from a third party to obtain favor from the volunteer board member in making decisions; or when the volunteer director has an interest in a company that the association is considering contracting with which would allow the board member to receive direct financial compensation.

Examples of non-monetary compensation include an association bidding vendor who provides services to a board member(s) below market cost; a vendor providing a board member with a vacation or other benefits.

Pursuant to *Corporations Code* §5233, a self dealing transaction is one wherein the corporation is a party and wherein one or more of its directors has a material financial interest. Such transactions are considered to be self dealing unless the corporation entered into the transaction for its own benefit; the transaction was fair and reasonable as to the corporation; prior to consummating the transaction the board authorized the transaction by a good faith vote of a majority of the directors without counting the vote of the interested director(s); that the remainder of the board had knowledge of the material facts concerning the transaction and the directors interest; prior to approving the transaction, the board in good faith determined after reasonable investigation that the corporation could not have obtained a more advantageous arrangement with reasonable efforts under the circumstances.

In order to avoid potential liability for board members and having the contract deemed voidable, the interested board member must: (1) disclose the potential conflict to the entire board; (2) recuse himself from both participating in the contract negotiation discussion and vote; (3) the rest of the board should ensure that the selection of the contract is pursuant to a fair and reasonable process.

Where a board member may be in a conflict of interest because of a potential of entering into a contract with an entity that the board member or his family has a financial interest or as a result of a concern that the topic is one that would otherwise be the basis for an executive session meeting wherein there is a substantial concern that the board member will breach the confidentiality of such executive session meeting, the board may wish to create an executive committee pursuant to *Corporations Code* §7212. This would allow the board of directors to delegate certain issues to this executive session committee and avoid having the conflicted board member participate. This is especially important where the board member(s) is in litigation with the association.

In addition, in those instances where a board member is in litigation with the association, the directors absolute right to inspect all of the records of the association pursuant to *Corporations Code* §8334 can be limited.

The Court in *Tritek Telecom, Inc. v. Superior Court*, stated that although corporate directors have an absolute right to inspect and copy all corporate books, records and documents (*Corporations Code* §1602), including documents protected by the attorney-client privilege, a corporate director does not have the right to access documents covered by the attorney-client privilege that were generated in the defense of a suit for damages that the director filed against the corporation. Corporate directors owe a fiduciary duty of care to the corporation and its shareholders and must serve in good faith, in a manner such director believes to be in the best interest of the corporation and its shareholders. Although it is generally presumed that the directors of a corporation are acting in good faith, a court is required to defer to the business judgment only of disinterested directors. A director is independent when he is in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences. A court may limit a directors inspection rights

because the directors loyalties are divided and documents obtained by a director in his or her capacity as a director could be used to advance the director's personal interest in obtaining damages against the corporation."

As such, directors are largely protected under both the Civil and Corporate Codes as long as those decisions are made pursuant to the Business Judgment Rule, the director performs such actions as a volunteer, i.e., without compensation, and does not have a conflict of interest with the association.

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HOW THE FIRST AMENDMENT IMPACTS WHAT IS SAID AT AN HOA MEETING: THE ANTI-SLAPP STATUTE

By: Kevin P. Carter

It is almost commonplace at Association or Board of Director meetings for tempers to flare or emotions to run high, leading to very animated exchanges between members and members or members and directors. Some of these exchanges get downright nasty and personal, with all kinds of accusations being made during these emotionally charged meetings. For example:

Scenario 1. At open Association meetings, an angry member who doesn't want to pay an increase in assessments or perform deferred maintenance at substantial costs necessitating a special assessment repeatedly accuses the Association and Board of Directors of being "crooks" and embezzling Association funds. Based on these accusations that a crime was committed, the Association and Directors sue the accusing member for defamation of character.Sound familiar?

Scenario 2. An Association denies a member's architectural application and a lengthy dispute ensues. During the dispute, the homeowner, who just happens to be an attorney, accuses the Board of applying the Association's architectural guidelines in a biased and discriminatory way. The Association's attorney writes a letter to the owner, accusing the owner of engaging in "reprehensible" conduct and violating State Bar rules by failing to disclose the fact that he is an attorney by trade. The Owner sues the Association for libel. This is a true case...we don't make these up!

When an association, manager, or homeowner becomes a defendant in a lawsuit, even a purely frivolous action can take painfully long to resolve. California law gives few, if any, avenues for prompt judicial review. However, there is a powerful procedural tool that is not often used or fully understood in the context of free speech disputes with HOA's. In appropriate instances, the anti-SLAPP statute (*Code of Civil Procedure* §425.16) can result in a nearly immediate dismissal of a lawsuit and mandatory reimbursement of attorneys fees and costs to the prevailing party. It is only in the last few years that California Courts have begun considering the application of this important "shield" in the context of community association law.

