May 1 - PROGRAM – SOUTHCOAST HOA - BETH GRIMM, SPEAKER, *www.californiacondoguru.com. – 2 hr program. AGENDA: 20-30 minutes DISCLOSURE INDEX/EMAIL NOTICE ... 30 minutes enforcement ... break ... LAST 50 min to hour - 15-20 minutes lease limitation update ... and 30 minutes Q & A at end.*

NEW DISCLOSURE INDEX AND EMAIL NOTICE OF FINANCIAL INFO

Discuss Index, when to send it out, and "Consent" Form

1363.005. DISCLOSURE INDEX. The association shall, at the request of any member, distribute to the member, in the manner described in Section 1350.7, the following Disclosure Documents Index:

Disclosure Documents Index

ITEM	DESCRIPTION	REFERENCE CODE
1	Assessment and Reserve Funding Disclosure Summary (form)	Civil Code Sec. 1365.2.5
2	Pro Forma Operating Budget or Pro Forma Operating Budget Summary	Civil Code Sec. 1365(a)
3	Assessment Collection Policy	Civil Code Sec. 1365(e) and 1367.1(a)
4	Notice/Assessments and Foreclosure (form)	Civil Code Sec. 1365.1
5	Insurance Coverage Summary	Civil Code Sec. 1365(f)
6	Board Minutes Access	Civil Code Sec. 1363.05(e)
7	Alternative Dispute Resolution (ADR) Rights (summary)	Civil Code Sec. 1369.590
8	Internal Dispute Resolution (IDR) Rights (summary)	Civil Code Sec. 1363.850
9	Architectural Changes Notice	Civil Code Sec.1378(c)
10	Secondary Address Notification Request	Civil Code Sec. 1367.1(k)
11	Monetary Penalties Schedule	Civil Code Sec. 1363(g)
12	Reserve Funding Plan (summary)	Civil Code Sec. 1365(b)
13	Review of Financial Statement	Civil Code Sec. 1365(c)
14	Annual Update of Reserve Study	Civil Code Sec. 1365(a)

[Note, the below form should be used only with approval of association legal counsel as there are potential legal ramifications that should be explained to the Association.]

EMAIL CONSENT FORM - [Per Section 1350.7 and 1363.005 of the Civil Code]

To Members: by signing this form, you will be saving the association printing and mailing costs. At the same time, you will be agreeing to accept email notices instead of mailed notices for items listed below which would otherwise be provided by mail. It is up to you to settle with other owners (if any) of your Unit/Lot on **one email address** for communications related to your property.

Before signing this form, we wish to inform you that:

1. You retain the right to request to have the documents transmitted in paper or other non-electronic form at any time; and
2. The consent applies only to all of the items listed below; and
3. In order to withdraw consent or change the email address on file, you must submit to the Secretary of the Corporation a written request to revoke consent or change the email address.

I, the undersigned owner, hereby give consent to ____[ASSOCIATION NAME] _____to provide notices of the following items via email as an alternative to mail notices (I understand that all numbered references are to the Civil Code):

Assessment and Reserve Funding Disclosure Summary (form (1365.2.5), Pro Forma Operating Budget or Pro Forma Operating Budget Summary (1365(a)), Assessment Collection Policy (1365(e)), Statutory "Notice/Assessments and Foreclosure" (1365.1 form), Insurance Coverage Summary (1365(f)), Board Minutes Access (1363.05), Alternative Dispute Resolution (ADR) Rights (summary) (1369.590), Internal Dispute Resolution (IDR) Rights (summary) (1363.850), Architectural Procedures and Processes (1378(c)), Secondary Address Notification Request (1367.1), Monetary Penalties Schedule (1363(g)), Reserve Funding Plan (or summary)(1365.5(b)), Review of Financial Statement (1365(c)), Annual Update of Reserve Study, Disclosure Index (1365(a)).
[BOARD – MAY WANT TO CONSIDER ADDING MEETING & ASSESSMENT NOTICES ETC. BUT NOTE THEY ARE NOT COV'D BY THE NEW STATUTE AND SO THAT COULD POSE ISSUES – be sure to discuss with your legal counsel.]

