SOUTH COAST HOMEOWNERS ASSOCIATION

LAW AND LEGISLATIVE UPDATE

FEBRUARY 3, 2014

ATTORNEY DAVID LOEWENTHAL DISTRIBUTED THE FOLLOWING:

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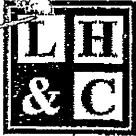
MR. LOEWENTHAL'S CONTACT INFORMATION APPEARS ON THE NEXT PAGE



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SUBSTANTIVE CHANGES TO THE DAVIS-STIRLING ACT AS OF JANUARY 1, 2014

OVERVIEW OF CHANGES:

- Substantively related code sections are now grouped together for ease of use
- Revisions have been made to clarify poorly worded sections for clarity
- Code sections which were previously lengthy are now divided into shorter sections
- Some altogether new laws have been added

NOTABLE MODIFICATIONS:

1. NEW DEFINITIONS REGARDING:
   a. Delivered to an Association – New definition for any document to be delivered to the Association must be delivered to the person and address designated in the Annual Policy Statement [Civil Code Section 4035]
   b. Individual Notice – relating to notice that an Association must give to a specific member. Notice can be provided by first class mail, registered or certified mail, express mail, or overnight mail. Individual notice must also be sent to any secondary address on file. [Civil Code Section 4040]
   c. General Notice – Any manner of individual notice, posting in a common area location, or printed on a billing statement of other document that is delivered by one of the above methods. [Civil Code Section 4045]
   d. Annual Budget Report – what was formerly referred to as the pro forma operating budget. [Civil Code Section 4076]
   e. Annual Policy Statement – a comprehensive statement/packet of all notices and disclosures that are provided at the beginning of each fiscal year, along with the *Annual Budget Report.* [Civil Code Section 4078]
2. EFFECTS ON GOVERNING DOCUMENTS:
   a. CA law controls over governing documents [Civil Code Section 4205]
   b. Priority by which the governing documents govern. [Civil Code Section 4205]
      i. Law
         1. CC&Rs
            a. Articles
               i. By-Laws

1. Operating Rules
    a. Note: Operating rules may not be inconsistent with the CC&Rs, Articles, or By-Laws

c. Board authorized to amend a cross reference of old statute in governing documents through adoption of a resolution showing the correction. [Civil Code Section 4235]
d. **Text of Proposed Amendment to Governing Documents:** Requires an Association to provide the member with the actual text of the proposed amendment for any upcoming election to be held for purposes of approving the proposed amendment. [Civil Code Section 4230]
e. **Reversal of Operating Rule:** Requires that if a vote is to take place to reverse a recently enacted operating rule, the provision is now modernized to incorporate the new election rules and two envelope secret ballot process. [Civil Code Section 4365]

3. PROPERTY USE MODIFICATIONS
    a. **Right of Access to Separate Interest:** Incorporates both owner and tenant's right to access their separate interest, and generally have the rights as to common area/facilities. [Civil Code Section 4510]
    b. **Protected Use of Separate Interest Property:** Owners have a protected right to sacred activity, including posting flags and signs, even if precluded from the CC&Rs. [Civil Code Section 4705]
    c. **Modification to Separate Interest:** Broadens the term "unit" when referencing owner's right to make reasonable accommodations of a separate interest in any type of CID. [Civil Code Section 4645]
    d. **Grant of Exclusive Use Common Area:** Civil Code Section 4600 clarifies requirement to obtain 67% membership approval when granting exclusive use common area. This requirement applies not only to common area owned by the Association as an entity, but also to common area owned by members as tenants in common. The requirement imposes exceptions for the following grants of exclusive use:
        i. To accommodate a disability
        ii. Required by law
        iii. Assignment of a parking space, storage unit, or other amenity if expressly provided for in the declaration.
4. BOARD OF DIRECTORS' MODIFICATIONS
    a. **Notice of BOD Meetings:** Corporation code provision does not require notice of upcoming meeting if date and time are specified in the corporation's By-laws. Section 4920 requires notice of <u>all</u> Board meetings at least four days prior to meeting, with the exception of emergency meetings.
        i. New law now requires all notices of board meetings via General Notice requirements as specified in §4045
    b. **Definition of "Meeting":** Defined as the "number of directors [sufficient] to establish a quorum [Civil Code Section 4925]

c. Conflicts of Interest: Code now identifies six (6) matters upon which a director/ committee member may not vote. [Civil Code Section 5350]
    i. Discipline against director/committee member;
    ii. Assessment against director/committee member for damage to common area
    iii. Payment plan consideration for overdue assessments for director/committee member
    iv. Decision to foreclose on a lien on a separate interest of the director/ committee member
    v. Proposed ARC modifications to a separate interest
    vi. Grant of exclusive use common area to the director/committee member

