

SOUTH COAST HOMEOWNERS ASSOCIATION

P. O. BOX 1052, GOLETA, CALIFORNIA 93116

(805) 964-7806

gartzke@silcom.com

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Michael J. Gartzke, CPA, Editor

IN THIS ISSUE

Upcoming Meetings

2005 Condominium Bluebooks now in Stock

Community Mediation of Santa Barbara County

After Your Reserve Study is Done – How to Defend A Fee Increase

Board of Directors Meetings – When? Why? How?

Community Association Helps a Member in Need

Newsletter Sponsors

UPCOMING SOUTH COAST MEETINGS

Watch for a separate mailing and email for our spring meeting. It is still being planned at this time, hopefully during May.

Thursday, July 21 – Please save this date for our annual summer seminar with Beth Grimm, Attorney at Law from Pleasant Hill, CA. We work with Beth to define legal topics of interest. If you have any recommendations, please email Mike Gartzke at the address noted above.

2005 CONDOMINIUM BLUEBOOKS NOW IN STOCK

The 2005 edition of the *Condominium Bluebook* is now in stock. All associations and professional members that renewed for 2005 should have received their copy by now. We have approximately 20 additional copies available for those who would like additional copies. Some associations like to provide a copy to each board member. Due to a price increase from the publisher, we have had to adjust our price slightly, to \$17/each, postpaid. Simply send your check to our P. O. Box address shown on page 1 to order additional copies, if you need them.

COMMUNITY MEDIATION OF SANTA BARBARA COUNTY

Editor's Note: This press release comes courtesy of Community Mediation of Santa Barbara County – Recent expansion of the Davis-Stirling Act requires associations to adopt dispute resolution procedures and encourages the “maximum use of available local dispute resolution programs”. Here is one such program. Contact them directly to see if they can offer services that your association can use.

Did you know that according to Section 1363.810-1363.850 of the California Civil Code, homeowners associations can be responsible for “involving a neutral third party, including low-cost mediation programs,” to resolve disputes between an association and its member(s). **Community Mediation of Santa Barbara County** would like to present South Coast Homeowners Association (South Coast HOA) with an inexpensive, appropriate method for solving such disputes.

Often times, as a result of unfortunate circumstances, conflicts can arise between an association and its member(s). Typically, formal court proceedings are perceived as the first route to resolving such disputes; however, present legislation requires that associations first seek out low-cost mediation to resolve disagreements. **Community Mediation of Santa Barbara County** offers an excellent means to resolving differences in an affordable, satisfying, and constructive manner, without the burdens of the judicial process.

The most essential benefits from using **Community Mediation of Santa Barbara County** are that it will save litigation fees and help individuals to discover resources and solutions that meet the needs of *all* parties. More specifically, our mediation services are designed for the South Coast HOA and its members.

If anyone is interested in acquiring more information about mediation, that can resolve disputes and improve relations among an association and its members, please contact **Community Mediation of Santa Barbara County**.

Community Mediation
330 East Carrillo Street
Santa Barbara, CA 93101
(805) 963-6765

AFTER YOUR RESERVE STUDY IS DONE – HOW TO DEFEND A FEE INCREASE

By Chris Andrews Stone Mountain Corporation – Santa Barbara

Suppose you've just received your reserve study indicating that a reserve funding increase will be necessary. Without an increase, it appears that your association will *not* be able to properly maintain the association's common assets over time.

Most associations are legally obligated by their CC&R's to properly maintain their property. Furthermore, California Civil Code § 1366(a) states "*... the association shall levy regular and special assessments sufficient to perform its obligations under the governing documents and this title.*"

Your board of directors has reviewed the reserve study and some or all of the directors agree with the funding increase. The board also realizes that the increase in reserve funding will require an increase in regular monthly assessments or even a special assessment.

From past experience, you know a regular monthly assessment increase will stir up resistance from a few vocal association members who don't like change of any sort – especially the type of change that requires them to spend more money! And what if some of these people are *on your board of directors*? On a five-person board, if you have a majority of three board members opposed to any assessment increase and only two fiscally responsible ones, you stand little chance of passing the reserve funding increase.

Your task – assuming you're one of the fiscally responsible board members – will be to convince the dissenting board members that a reserve funding increase is the right thing to do.