I certify that I am an owner of the property described below and that all owners of the property at the address listed below have authorized me to provide this written consent form and the email address for communications on our/their behalf, (email address to use for our Unit/Lot).

_____
[TYPE OR PRINT EMAIL ADDRESS FOR BOARD TO USE – WRITE CLEARLY PLEASE]

This consent shall remain in effect until revoked in writing. I understand that my signature must be authentic, either by returning an original signed document to the association or by affixing an authenticated digital signature to it and returning it by email.

_____ Dated:_____
[Owner Signature]

Printed Name:_____

Property Address:_____ City/State/Zip:_____

**

1350.7. DELIVERY OF DOCUMENTS; APPROVED METHODS. (see next page)

(a) This section applies to delivery of a document **to the extent the section is made applicable by another provision of this title.** **(Note Confusing language.)**

(b) A document shall be delivered by one or more of the following methods:

(1) …

(2) …

(3) E-mail, facsimile, or other electronic means, if the recipient has agreed to that method of delivery. The agreement obtained by the association shall be consistent with the conditions for obtaining consumer consent described in Section 20 of the Corporations Code. If a document is delivered by electronic means, delivery is complete at the time of transmission.

…

** BREAK …

EMAIL ISSUES:

Good News: Easy, Fast, Convenient, Saves Paper, Saves Costs

Bad News: Another "list to keep", lost communications/arrival issues - email "blasts" effective maybe 80%, invites response

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ENFORCEMENT [Note that PRIMERs are available on the website covering all aspects of enforcement from the most basic to complicated issues like parking and towing and neighbor to neighbor disputes. I will hit the highlights at the program for making things easier.]

Why Enforce?

WHAT HAPPENS IF YOU DON'T?

Why adopt Rules? (To lead the "sheep" and give them something understandable.)

DETERENT..."BOUNDARIES" ... CONSISTENCY (as to OWNERS and for BOARDS)

How Do You Get The Owners "Buy-In?" Acceptance? Support?

APPROACH – ENFORCE VS. CONSENSUS .... Title: "RULES" VS. POLICY

How Does the Board Avoid Egg on Face?
Authority – Be On Target, Don't Be Embarrassed!
THE GOVERNING DOCUMENTS
THE LAW- STATUTES AND CASES

Examples: (Civil Code 1360), Pets (Civil Code 1360.5), U.S. Flag display (Civil Code Section 1353.5), noncommercial signs, posters, flags and banners (Civil Code Section 1353.6), roof installation (Civil Code Section 1353.7), drought resistant plants (1353.8), Solar Installations (Civil Code 714), real estate signs, (Civil Code Sections 713) and the "Pookie Principle". You can find the California Codes at **www.ca.gov** by navigating to the section on California.

WHAT POLICIES/Rules are Required by Law? (Fines Schedule, Pre-Adoption Circulation CIVIL CODE SECTION 1357.100 ETC.

What Steps Need To Be Taken in Enforcement? Generally
RECEIVE COMPLAINT – INVESTIGATE – DETERMINE IF VIOLATION
LETTERS (WARNING OR 1ST OFFENSE)

THEN:
HEARING NOTICE ... HEARING ... HEARING DECISION
DECISION ON FINES, REIMBURSEMENT ASSESSMENTS

SELF HELP ?? LAWSUIT ??

CONSIDER IDR ... AND/OR ADR ... (REQUEST IS REQUIRED PREREQUISITE TO LITIGATION) – A NEW WAY OF THINKING, KILL 2 BIRDS WITH ONE STONE (IDR MEETING – CHANCE TO RESOLVE, MELDING INTO A HEARING IF PARTIES CANNOT RESOLVE!

STATUTE OF LIMITATIONS – DON'T WAIT TOO LONG!

[Time Limitation] Code of Civil Code Procedure Section 336. *Within five years:*

The period prescribed in this subdivision runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. A failure to commence an action for violation of a restriction within the period prescribed in this subdivision does not waive the right to commence an action for any other violation of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable. This subdivision shall not bar commencement of an action for

violation of a restriction before January 1, 2001, and until January 1, 2001, any other applicable statutory or common law limitation shall continue to apply to that action.