5. MEMBER ELECTIONS MODIFICATIONS
    a. **Scope of Member Election Procedure** – Expands the Association's ability to incorporate the two envelope secret ballot procedure to other types of elections provided such a provision is incorporated into the Association's election procedure [Civil Code Section 5115]
    b. **Notification of Election Results** – Election results are to be provided under the General Notice requirements in Section 5120(b).
    c. **Ballot Custody** – Ballots must be retained for a period of twelve (12) months by the inspector(s) of election. [Civil Code Section 5125]
    d. **Campaign Communications** – Drafting of meeting minutes and disbursing same to the membership does not violate the Davis-Stirling Act, even though the minutes may include a candidate's name for an upcoming election. [Civil Code Section 5135]

6. RECORDS & NOTICES
    a. **Accounting for Reserve Funding Expenditures for CD Litigation** – Accounting records for CD litigation expenses are deemed association records and requires the membership be notified of the Board's decision to spend reserve funds for CD litigation by means of the *General Notice* requirement. [Civil Code Section 5520]
    b. **Addition to "Association Records"** – Modifies the list of documents entitled to an owner on demand to include "Governing Documents." [Civil Code Section 5200]
    c. **Annual Policy Statement and Annual Budget Report** – Current law allows a Board to send a summary of the budget (now Annual Policy Statement) to the members. New Act will extend this option to the Annual Policy Statement as well. [Civil Code Section 5300-5320]
    d. **Requirements for Written Requests for Documents** – Written requests under Civil Code Section 5260 must be delivered to the Association at the address listed on the Annual Policy Statement. Such written requests include: address change on membership list; request to add or remove a second address for delivery in individual notices; request for individual delivery or to cancel a prior request for individual delivery; opt out request; or a request for a full copy of a specified Annual Policy Statement, Annual Budget Report or all reports in full.

7. ASSESSMENTS & COLLECTIONS

   a. **Assessment Increases** – Any annual assessment increase for any fiscal year may not be imposed until the board has distributed the Annual Budget Report. [Civil Code Section 5605]

   b. **Election Process on Assessment Increases and Special Assessments** – Any vote by the membership for an increase in assessments by more than 20% or special assessment great than 5% or the gross expenses requires the two envelope, secret ballot process. [Civil Code Section 5115, 5605(b)]

   c. **Lien Releases** – An Association that records a lien in error, whenever it's discovered, must release the lien and reverse all costs, fees, and interest associated with the error. [Civil Code Section 5685(c)]

   d. **Overnight Payments** – The address designated for owners to mail overnight payments must be included in the Annual Policy Statement. [Civil Code Section 5310(a)(11)]

8. ENFORCEMENT OF RULES AND DISPUTE RESOLUTION

   a. **Schedule of Monetary Penalties** – The Association must provide the fine schedule on an annual basis in the Annual Policy Statement. [Civil Code Section 5310(a)(8)]

   b. **Right to be Heard** – A notice and hearing must be provided to a member by individual notice if the Board is attempting to impose a monetary charge against an owner for reimbursement to the HOA for damage caused to the common area by the member or their tenant(s)/guest(s). [Civil Code Section 5855]

   c. **ADR** – In an action in which fees and costs may be awarded, courts retains discretion as to whether a non-filing party's refusal to accept ADR was reasonable, when determining the amount of the award. This provision now applies not only to actions to enforce governing documents, but to any action in which fees and awards may be awarded. [Civil Code Section 5960]

9. COMMERCIAL/INDUSTRIAL DEVELOPMENTS

   a. **Imposition of Emergency Special Assessments – Industrial/Commercial properties now permitted to impose special assessments for certain emergency assessments (Section 5610)**

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REVIEW OF COURT DECISIONS IMPACTING COMMUNITY ASSOCIATIONS IN 2013

Wittenberg v. Beachwalk Homeowners Association (2013) 217 Cal. App. 4th 654.

Facts:

The Association held an election to amend its CCRs and the plaintiffs filed a lawsuit to void the result of the election on the ground that the Association's board violated Civil Code Section 1363.03 (a)(1) and (a)(2) concerning use of "association media" to campaign for the amendment but refused to give equal access to members who opposed the amendment. The amendment was designed to eliminate a 2/3 approval requirement in the CCRs to make alterations, additions or improvements to the common areas of the development which cost more than $1,000.00. The Board was sued because it allegedly had removed one swimming pool without a vote of the membership.

Realizing that the burden of a 2/3 vote of the membership was very onerous, the Board advocated an amendment that provided the Board with much greater flexibility and discretion in making expenditures for capital improvements to the common areas. The Board sent out ballots and encouraged the members to vote for the amendment. Accompanying the letter and ballots was a one-page attachment which was also prepared by the Board which was essentially a "pros and cons" of the amendment. The "cons" section of the attachment was derived from open forum comments of members at meetings. However, the Board specifically declined to include any written opposition material. In addition, the Board refused to let the opposition use the Association clubhouse for free to hold a "town meeting" to discuss the amendment and the board up for election.