The California legislature enacted the anti-SLAPP statute (SLAPP = Strategic Litigation Against Public Participation) to provide a quick and efficient remedy to terminate meritless lawsuits brought to "chill" the exercise of First Amendment rights very early on. The statute is designed to protect "acts in furtherance of a person's right of petition or free speech," which includes the right to make statements in a "public forum" and in connection with an issue of "public interest." If a person is sued for statements made in connection with a government proceeding, for example, the statements automatically qualify as protected "acts". Because association meetings are considered "public forums," the statute can sometimes offer relief to defendants in community association lawsuits.

In **Scenario No. 1** above, if the court agrees that the accusatory statements were made at open board meetings ("public forum") and would be of concern to the entire membership ("public interest"), then the burden is placed on the Association to immediately prove that no funds were in fact embezzled. If the Association cannot immediately provide evidence that embezzlement did not occur, the defamation suit will be dismissed and the Association will be ordered to pay the Owner's attorney's fees and costs.Instead of answering the complaint in the lawsuit and beginning the long trek towards trial, the Association files an anti-SLAPP motion.

In **Scenario No. 2** above, because even private letters such as the one from the HOA's attorney can be protected by the anti-SLAPP statute if they relate to an issue of interest to all members of the Association, a California court could find that the letters written by the Association's attorney constitute protected speech. If the court makes that finding, the burden then immediately shifts to the owner to prove that the statements contained in the offending letters are truly defamatory (damaging to reputation) and more than mere hyperbole or figurative statements. Unless the owner can show a probability of winning at time of trial, a court may immediately dismiss the lawsuit and allow the Association to recover its attorney's fees and costs.

Under normal circumstances, a Plaintiff has ample time and opportunity to gather evidence to prove his case at trial through investigation, depositions, written discovery, and other methods. The anti-SLAPP statute greatly accelerates this process and forces the Plaintiff to gather enough evidence to prove his case within two months of the initial service of the lawsuit. Thus, cases that lack merit can be adjudicated in a matter of months as opposed to years.

California courts have held that a community association is considered a "quasi-government entity" and functions "as a second municipal government,"[1] meeting the "public forum" requirement of the statute. Two California cases, decided by the same court of appeal, extend this protection to the community association realm. In *Ruiz v. Harbor View Community Association*[i], it was held that even statements in private letters and conversations between a member and a Board of Directors may be protected. The *Ruiz* case involved a lengthy dispute over the rejection of an architectural submission that included claims of discriminatory or unequal application of the CC&R's and an alleged conspiracy, resulting in a defamation lawsuit against the Association. Plaintiff's colorful allegations took the Association's conduct beyond mere "mundane communications" to become a matter of public interest (interest to all members of the Association).

Later, the same Court decided *Turner v. Vista Pointe Ridge Homeowners Association*[ii], which limited applicability of the anti-SLAPP statute to ensure that it could not be used to defeat all community association lawsuits. Because *Turner* involved only a "mundane communication (rejection of architectural application) between a member and his Association," it did not involve an 'issue of public interest,' and the lawsuit was allowed to proceed. However, if *Turner* involved allegations of preferential treatment, or uneven application of governing documents, it may have resulted in a dismissal of the lawsuit as in the *Ruiz* case.

Our office has just successfully extended the anti-SLAPP protection to apply to repeated complaints by an association member against another member. In our case, the defendant was sued by the plaintiff for making numerous complaints to the Association and the City against the plaintiff over the course of several years. The complaining defendant was sued for, among other things, intentional and negligent infliction of emotional distress, invasion of privacy, and other serious torts.

Because the lawsuit alleged a fanciful story of conspiracies and malicious plots to force Plaintiff out of the community, the Plaintiff's attorney unknowingly helped to ensure a finding that the homeowner complaints related to "a matter of public interest" that was protected by the anti-SLAPP statute. Thus, in the anti-SLAPP context, the exaggerated and colorful language often found in civil complaints can actually be turned around and used to a defendant's benefit.

Because our client's complaints and statements at board meetings and in letters were protected by the anti-SLAPP statute, and because the Plaintiff could not provide admissible evidence to prove the truth of his claims , the Court dismissed the action and awarded attorney's fees to our client less than two months after the lawsuit was initially served.

As there is still no appellate case that specifically deals with the anti-SLAPP statute in the context of a homeowner suing another homeowner, this area of law will continue to evolve. However, as it now stands, any community association lawsuit should be immediately analyzed to see if the protections offered by the anti-SLAPP statute can result in a virtually immediate dismissal and reimbursement of attorney's fees.

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[i] *Ruiz v. Harbor View Community Association* (2006) 134 Cal. App. 4th 1456

[ii] *Turner v. Vista Pointe Ridge Homeowners Association* (2009) 180 Cal. App. 4th 676