Civil Code Section 784. *"Restriction," when used in a statute that incorporates this section by reference, means a limitation on, or provision affecting, the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.*

How Do You Get The Attention of a Really Bad Owner or Tenant?

A REALLY BIG THREAT! NUISANCE, NEIGHBORS, SMALL CLAIMS, LS-ATTNY FEES

TAKE AWAY RIGHTS – LAUNDRY ROOM, COMMON AREA FACILITIES ETC.

RESTRAINING ORDERS – PROS AND CONS

Neighbor To Neighbor Question – Do You Get Involved?

IS THERE A VIOLATION OF CC&RS?

CAN BD GET AWAY WITH LETTER DIRECTING PARTIES TO MEDIATION?

[NOTE THAT THERE IS A PRIMER AVAILABLE – ENFORCEMENT – ADVANCED – NEIGHBOR TO NEIGHBOR ISSUES – ON THE WEBSITE www.californiacondoguru.com in the Publications Available.]

** BREAK

LEASE LIMITATION MEASURES

PROS AND CONS ON LEGALITY DISCUSSED IN FREE ARTICLE ON WEBSITE www.californiacondoguru.com – the restrictions on leasing have been found to be reasonable to protect residential quality of development.

COMMON ISSUES, QUESTIONS

- PERCENTAGE LIMITATION, RESIDENCY REQUIREMENT (Don't Try To Restrict **Sale** To Investors, Stick To **Restricting Rentals** By Owners – Backed By Court Decisions)
- WHO TO GRANDFATHER – given current economic times.
- WHAT HARDSHIPS TO CONSIDER -
- IMPORTANCE OF PROVIDING BALANCED INFORMATION – distrust and fear at all time high.
- WHAT APPROVAL IS NEEDED [OWNERS? MASTER ASSN? CITY? LENDERS? DECLARANT?]

***

QUESTION AND ANSWER PERIOD – write down the questions for the end of the program, will allow at least 30 minutes.

ENFORCEMENT, ADR, OR IDR? / BREAKING THE CODE

Addressing violations and dispute resolution in homeowner associations is getting more and more complicated all the time by the addition of new laws. The good news is that boards have statutory guidance for imposing discipline and resolving association disputes. The bad news is that the real sympathy in Sacramento lies with homeowners who have complaints about their board or association, who complain of no "due process", and who have no recourse that is affordable when battling with their HOA board.

All this results in a trend toward laws that give owners more rights, and encourage more resolution within the Association, so disputes don't get to court.

When considering whether enforcement, IDR, ADR, either, any, or both are appropriate procedures for any disputes or governing document violations, boards have been put in the unenviable position of having to determine whether a violation of or disagreement over responsibilities under the governing documents should first go into the "enforcement category" or into the "dispute resolution" category. If it fits into both, the Board must decide which process to try first. If it fits into the "dispute resolution" category, it has to decide whether to try IDR before ADR. The intent of this article is to try and help boards make some sense of all of this.

For purposes of clarification, these definitions should help.

Enforcement - The board of directors is charged with "enforcement" of the CC&Rs and other governing documents. ("Governing documents" include the Articles of Incorporation, the Bylaws, CC&Rs aka the Declaration, and any rules and regulations, policies, etc., that regulate and govern the association.) Thus, if the CC&Rs or rules contain a restriction such as a prohibition on parking recreational vehicles in the development, and someone is violating the rule, the board of directors must seek compliance ("enforce"). One way is to threaten fines or other disciplinary action. This would require a meeting/hearing (discussed in more detail below). Hearings are more commonly associated with en*force*ment (and the word *force* explains the mindset) than dispute resolution.

ADR stands for "**alternative dispute resolution**". That suggests a means of resolution of disputes "alternative" to litigation. ADR has been around longer and is a more generally understood process than IDR. ADR methods generally include conciliation, mediation, or arbitration. Conciliation and mediation involve a neutral facilitator and resolution is by voluntary agreement. Arbitration is like court, a hearing officer makes a decision. (See Civil Code Section 1369.510 and following.)