Two elections conducted by the Association at substantial expense failed to garner the requisite 75% supermajority to adopt the amendment. During these elections the Board continued to use the Association's newsletter to lobby for positive votes but opposing views were not invited to submit any materials. In response to one such article in favor of the amendment, a member asked to write a response to be published in the newsletter. The Board refused because only directors were permitted to publish articles. The Board posted materials in favor of the amendment on the Association website and in display cases but did not allow non-board members to post opposing materials. The Board also advised the membership that it would continue to seek to have the amendment passed by sending out ballots (at $5,000 per election) until the 51% threshold was reached.

The Association never reached the 75% approval, but did reach the majority threshold which would allow it to file a Petition To Reduce Voting Percentage in the Superior Court as allowed by Civil Code Section 1356. The Plaintiffs filed this lawsuit to invalidate the election and prevent the approval of the amendment through the Petition process.

At trial, the court ruled that the provisions of Section 1363.03 requiring equal access to association media made a distinction between access to candidates and members advocacy and the "Association" and ruled that there was no violation of the statute requiring equal access.

Appellate Decision:

Not surprisingly, the appellate court reversed the trial court's decision and ruled that the trial court erred in finding that the Association did not have to provide equal access to Association media when the Association's board was the one advocating for a position such as on the proposed amendment. The appellate court found that Section 1363.03 (a)(1) cannot be interpreted to allow Board members, who are also Association members, to advocate for a particular point of view in an election, without giving equal access to members with opposing views. The appellate court also found that the Association violated Section 1363.03 (a)(2) in denying free access to use Association common areas, including the clubhouse and a greenbelt, to hold meetings at which the amendment was to be discussed by opponents to the amendment.

Significance:

Associations and their Boards have to be very careful to avoid preventing opposing views to be expressed through Association media sources on any issue that is being put to the vote of the membership, including changes to governing documents, special assessments or elections of directors. In addition, it clarifies that Boards can be characterized as advocates that can trigger the right to use Association media by opponents. This case is a classic example of a Board being so heavy handed in trying to both coerce the membership to approve the action and prevent the opposition from having a voice that the court could not come to any other conclusion.

Friars Village Homeowners Association v. Charles I. Hansing (2013) 220 Cal. App. 4th 405.

Facts:

The Association's Board of Directors adopted an operating rule as part of its election policy which prevents a person from running for the Board if the prospective candidate is related by blood or marriage to any current Board member or to any current candidate for such office. Mr. Hansing sought to nominate himself to run for the Board during a period of time when his wife, was currently serving on the Board. Mr. Hansing

challenged the legality of this rule on the basis that it violated Civil Code Section 1363.03, which guarantees the right of every member to nominate himself or herself to run for the Board. After his self-nomination was rejected, he filed suit to have the rule declared invalid.

The Board's rationale for the rule was to prevent possible wrongdoing by two directors from the same household and to prevent a situation in which two members would constitute a substantial voting block within the nine member board.

In a court trial, a judgment was issued in favor of the Association that the rule was properly adopted, was valid and may be enforced.

Appellate Decision:

On appeal, the court went through an analysis of numerous appellate decision which discussed that individual expectations in a common interest development setting had to be tempered by the fact that possibility that the Association would pass a rule or policy that an individual may disagree with. The issues on appeal were: (1) was the election rule preventing related persons running for the board or serving on the board at the same time reasonable; and (2) was it inconsistent with the Association's governing documents and current law. The court discussed the relative deference given to Board decisions and the need for the purpose of the rule to be rationally related to the protection, preservation and proper operation of the property and purposes of the Association set forth in the Association's governing documents.

The appellate court ruled that the election rule prohibiting relatives from running or serving on the Board to be a valid and enforceable operating rule setting the qualifications of a director pursuant to Section 1363.03. The court held that the rule was rationally related to the protection, preservation and proper operation of the Association and that it was not unfair or discriminatory. The court stated: "the record supports a conclusion that the relationship rule was a legitimate response to business concerns among Association members that allowing a voting bloc on the Board would not be in the best interests of the Association. The Board's policy decision to enact the relationship rule constitutes a reasonable attempt to balance the respective interests, and is consistent with the nature of the specific requirements in the governing documents and other rules.... Such requirements legitimately promote the ability of the Board members to impartially conduct the business affairs of the development."