In addition, you'll also need a majority vote of your membership – per California Civil Code §1366 – if the resulting regular assessment increase is more than 20% above the preceding fiscal year's regular assessments or if your proposed special assessment exceeds 5% of the budgeted gross assessments for the fiscal year. This means you'll have to present your argument not only to your board of directors, but also to your membership. How can you do so effectively?

Following are several tips on how to successfully get an assessment increase approved:

First, you must break the news gently. Association members are most receptive to hearing that "*member assessments must be increased due to factors out of our control or due to new information not available to us previously.*" There is really no rational argument against these reasons. For example, significant increases in worker's compensation insurance in recent years have caused dramatic increases in roofing, painting, and paving contractor's prices.

Members are least receptive to assessment increases due to incompetence by board members. Common examples might be board member negligence that caused ultimate expenses to be much higher than they should have been if the board had been diligently maintaining those items. For example, not painting trim & siding caused it to become prone

to dry-rot and warping. Or not sealcoating asphalt frequently enough so that potholes formed prematurely.

Before even uttering the words “assessment increase,” build a strong case for the assessment increase by mentioning some or all of the following where applicable:

- ✓ The costs to maintain association property have increased significantly.
- ✓ Some new reserve expenses have become apparent since the last budget and the last reserve study were prepared, for example, slab leaks, fumigation, etc. It is easiest to tie an increase in funding to forthcoming capital replacement projects that people agree are necessary.
- ✓ The association never had a proper reserve study done before and now that one has been prepared, a comprehensive inventory of capital assets (reserve components) was made with *up-to-date* replacement costs for those items.
- ✓ There have been many planned and unplanned reserve expenses in recent years. Compile a long itemized list of these expenses and show how they have exceeded your recent reserve income and depleted available reserves for future expenses.
- ✓ The percent funded estimate provided by the reserve study indicates that in past years, the association has not set aside sufficient funds for these items for each year they have depreciated in value.
- ✓ If the association does not maintain its property, the real estate values of each home may be adversely impacted. Ironically, in a poorly-maintained association, the net reduction in real estate values often far exceeds the amount of the proposed increase in assessments.

After you’ve presented the foregoing funding issues, then kindly explain that a reserve funding increase or special assessment will be needed. Upon hearing the magnitude of the proposed funding increase, there will inevitably be some members who voice strong objections.

Following are several typical objections and how to effectively respond to them:

➤ ***“I can’t afford the increase.”***

RESPONSE: Remind them that the association is a business and it has an obligation to maintain its common assets for the good of the community. It is not fair for a handful of individuals claiming hardship to hold hostage the entire association and the property values belonging to all its members.

Although the association is usually run by volunteer board members, it is not a socialist organization. The cold reality is that nobody has a right to live in the association if they are no longer able to uphold their responsibility to share in the costs as described in the governing documents to which they agreed during escrow. If neighbors wish to be compassionate to a neighbor who claims hardship, they should personally arrange to do so outside of the association budget.

Once the regular assessment increase or special assessment is passed, it is remarkable

to see how resourceful people actually can be in spite of their claims of hardship. With large increases in home equity, some tap into a home equity line of credit. Others with an extra bedroom in their unit decide to rent it out to a tenant to bring in extra money.

- ***“As a senior citizen, I won’t be here in 15 years when the roof needs replacement and in 10 years when the streets need repaving. Why should I have to pay for those costs now?”***

RESPONSE: Senior citizens are not the only ones who pose this question. Young people who consider a condo as a starter home and don’t plan on living there for more than several years ask the same question. The problem with the “short-timer” logic is that these people are benefiting from the use of the roofs, streets, pool, etc. while they’re living in the association. If the roof is a 30-year roof and they live in the association for 5 years, then the value of the benefit they derive from the roof during their stay at the association is 5/30th or 1/6th of the cost of the roof replacement. It is indeed fair that they pay for their incremental use of the roof, streets, pool, etc. even though they may not be living in the association in the future when the actual replacement occurs. Additionally, remind new residents that they are currently enjoying capital improvements paid for by other members before they moved in.

Another argument for the “short-timers” who expect to sell their unit in the next few years is that the future market value of their residence may indeed increase significantly more than the net increases in assessments if the association is well-maintained via those increases.

- ***“Why don’t we just special assess for future capital expenditures like roofing, paving, etc***

RESPONSE: The primary drawback to the special assessment method of funding is that your board may have trouble collecting all of the necessary money from all owners when large reserve expenses occur. Suppose some owners cannot come up with \$10,000 for a roofing special assessment when your association desperately needs a new roof? It is better to collect the money gradually every year so your association has those funds when they’re needed.