IDR is a newer concept commonly referred to as "**internal dispute resolution**". This means an "internal process", whereby the board or one or more directors meet with an owner who is in "dispute" with the association, or vice versa (association is in dispute with owner), or in an attempt to enforce the governing documents. It may also relate to something like an election dispute, an argument over property lines or actions of the board, or the like. And, the association can provide a neutral facilitator, or not. (See Civil Code Section 1363.810 and following.)

If the Association is considering litigation against an owner, ADR has to be considered. The board must participate in IDR if an owner requests it, and must seek to engage the owner in ADR before litigation can be filed unless an exception applies including urgency or other considerations as set forth in the specific law found at Civil Code Section 1369.510 and following. If an Owner is considering

litigation against the Association, he or she is required to follow the ADR statutes to offer the board ADR but the IDR process is voluntary.

KEYS TO SUCCESS

California law contains statutes dictating requirements for all three processes. The key to planning for a board is to formulate from these statutes and the governing documents of the Association an overall policy for handling matters that involve a lack of compliance with the governing instruments of the Association or pertinent laws. The key to success and the quandary for boards is putting together a policy that satisfies the minimum requirements of the law, satisfies the enforcement requirements of the governing documents, *and* provides a process that can reasonably be applied.

Any board of directors that does not have a "roadmap" (written policy) to go by to apply these concepts will surely face considerable confusion as to how to handle each particular matter, and in what order. And there is always a risk that boards will miss important legal requirements since the laws are so technical and process intensive.

Below are some suggestions that might help a board formulate a policy to deal with enforcement, IDR and ADR processes. It's kind of a "menu" process with steps that can be changed around or combined, depending on what action needs to be addressed, the type and severity of it, and depending on whether the inability to resolve it could lead to litigation, by necessity or choice. Each association is unique in varying character of the board members, the makeup and level of sophistication, the acumen, and people skills. Fiduciary duty (responsibility) to enforce the governing documents enters into the picture as to how to best choose the right path, and when to invoke dispute resolution processes. The finances available to the association might also be a factor in defining a workable, legally acceptable plan of action (the policy) that would make sense for a particular association.

The board must keep in mind that any time it adopts a policy that is to be used to govern members of the association, discipline, conduct, etc., it must circulate that policy to the members before the board formally adopts it. (Civil Code Section 1357.100 et seq.) This is to allow the owners the opportunity to comment on the proposed rules or policies before they are adopted. No rule, rule change, or policy needs to be circulated to the owners before adoption by the board if it simply reiterates a statute or existing governing document provision because in that case the board would not be formulating provisions; it would be using existing authority for the policy. Owners are also entitled to notice of the board's intent to adopt the enforcement policy (unless it's taken directly from an existing document or law) and to attend the board meeting when the board will discuss the proposed policy and consider adopting it. They must receive written notification after the policy is formally adopted by the board.

In many situations, there is good chance that disputes would be resolvable if the board would give the owner some personal attention and discuss the issue with the owner(s). On the other hand, there are often situations where actions (such as a threat of discipline, fines, reimbursement assessments, or "self-help" by the board) are more convincing and effective than friendly pleas for compliance. The question is:: which comes first, enforcement or dispute resolution, especially since the order of processes is not provided in the pertinent statutes.

For a clear, unequivocal violation that is obvious based on evidence or investigation supported by pictures, eyewitness accounts, or observation, the most common instinct (and most widely given advice) is to move right to enforcement and try to get compliance. While it is true that this prevents delays, it tends to be a turnoff to many owners. Time may be of the essence where the existing

violation could lead to more violations by others who see something going on in spite of restrictions stated in the governing documents. However, in most situations, a meeting with the owners involved before hard feelings have a chance to form has a good chance of resolving the differences.

Thus, the suggested steps below could be used as is or modified by identifying specific types of violations that would switch the course of action. The Board could adopt one process for all, or categorize types of disputes and identify the order of the steps for each category. For example, a board may decide for architectural disputes it will use the dispute resolution processes first, rather than moving to fines or disciplinary hearings, but for rule violations such as leaving out trashcans too long or creating a nuisance, threats of enforcement including possible fines could be considered as a first step. If the dispute or action of the owner could lead to litigation, the board needs to keep in mind that there are requirements to be met, prior to filing any kind of litigation. IDR is voluntary if the board initiates it (see Civil Code Section 1363.810(b)). Offering ADR processes is mandatory in cases where a court order is sought and damages are less than $5000. (See Civil Code Section 1369.520 -there is an exception if for good reason an immediate court order (injunction) is needed).