Significance:

This decision is significant because it does not give blind credence to the provision in Section 1363.03 concerning the right to self-nominate in lieu of a broader analysis of the rule in light of the best interests of the Association and whether it is discriminatory or unfair. Consequently, this seems to be another in a string of appellate decisions which analyzes Association rules and issues pragmatically and equitably rather than narrowly interpreting a code section without important context.

Arlyne M. Diamond v. Superior Court (2013) 217 Cal. App. 4th 1172

Facts:

In 2006, the members of the Casa Del Valle Homeowners Association passed a special assessment to pay for a roofing replacement project in the sum of $9,750 per unit. Diamond was unable to pay the lump sum special assessments and attempted to negotiate a payment plan with the Association. Diamond believed that she had reached an agreement with the Board president for a payment plan which involved payment of $1000 down and $100 per month until her financial situation improved. She also believed that this agreement was to be memorialized in a promissory note that she would execute. After making the down payment and five monthly payments of $100, she received a "pre-lien" letter from the Association's attorney, alleging that the total amount due was over $10,000 and threatening to record an assessment lien if not paid within 30 days. The letter contained the various notice provisions relative to member rights to engage in dispute resolution and to review association records. Diamond responded to the pre-lien letter with a letter to the attorney explaining about the payment plan agreed to by the Association's president and stated that she was in compliance with the agreement. The Association then proceeded to record the assessment lien and provided her with a copy of the recorded lien. The cover letter enclosing the recorded lien indicated that the Board had approved a 12 month payment plan that consisted of monthly payments of $989.17 and the maintenance of the lien until the balance was paid in full.

Diamond hired an attorney who wrote the Association's attorney and requested that the parties meet and confer and if unsuccessful, engage in alternative dispute resolution. The Board rejected both the meet and confer and ADR requested, stating that the Board had already met and conferred and she wasn't entitled to both. The Board also returned three $100 checks which Diamond had submitted after the lien was recorded. Thereafter, the Board met in executive session and approved commencement of a foreclosure proceeding through a judicial foreclosure.

Diamond file a motion for summary judgment and motion to expunge the lien based on the Association's multiple failures to strictly follow the procedures and notice provisions set forth in Civil Code Section 1367.1 which are mandated prerequisites to recording a lien and pursuing foreclosure. The trial court denied these motions on the basis that Diamond failed to meet her burden to produce evidence that the Association is barred by Civil Code Section 1367.1 and 1367.4 and that the Association had "substantially complied" with the statutory requirements.

Appellate Decision:

Diamond appealed the denial of the motions. The appellate court went through a painstaking analysis of the statutory requirements of Section 1367.1 and the legislative

history in determining that the Association had failed to strictly comply with the statutory notice and related requirements and in ruling that "substantial compliance" was not adequate when a member could lose her home to foreclosure, based on the clear statutory language and legislative history. The court found multiple technical failures by the Association to strictly comply with the statutory notice requirements in the pre-lien letter, a failure to properly document in Association minutes the decision to foreclose and the failure to personally serve the notice of intent to foreclose on Diamond, each of which made the assessment lien invalid. The appellate court ordered the trial court to grant the summary judgment in Diamond's favor and expunge the lien.

Significance:

This case is significant because it establishes that every "i" needs to be dotted and every "t" needs to be crossed in complying with the statutory requirements related to collections and lien foreclosures. One technical mistake related to the procedures in the statute will result in the lien being invalid and forcing the Association to start over and potentially, being responsible for the attorney's fees and costs of the member who successfully challenges the collection process. This strongly underscores that a highly regimented and professional approach to collection activities must be maintained by Associations, management companies, attorneys and foreclosure trustees to be able to document clearly that every statutory requirement was met, right down to inclusion of the execute session action approving foreclosure in the minutes of the next regular board meeting.

Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC 219 Cal. App. 4th 98.

Facts:

Eric Hart purchased a newly constructed home from the defendant developer. A pipe in the fire sprinkler system burst, causing significant damage. Hart's property insurer, Liberty Mutual, paid his relocation expenses while Hart was out of the home during repairs. Liberty Mutual sued the defendant developer in subrogation to recover those relocation expenses. The defendant argued and the trial court agreed, that the claim was time-barred under the Right to Repair Act (Civil Code Section 895 et seq.) because the case was filed more than four years after the purchase. Under the Right to Repair Act, a plaintiff's burden is to demonstrate a defective condition exists, without any requirement of physical property damage caused by the defect. This act was put into play to address a Supreme Court decision that precluded claims against contractors and subcontractors based on a negligence theory for defective construction in the absence of property damage caused by the negligent construction. (Aas)

Appellate Decision:

Liberty Mutual appealed the trial court's decision on the basis that there is no language in the Right to Repair Act making it the exclusive remedy for construction defects when

there is actual property damage caused by the defective condition. The appellate court agreed, ruling that the shorter statutes of limitation in the Right to Repair Act do not apply to claims for actual property damage arising from a construction defect and instead, the general statutes of limitation for latent defects (10 years) and patent defects (4 years from discovery) and for property damage (3 years after damage) applied.