Furthermore, using the roofing example above, if the association does not have sufficient reserve funds to replace their roofing immediately when needed, the eventual cost to do so may increase dramatically. While the board has to tiptoe through the painful process of levying a special assessment, more roof leaks and costly interior damage may occur to residential property inside the units. And, during that time, the scourge of most associations – dry rot and mold – have a chance to become established. Does anyone want a mold lawsuit? In short, having to defer maintenance even further while levying a special assessment is poor planning.

Another drawback of the special assessment funding method is that it unfairly penalizes those homeowners who happen to be living in the association at the time of the special assessment. A reserve study calculates an annual reserve funding amount which

ensures that everyone pays equally for the depreciation that occurs while they live in the association. (Depreciation represents, in dollars, how much of an asset such as roofing, streets, etc. is “used up” over a period of time).

➤ ***“The fees are already too high!”***

RESPONSE: Determine how much are member assessments in other associations in your area with similar amenities and share this with your membership. They may be surprised at how high other association assessments are. Explain how the reserve study works and show them the list of reserve components that the association is obligated to maintain.

Ask the dissenting members if they don’t want to raise assessments to the appropriate level, *which of those items in the reserve study do they want the association to cease to maintain.* Suppose the recommended reserve funding increase is \$10,000 per year more than last year, ask them to find a \$10,000 per year item in the reserve component list (or a \$100,000 item occurring every 10 years) that they deem to be “non-essential” and if they really want to vote to cease to maintain it. Calmly ask them if they don’t mind being documented in the minutes as having taken that position.

If the foregoing rational discussion does not overcome objections, it is time to escalate the debate:

- If the objections come from board members, inform them that California case law (*Raven’s Cove Townhomes vs. Knuppe Development, 1981*) has held that board members can be individually liable for failing to properly fund a maintenance reserve account. See the *SCHA Sept 2004 Newsletter* for more on this case and refer to: <http://davis-stirling.com/ds/cases/ravenscove.htm>
- If the objections come from board members, inform them that their vote against prudent reserve funding will be documented in the minutes. Then calmly ask them again if they still want to vote against it.
- If your board is in agreement on the assessment increase, but several association members vehemently oppose it, inform them that the board members have been elected to act as fiduciaries on behalf of the association and they will do what they deem to be best for the association. In other words, members essentially don’t have much say in the matter in most cases

Depending on the wording of your CC&R’s, association members may have the right to force the board to call a special meeting of the membership to discuss the issue. They may even try to force a membership-wide vote on the assessment increase, but in most CC&R’s, the board has the ultimate say in whether or not to bring an issue to the membership for vote, unless, of course, the assessment increase exceeds the amount that the board is authorized. Consult with your attorney for further clarification.

If the Board agrees to a vote of the membership on the assessment increase and the increase is rejected by popular vote, then the membership, rather than the board, may be

seen as complicit in not funding reserves properly. To protect yourself and your fiscally-prudent allies, keep a tally of members who voted against and those who voted for the proposed reserve funding increase and document that in your minutes.

- Strive to get as many members as you can on email and use that medium to campaign for the assessment increase. Make sure that you send equivalent copies of those emails to your members who don't have email so everyone has equal access to information. In the end, persistence coupled with logic and reason should prevail.

After some rigorous lobbying for an assessment increase on your part, some members who had opposed the increase will capitulate and you will have won more votes. Or they'll become even more irrational, at which point you must realize that you'll never convince them. Conserve your energy and focus your efforts on the remaining rational individuals.

Indeed, some of the foregoing suggestions may seem like playing hardball against the opposition, but you should remind yourself that the opposition is playing hardball against the association's fiduciary duty to maintain its property.

BOARD OF DIRECTORS MEETINGS - WHEN? WHY? HOW? OH, AND WHAT ABOUT THE MINUTES?

By Karen A. Mehl, Esq.

The meeting is scheduled for the Board of Directors. They have the duty of managing the affairs of the community association. Do the members have to be notified about the meeting? Are the members allowed to attend? Do you have to let them speak? As a general rule, the answer to these questions is yes. There are three places where a Board of Directors should look to determine the answers to those questions. First, everyone should always check the Association's governing documents (CC&Rs and bylaws) for any requirements that they may have concerning meetings of the Board of Directors. Second, the California Corporations Code provides some requirements for holding Board of Directors meetings. Third and most importantly, the Common Interest Development Open Meetings Act provides the basic requirements for holding Board of Directors meetings for community associations.