There may even be those situations where the board may want to implement the enforcement processes *and* the dispute resolution processes at the same time. The board may decide to conserve resources and energy, shorten delays in the passage of time, and/or prefer a more creative process. There is nothing in any of the laws that dictates the order in which the processes should be used, or that prevents using a combination of processes concurrently.

Here are some reasonable steps to consider for a policy designed to handle noncompliance issues or a dispute over rights or responsibilities in the governing documents or the law:

Step 1: Verify and Document Problem. Verify, in writing, the problem, either by obtaining a written complaint from the complaining party, or by documenting what has been observed, providing dates, times, and a description of the observation. (The Association "record" is critical to success as the enforcement or dispute resolution processes progress.)

Step 2: Courtesy Letter. Communicate with the owner of the property regarding the violation or violations that are believed to be occurring, or have been identified as occurring. A phone call works for some associations. If phone calls are not feasible or there is good reason to be fearful about approaching an owner, a letter is better. [The Step 1 information discovered can be memorialized in a "courtesy" letter to the owner who is responsible for the noncompliance or non-complying party's actions.] Quite often an owner is simply unaware that they or their tenant have violated a restriction or provision exists in the governing documents, or failed to maintain something that is their responsibility, so a courtesy letter may take care of many common problems.

Step 3: Warning Letter/Demand/Possible Notice of Process. If compliance is not forthcoming, a more pointed letter again identifying the problem and demanding compliance immediately or within a stated time could be sent. This letter would include a laundry list of the Association's remedies that will be considered (suspension of rights, fines, reimbursement assessments, right of entry, self-help, etc.). This letter could include an invitation to attend an IDR meeting. If the board believes for some reason that a hearing is warranted at this point that is an option. Each process has its own set of parameters according to the controlling statutes, and there may be good reason to treat the two as separate processes. However, it is also conceivable that a board could opt for a combined meeting that would involve at first a discussion about the issues and an attempt to reach an agreement (as in IDR), with a subsequent hearing to discuss possible disciplinary action in the event an accord was not

reached in the IDR process. This dual track could be called a "cross-over step" that encompasses both steps at the same time. There is more discussion on this below.

Step 4 or 5: **IDR.** The Board can choose IDR at this or any point if not already tried (addressed in Civil Code Sections 1363.810 et. seq.). An association is required to adopt a "fair, reasonable, and expeditious process" for dispute resolution. The process may be a meeting with 1 or more members of the board and the owner(s) involved, and it may involve a neutral facilitator if the board wants to provide (and pay for) one. This process can be accomplished by sending a written request to the owner to attend a meeting, and it could be set 20 minutes or so before the next board meeting. The purpose which should be stated would be to discuss the pending problem with the full or partial board. At the meeting, the board members and the owner would be able to discuss the problem and possible resolution and hopefully reach an agreement. An owner is not obligated to attend. (But note that if the owner demands the IDR meeting, the board is required to attend.) The board members (if less than the full board) should have some authority to discuss settlement and thus would be able to execute a written agreement if an accord is reached. Such an agreement would be binding on the Association. It is not the same as a hearing where the board or board members assigned to meet sit in judgment and mete out discipline like fines. **(See more on the hearing process in the next Step.)**

[One challenge is that the statutes do not put IDR in the category of executive session meetings however if the meeting is treated as an executive session meeting based on the fact that disciplinary action may be considered, it could qualify. And, if the owner meets with less than a quorum of board members that would be a way to safely avoid open meeting notice requirements. The statute says one board member is enough but in order to avoid "he said-she said" arguments about what was decided, two is generally better to have at least two board members present. If the IDR process is combined with a hearing, then the statutes would clearly allow the meeting to be held in executive session because consideration of disciplinary action is appropriate for executive sessions. Additional Note: This meeting with a board member or board members is not the only type of IDR that is acceptable. Boards may adopt a policy using outside dispute resolution resources (neutrals such as mediators) and provide for prompt timelines and written notice to an owner requesting attendance. But the "meet and confer" process (which is the default process under the statute if another process is not adopted) described here makes more sense in practical terms because using outside resources to try and resolve matters internally results in costs to the association where meeting with board members does not. If a board uses an outside mediator and the matter does not resolve, the process must essentially be repeated in the ADR processes and then there are more costs (although these are shared).