Significance:

Developers, contractors and subcontractors have attempted to argue that all aspects of construction defect litigation are controlled by the Right to Repair Act, including the narrow and restrictive statutes of limitation for various types of defective construction. This case brings back into play defective construction claims which are undiscovered and manifest property damage after the short limitations in the Right to Repair Act have run.

Fowler v. M & C Association Management Services, Inc. (2013) 220 Cal. App. 4th 1152.

Facts:

Fowler was the lead plaintiff in a potential class action lawsuit against a management company for charging "transfer fees" in order to update homeowner records. The plaintiff claimed that unless the management company filed a notice of the transfer fee with the Office of the County Recorder pursuant to Civil Code Section 1098. That section requires the recording a notice of certain types of transfer fees before such fees can be collected.

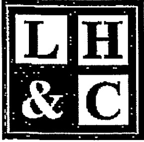
Appellate Decision:

The Court of Appeals ruled that transfer fees charged by management companies were exempt from this requirement due to an exemption in Section 1098 for any "transaction authorized by the Davis-Stirling Common Interest Development Act." The basis for the decision was an expansion of the principles in the prior decisions of Berryman v. Merit Property Management, Inc. and Brown v. Professional Community Management, Inc. which dealt with whether fees charged by management companies to Associations per the management contract could be passed through to members in sales transactions without proof that the amount charged by management the actual amount it cost the manager to perform. In those decisions the courts found that the management company's fee was a contractual issue with the Association and not subject to the actual cost requirement of Civil Code Section 1366.1.

Significance:

The trend continues at the appellate court level of not micro-managing the contractual relationship between associations and management companies and treating management companies as a mere extension of the Board that is subject to the

restraints and limitations of the laws applicable to associations. This decision recognizes that Boards are entitled to enter contracts with managers to perform certain association functions and that commercial transaction is entitled to deference by the courts.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Running an Effective Board Meeting Do's and Don'ts and Where the Pitfalls May Lay

By: David A. Loewental

Notice of Meeting:

Pursuant to *Civil Code* Section 1363.05 (new *Civil Code* Section 4920), the Association must provide members with notifications of Board meetings, both regular as well as executive sessions. Specifically, unless the Bylaws state otherwise, the Association must provide at least four (4) days prior notice of a regular meeting and two (2) days notice of an executive session meeting. Notice to the members shall be given by posting the notice and agenda in a prominent place within common areas and by mail to any owner who so requests. *Civil Code* Section 1363.05 also allow that Notice and agenda may be given by mail, by delivery of notice to each unit in the development, by newsletter or similar types of communication, or, with the consent of a member, by electronic means. Included within the Notice shall be the agenda for the meeting.

Emergency Meeting:

An exception to the notice requirement exists as to emergency meetings. With respect to the emergency meeting, the president of the Association, or any two members of the governing body, other than the president, can call an emergency board meeting if there are circumstances that could not have been recently foreseen which require immediate attention and possible action by the Board and, by necessity, make it impracticable to provide notices as required by the Code. Emergency meetings may be held in person, via email or telephone conference.

Electronic Meetings:

Under limited circumstances, the Board can conduct an "emergency board meeting" via email. Specifically, *Civil Code* Section 1363.05(j)(1) states as follows: "The Board of Directors shall not take action on any item of business outside of the meeting (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.

Essential in determining whether or not a Board can confirm and make decisions via the use of electronic transmission/email requires the following objective analysis:

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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).

It should be noted that emails between less than a majority of a Board of Directors will not violate the language of the Open Meeting Act since the meeting cannot be conducted if there is less than a quorum present. However, Directors should avoid attempting to circumvent the intent of the email restriction 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.

It should be noted that 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 appropriate. However, the line is crossed if the management email solicits comments or feedback that constitutes a discussion amongst the Board or solicits a decision or deliberation which would trigger a potential violation of the Open Meeting Act unless the parameters for an "emergency" are met.

Executive Session Meetings:

Again, it is important to remember that members of the Association may attend meetings of the Board except when the Board meets in Executive Session to consider litigation, matters relating the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member regarding the member's payment of assessments. (*Civil Code* Section 1363.05).

Scheduling Meetings:

If possible, the Board should attempt to schedule their meeting on a "regular basis", i.e., as an example the third Thursday of each month. The Board should be aware of Bylaw requirements that may state the frequency in which the Board meetings must occur. At a minimum, Boards must meet at least quarterly to satisfy Civil Code requirements regarding financial review.