The Association's governing documents often contain important information about meetings of the Board of Directors. These requirements are usually found in the Bylaws and will govern the Board's actions unless the requirements of California law are more strict. For example, many associations' bylaws require that the Board of Directors meet at least quarterly. The bylaws usually state how many Directors must be present to constitute a quorum. Some bylaws state where the meeting must be held. Some bylaws actually state the dates and times when regular meetings of the Board must be held. The Board of Directors has an obligation to follow these requirements unless California law is more strict.

California Corporations Code Section 7211 also provides important information about Board of Directors meetings. It discusses giving notice to the Directors about meetings, Boards

taking action without a meeting, who can call a meeting of the Board of Directors and other important information. However, Boards should be careful about relying on Section 7211 because many of its provisions are more liberal than the Open Meeting Act. If the Open Meeting Act is more strict than the Corporation Code, then the terms of the Open Meeting Act apply.

The Common Interest Development Open Meetings Act is the primary law governing meetings of Boards of Directors of community associations. It defines a meeting of the Board as, “[A]ny 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 scheduled to be heard by the board, except those matters that may be discussed in executive session.” Therefore, any time that a majority of the board meets for the purpose of discussing association business, that meeting is subject to the Open Meeting Act. Some people have used the language of this section to argue that if the Board meets to discuss association business but does not prepare an agenda, then the Board is not required to allow the members to attend the meeting. I disagree. The intent of the law is to require Boards to permit members of the association to attend Board meetings if association business is to be discussed, unless the topic of the meeting is one where the Board may meet in executive session.

The Open Meeting Act states that members of the association are entitled to attend meetings of the Board of Directors unless the Board is meeting in executive session. A Board may only meet in executive session to discuss four things: litigation, contracts with third parties, member discipline, and personnel matters. If the Board is going to discuss disciplining a member, that member has the right to be present at the meeting.

Members of the Association are entitled to at least 4 days' notice of Board of Directors meetings, unless the Directors are holding an emergency meeting, according to the Open Meeting Act. The meeting notice must include the date, time and place of the meeting. You can give members of the association notice by publishing it in the newsletter, by displaying the notice in a prominent place at the common area, by mailing the notice or by hand delivering the notice to each home in the association. The Open Meeting Act does not require the Board to mail notices of meetings to owners who do not live in the development if the Board is providing notice by posting it in the common area or by delivering a notice to each home in the development. There are different notice requirements for Directors, which are contained in Corporations Code Section 7211.

The Open Meeting Act defines an emergency as, “[C]ircumstances that could not have been reasonably foreseen which require immediate attention and possible action by the board, and which of necessity make it impracticable to provide the notice required by this section.” There are two parts to this test. One, that the situation could not have been reasonably foreseen; and Two, that the situation requires immediate action by the Board. Whenever possible, the members should receive as much notice about Board meetings as possible. If the Board is meeting in emergency session, it should give the membership some sort of notice of the meeting, even if it is less than the four days' notice required by statute.

Members must be permitted to speak at meetings of the Board of Directors, unless the Board is meeting in executive session. The Board must allocate a reasonable period of time for the members to address the Board of Directors at their meetings. Most Boards of Directors hold a public comment period either before or after the other items on the Board's agenda. This

provision of the Open Meeting Act does not mean that members can enter into discussion or debate along with the Directors on each item of the Directors' agenda. The Board of Directors may want to permit this activity, but it is not required to do so. Rather, the Open Meeting Act simply requires the Board to set aside time to listen to the members.

Minutes should be taken at each meeting of the Board of Directors. Minutes of executive sessions of the Board should be stored in a separate place from minutes of open meetings of the Board. However, the Board meeting minute book should note the date, time and place of any executive sessions as well as the general subject discussed. The minutes should note who attended the meeting. The meeting minutes should simply be a summary of actions taken by the Board of Directors. They should include at least summaries of reports from officers and committees. The minutes should contain the exact wording of any motions made and note whether or not the motion passed. If a director or the meeting chair requests a roll call vote, the directors who voted in favor and against the motion should be noted. Minutes of Board meetings should never contain any of the debate or discussion that takes place during the meeting. At best, summaries of debate can perpetuate hard feelings. At worst, they can form the basis of libel and slander suits. The Open Meeting Act requires that draft minutes of all meetings, except executive session meetings, be made available to the members within 30 days of the meeting.