Step 5 or 4: Enforcement Actions. At this point, if the owner has been given one or two written notices about the situation, the board may decide it's time to give the owner a notice of hearing, before or after IDR (hence the possibility of switching Step 5 or 4). The requirements under Civil Code Section 1363(h) require that if a board is going to meet and consider discipline of any Owner, the board must (1) send a written notice to the owner listing the violations and remedies to be considered and the date and time of the meeting/hearing; (2) have the meeting/hearing; and (3) send a written notice to the owner of the discipline to be imposed within 10 days of the board's decision. Without following these steps, the disciplinary action would be considered invalid.

[Comment: In order to combine Steps 4 and 5 into one process, the board would have to satisfy the requirements for IDR and satisfy these requirements for notice of a hearing, and if the meeting evolves into a hearing because agreement is not reached, follow through will include deciding on the discipline and providing the notice of decision.]

Step 6: Alternative Dispute Resolution. ADR options are always available on a voluntary basis. If the board is considering litigation, it needs to follow the minimum requirements for ADR, which per Civil Code Section 1369.510 et seq. contain a number of steps and requirements. These steps involve making a request that the other party participate in an ADR process such as mediation, conciliation or arbitration. The responding party has 30 days to respond or the request is deemed rejected. This process is not new, and a request can be made even if there is no intent to file litigation.

[Note: If either party requests that the other participate in ADR, the other does not have to agree or participate but they probably should. If the other side agrees, the parties have 90 days to complete the process – but they can agree to a longer period of time. The Association must provide an IDR policy and an ADR summary each year (to members) explaining the law on ADR. A party must file a certificate stating that an attempt was made to engage the other side in ADR before litigation may be filed asking for injunctive or declarative relief coupled with a damages request of $5000 or less. This would include a homeowner or association as a party. If one party requests ADR, and the other declines to respond or says no, the requesting party can proceed to litigation. If a party refuses to participate in an ADR process and the matter is litigated, the judge can take the refusal to participate in an ADR process into consideration in deciding whether to award attorneys fees to the prevailing party. The implication is that a judge could withhold attorneys fees to the prevailing party if it refused to participate in an ADR process that might have resolved matters and saved the court and parties money and time.)]

Step 7. Further Legal Action (Litigation). If the differences are unresolveable through any of the above steps, then the association (or owner in dispute with the association) may consider litigation. Certification will have to be made as to the attempts to resolve matters through ADR in many cases.

The policy of the association for handling noncompliance or violations of the governing documents or California law regulating HOAs should include the procedures that the association would use in any of the above settings. Because of the complicated nature of these processes, it would be advisable to enlist the help of a professional sufficiently knowledgeable so as to make sure that any policy adopted is useful, understandable, and accurate with regard to all of the requirements. It should provide a manageable "road map" for a board now in place and future boards in the association. A policy to deal with any violation or dispute with an owner needs to be circulated to the membership before it is adopted by the Board as prescribed by Civil Code Section 1357.100 et. seq.

Attempting to reconcile the three processes (enforcement, IDR, and ADR) may seem complicated but when broken down into steps and choices that are embodied in a policy, the processes become manageable. It is to the benefit of all associations to try and make these processes work and to treat owners fairly. Experience tells us that if "due process" for owners is ignored (by violating the notice and hearing requirements), or if boards ignore the statutory requirements for HOAs, or if IDR and ADR are not taken seriously or given an opportunity to work, the legislature will continue to mandate more processes geared to punish boards for the inadequacies and failures, and to keep HOA disputes off of their doorsteps and out of court.