Agendas:

Agendas are required for both General Open Board Meetings, as well as Executive Session Board Meetings (although because sessions are confidential in Executive Sessions the topic should be kept general and brief). As an example: "Executive Session Board meeting with attorney regarding Construction Defect litigations." Board meeting agendas must be posted along with the notice of the meetings. The Board of Directors may not discuss or take action on any item at a non-emergency meeting unless the item was placed on the agenda, included in the notice that was posted and distributed appropriately. Boards are only allowed to discuss and take action on items on the agenda, with exceptions including (1) brief responses to questions/statements from Association members, (2) references to informational or administrative matters, including asking questions for clarification, make a brief announcement, or make a report of his/her own activities in response to a member's inquiry where it can be self-reported, and (3) emergency that requires immediate action.

It should be noted that owners, who are not Board members, may speak on issues not on the agenda during open forum.

1. Board members may also do any of the following:

   a. Provide factual information to its managing agent, other agents or staff;

   b. Request its managing agent or other agents or staff to report back to the Board of Directors at a subsequent meeting concerning any matter, or take action to direct its managing agent or other agents or staff to place a matter of business on a future agenda;

   c. Direct its managing agent or other agents or staff to perform administrative tasks that are necessary.

2. As stated above, the Board of Directors cannot act on any item of business (if not appearing on the agenda and proper notice given) except as required by emergency measures when:

   a. A majority of the Board of Directors present at the meeting determines that an emergency situation exists (an emergency is defined as a circumstance that could not have been reasonably foreseen which, otherwise would have allowed proper notice to be provided);

   b. Two-thirds of the Board members present at the meeting vote that there is

an issue which requires immediate action, and the need for action came to the attention of the Board after the agenda was posted and distributed. If less than two-thirds of the total Board membership are present, then this action requires a unanimous vote of those attending.

c. The item was on an agenda that was posted and distributed appropriately for a prior meeting of the Board of Directors that occurred not more than thirty (30) calendar days before the date that the action was taken on the item, and at the prior meeting, action on the item was continued to the meeting at which the action is taken.

3. Before discussing any emergency measures, the Board of Directors shall openly identify the item to the members in attendance at the meeting.

Open Forum:

General Board meetings should include an open forum that can take place either at the beginning or at the end of the meeting. During the open forum, the Board shall permit any member of the Association to speak for a reasonable period of time. Most Associations adopt a three (3) minute time limit per member. It should also be noted that Board members have no obligation to respond to questions, issues or inquiries raised by members during the open forum. (See new *Civil Code* Sections 4925(b) and 5000(b). It should be noted that the only time non- Board members have a right to participate in General Open Board Meetings (non executive) is during the open forum. Boards may not create rules that unreasonably prevent the ability of members to participate and a reasonable time period must be allowed. It should be noted that members do not have unlimited free speech during open forum.

Unruly Member:

While there is a right of members to address the Board, such right does not include the right to intimidate, use profanity, make obscene gestures, shout or otherwise attempt to take over the Board meeting. In the event that members become unruly, the Board must balance the right to free speech versus the need to conduct business. In such cases, the Board has several options which may include, but not necessarily be limited to, the following:

1. Remove unruly member from the meeting by asking him/her to leave. Do not attempt to physically remove an unruly member.

2. If the unruly member refuses to leave, the Board may decide to adjourn the meeting to another location and preclude the unruly member from entering. As an example, a Board Member's residence;

3. If there is a history of unruly and disruptive behavior, you may wish to have a security guard attend the meeting.

4. Call the police if the member gets out of hand so as to remove the unruly member;

5. If allowed under the Association's Bylaws and/or Operating Rules, schedule a hearing to fine the unruly member pursuant to *Civil Code* Section 1363(g);

6. If such behavior is ongoing and consistent, attempt to obtain a restraining order against the member to preclude their further participation and/or attendance at Board meetings.

Voting:

With respect to voting, Directors must vote in person or electronically (including telephonically) if the meeting is being held via telephone conference, but not through the use of a proxy. Generally, Directors shall vote on all matters before the Board unless that Board member has a valid reason not to vote including, but not necessarily limited to, a conflict of interest where that Board member may need to recuse himself from the discussion and/or vote or where there is a lack of information by a Board member(s) and thus do not believe that they are competent to cast a vote. Each Director has one vote and that vote can be cast once a quorum of the Board of Directors has been achieved. A quorum means a majority of the Directors are present; however the definition of quorum may be altered by the Bylaws.

Board Member Conflict of Interest:

As stated above, there may be those instances where a Director has a conflict of interest with respect to a matter that is before the Board. Such a conflict may arise as a result of various factors including, but not limited to, when a Director or Director's family stands to benefit from a matter in front of the Board in way that is different from the other Board members. As an example, but without limitation, a Board member or Board member's family member who has an interest in a company who is bidding an Association project would constitute the type of conflict where the Board member should not only identify their interest in the matter before the Board, but also recuse themselves from the matter including not voting on the issues.