One of the biggest complaints that I hear from members of associations is that the Board of Directors acts in secret. Members wonder whether their interests are being protected when they cannot obtain information about Board actions. Most Directors work hard for their associations and make every effort to act in the best interest of all of the members. Following the rules established in the Common Interest Development Open Meeting Act will assist your members in seeing that this is true.

COMMUNITY ASSOCIATION HELPS A MEMBER IN NEED

The December 10, 2004 edition of the *Santa Barbara News-Press* noted that a fire on Thanksgiving displaced a family living at Casitas Village HOA in Carpinteria. The association's insurance is covering the cost of reconstruction but does not cover personal property and contents within the unit and the family had no coverage of their own. The association's President, Michelle Wilson, organized a fundraising drive with a local supermarket and an account was set up at a local bank to collect community donations. By Christmas, \$1,500 had been raised to help the family. The story was picked up in the national, Community Association's Institute's *Common Ground* magazine in the March-April issue. At the association's annual meeting earlier this month, it was reported that reconstruction was nearly complete and the family would be able to move back in soon. The association is also inspecting its range/roof vents (the cause of the fire) and will take steps to bring them up to current building codes.

Your Editor's Note: Thanks to all for your patience during my "crunch" time. I appreciate the contributions of others to the newsletter, especially during my "busy" time. Articles are welcomed anytime and help to create a diverse, interesting newsletter. If you have a newsletter article or idea, please do not hesitate to contact me.

SOUTH COAST NEWSLETTER SPONSORS

ACCOUNTANTS

Cagianut and Company, CPAs
Gayle Cagianut, CPA
P. O. Box 1047
Oak View, CA 93022
805-649-4630

Michael J. Gartzke, CPA
5669 Calle Real #A
Goleta, CA 93117
805-964-7806

Denise LeBlanc, CPA
P. O. Box 2040
Santa Maria, CA 93457
805-598-6737

ATTORNEYS

Allen & Kimbell, LLP
Steven K. McGuire
317 E. Carrillo St.
Santa Barbara, CA 93101
805-963-8611

Beth A. Grimm
www.californiacondoguru.com
3478 Buskirk #1000
Pleasant Hill, CA 94523
925-746-7177

James H. Smith
Grokenberger, Smith & Courtney
1004 Santa Barbara St.
Santa Barbara, CA 93101
805-965-7746

David A. Loewenthal
Loewenthal, Hillshafer & Rosen
15260 Ventura Blvd #1400
Sherman Oaks, CA 91403
866-474-5529

FINANCIAL SERVICES

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805-683-4944

Ken Partch & Company ('04)
Investment Management
3433 State Street, Suite C
Santa Barbara, CA 93105
805-563-7699

ASSOCIATION MANAGEMENT

Sandra G. Foehl, CCAM
P. O. Box 8152
Goleta, CA 93116
805-968-3435

Santa Barbara Resources, Inc.
Phyllis Ventura
P. O. Box 6646
Santa Barbara, CA 93160
805-964-1409

Spectrum Property Services
Cheri Conti
1259 Callens Rd #A
Ventura, CA 93003
805-642-6160

Town'n Country Property Management
Connie Burns
5669 Calle Real
Goleta, CA 93117
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Management Services (Cont)

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Gordon Goetz, CCAM
805-937-7278

Good Management Co.
Michelle Armstrong
1 N. Calle Cesar Chavez #230A
Santa Barbara, CA 93103
805-564-1400

RESERVE STUDIES

Stone Mountain Corporation
Chris Andrews
P. O. Box 1369
Goleta, CA 93116
805-681-1575 www.stonemountaincorp.com

The Helsing Group
Roy Helsing
2000 Crow Canyon Place, Suite 420
San Ramon, CA 94583
800-443-5746

INSURANCE

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5775-A Dawson
Goleta, CA 93117
805-964-9810

ROOFING CONTRACTOR

Derrick's Roofing
Frank Derrick
650 Ward Drive, Suite F
Santa Barbara, CA 93111
805-681-9954

**HOMEOWNER ASSOCIATION
ORGANIZATIONS**

Community Associations Institute –
Channel Islands Chapter
P. O. Box 3575
Ventura, CA 93006
805-658-1438
www.cai-channelislands.org

Executive Council of Homeowners
ECHO
1602 The Alameda #101
San Jose, CA 95126
408-297-3246
www.echo-ca.org

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