In other instances, a Board member may have a conflict due to the fact that they have received gifts or other compensation from a vendor which could impact the objectivity of the Board members in their decision making process.

It is important to remember that Board members serve as a volunteer and this is essential to their protection. Specifically, pursuant to *Civil Code* Section 1365.7 and *Corporations Code* Section 7231.5(a), there is no monetary liability on the part of, and no cause of actions for damages shall arise against a voluntary Director or voluntary Executive Officer of a non-profit corporation based upon the alleged failure to discharge their duties as a Director or Officer (1) if the duties are performed in good faith; (2) performed in a manner that the Director or Officer believed to be in the best interest of the corporation and, (3) performed with such care, including reasonable inquiry, as an

ordinary 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 the volunteer Board members conduct themselves in this matter, 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 non-monetary 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 below market costs; a vendor providing a Board member with vacation or other benefits.

Pursuant to *Corporations Code* Section 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 (1) the corporation entered into the transaction for its own benefit; (2) the transaction was fair and reasonable as to the corporation; (3) 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); (4) that the remainder of the Board had knowledge of the material facts concerning the transaction and the Director's interest; (5) 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.

New *Civil Code* Section 5350 pertains to "Prohibitive Actions by Directors and Committee members" and states as follows:

a. Notwithstanding any other law, and regardless of whether an Association is incorporated or unincorporated, the provisions of Section 7233 and 7234 of the Corporations Code shall apply to any contract or other transaction authorized, approved, or ratified by the Board or Committee of the Board.

b. A Director or member of a committee shall not vote on any of the following matters:

1. Discipline of the Director or Committee member;

2. An assessment against the Director or Committee member for damage to the common areas or facilities;

3. A request by the Director or Committee member, for a payment plan for over due assessments;

4. A decision whether to foreclose on a lien on the separate interest of the Director or Committee member;

5. Review of a proposed physical change of the separate interest of the Director or Committee member;

6. A grant of exclusive use common area to the Director or Committee member;

c. Nothing in this section limits any other provision of law or the governing documents that govern a decision in which a Director may have an interest.

With respect to the Business Judgment Rule, volunteer Officer or Director is not personally liable for damages that exceed an Association's insurance for bodily injury, emotional distress, wrongful death or property damage or loss due to tortuous act or omission of the Officer or Director if:

1. The act or omission was performed within the scope of the Officers or Directors duties;

2. The act or omission was performed in good faith;

3. The act or omission was not wilful, wanton or grossly negligent;

4. The Association has sufficient insurance for general liability of the Association and general liability for the Officers and Directors at the time of the act or omission occurred.

Rogue Board Members:

A rogue Board member is one who no longer acts in a way that is appropriate for a Board member and/or acts outside of the confines of his duties as a Board member. As an example, but without limitation, if the Board votes to proceed in a certain way, it is inappropriate for a Board member, who was opposed to that decision, to conduct themselves in a manner that is directly contrary to the decision of a majority of the

Board. Thus, a dissenting Board member can state that he is opposed to the decision of the Board majority, however, he/she should not take action based upon the dissent, since such action could create liability for that Board member and the Association as a whole. As an example, if the Board has voted to direct a vendor to perform services in a certain way, a dissenting Board member does not have a right to provide contrary instructions to that vendor.

When a Board member goes rogue and starts to act outside the course and scope of his duties and responsibilities on the Board, not only could such actions ultimately create substantial liabilities for the Association, as well as the Board member, but also, in acting outside the course and scope of a Board member, the Association's Directors and Officers Insurance may not defend that owner for such actions.

Another example would be a Board member who acts in a physical or hostile manner with a member, such as striking a member. Such action would not be considered to be approved Board conduct and thus, in a subsequent civil action by the battered homeowner, the Association's carrier would likely not provide a defense and indemnity for that rogue Board member.

In instances where a Board member is acting out of control, the Board is certainly empowered to censure or reprimand the Director. Such action would be appropriate wherein the Board member is disrupting meetings, using profanity, breaching the confidences of the Board, interferes with Association operations, matters of conflict of interest, breach of fiduciary duties, improper behavior towards Association vendors or employees, etc. A censure is effectuated by a majority of the Directors passing a motion once quorum has been established.

Removal of Board Member:

It is important to note that an offending Director and Officer, i.e., President, Vice President, Treasurer or Secretary, can be removed from office by the other Directors by a majority vote of the other members of the Board, but not removed from the Board.

A Board member(s) can be removed from the Board through process of a petition brought by 5% of the members seeking a recall election of the Board member or the entire Board. Varying percentages are required if the petition is seeking the removal of only one Board member. (*Corporations Code* Section 7222). Typically a much higher percentage of the members are required for such action. In a vote to remove the entirety of the Board if the Association has 50 or fewer members, then a majority of the members must vote in favor of the recall. If 50 or more members, it requires a majority of a quorum.

In addition, the Board can declare a Board seat vacant if they have been convicted of a felony or have been declared of unsound mind. Further, the Court may remove from office any Director in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the Association and may bar that individual from future elections for a period determined by the Court. An action to remove a

Director may be brought by another Director or by an authorized member. (*Corporations Code* Section 7223).

Motions and Resolutions:

Ultimately, the Board conducts business and makes decisions via the making of motions and passing same. Typically a motion is made by a member of the Board of Directors and then seconded by a different director. After it is seconded, it is typical for the Board to discuss the motion and once the deliberation has ended, the Board votes on the motion. The minutes should reflect the fact that a motion was made, seconded and the ultimate result of the vote. When the motion is ultimately passed, the Board should turn this into a resolution by writing it down and specifically setting forth what was in fact adopted by the Board.

Length of Meetings:

Except for extraordinary circumstances, such as discussions involving litigation; a major construction project; going through proposed CC&Rs, a Board meeting should not typically take more than 2 hours. Much longer than that is an indication that discussions are going too long.

Minutes:

The historical preservation of what occurs during a Board meeting is through the use of minutes. The minutes proposed for adoption that are marked/indicate draft status, or a summary of the minutes, of any meeting of the Board of Directors of an Association, other than an executive session, shall be available to members within thirty (30) days of the meeting. *Civil Code* Section 1363.05(d)). The minutes shall be distributed to any member of the Association upon request. Minutes should include the following: date, place and time of the meeting; Board members and manager in attendance; reports given; motions made and motions passed. You do not want Minutes to be a recitation of each and every word said during the meeting. Thus, Minute takers should be instructed accordingly.

With respect to executive session Board meetings, any matter discussed therein shall be generally noted in the minutes immediately following executive session meeting, (*Civil Code* Section 1363.05). Executive session minutes should not be provided to the membership as part of the Association's books and records (*Civil Code* Section 1363.05(d), but would have to be produced as part of written discovery in the event of a lawsuit, except for those minutes that are protected by the attorney-client privilege.

Defamation:

Often times, homeowners will make statements as to members of the Board of Directors and/or management that would appear to be defamatory on their face. Such defamation may be written (liable) or spoken (slander). (*Civil Code* Section 44).

Typically, elements of defamation include the following:

1. False statement made about the victim (i.e., Board member or manager);

2. Such false statement is published/communicated to a third party. (This only requires another person to over hear the remarks). Thus, in a general meeting where such "defamatory" statements are made, it has been published to all others who are in attendance;

3. The defamatory statement tends to injure the victim's reputation or standing in the community; or it holds the victim out for ridicule or contempt.

In instances of defamation, a court may grant the prevailing victim damages including general (non-economic damages) for mental anguish, emotional distress, harm to reputation, loss of standing in the community. In addition, and depending upon the circumstances, the victim may also recover special (economic damages) for loss of employment, medical attention, etc., as well as potentially punitive damages if the defamatory action was malicious.

It should be noted that it is difficult to obtain an injunction for defamation due to First Amendment rights. Generally, a court cannot enjoin speech, even if it is hate filled, because this would be a prior restraint on speech. In order for a court to potentially grant any type of injunction for defamation, such an order must be narrowly drafted so that the injunction is very limited.

Since it is common place at Board meetings for tempers to flare and statements to be made, such meetings are ripe with the possibility for the expression of potentially defamatory statements. A typical example is at an Open Association Meeting, an angry member who is upset about an increase in assessments and accuses the Association and its Board of Directors of being "crooks" and "embezzling" Association funds. Based upon these accusations that a crime was committed, the Association and Directors may decide to bring an action against the accusing member for defamation of character.

Under California law, and in appropriate instances, the anti-SLAPP statute (*Civil Code* Section 425.16) can result in an 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 (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 a 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, the statements automatically qualify as protected "acts". Because Association meetings are considered "public forums" the

statutes can sometime offer relief to defendants in community association lawsuits.

With respect to the example above where the homeowner accused the Board of Directors of being "crooks" and of "embezzling Association funds", 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 the embezzlement did not occur, the defamation suit will be dismissed and the Association will be ordered to pay the owners attorneys 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 plaintiff to gather enough evidence to prove its case within two (2) 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.

It is important to understand that California courts have held that a community association is considered a "quasi government entity" and functions "as a quasi government" meeting the "public forum" requirement of the statute.

Thus, the use of an anti-SLAPP motion by an owner who is sued for defamation by a Board member may provide a significant shield for that owner making an action by a Board who believes to have been defamed that much more difficult.