SOUTH COAST HOMEOWNERS ASSOCIATION

ANNUAL LEGISLATIVE FORUM

January 21, 2015

The statements set forth below are provided to assist participants in following the program. They should not be interpreted as absolute statements of law. The actual application of any statute or court decision is dependent upon the facts and circumstances presented in each case.

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New Legislation

Clarification of Responsibility for Repair and Replacement of Exclusive Use Common Area and Unit

AB 969; Civil Code 4775

I. Existing Law

A. Unless the Association's Governing Documents otherwise state, the Association is responsible for repair, replacement and maintenance of the Common Area, other than Exclusive Use Common Area.

B. Unless the Association's Governing Documents otherwise state, owners are responsible for maintenance of Unit & Exclusive Use Common Area.

C. Who is responsible for repair and replacement of the Exclusive Use Common Area and Unit?

II. New Law / Effective Jan. 1, 2017

Clarification of Responsibility for Repair & Replacement of Exclusive Use Common Area & Unit

A. Unless the Association's Governing Documents otherwise state, the Association is responsible for repair & replacement of the Exclusive Use Common Area.

B. Unless the Association's Governing Documents otherwise state, owners are responsible for maintenance of Exclusive Use Common Area.

C. Unless the Association's Governing Documents otherwise state, owners are responsible for maintenance, repair and replacement of the Unit.

Attorneys May Now Attend a Meet and Confer

AB 1738; Civil Code 5910 & 5916

I. Prior Law

A. An Association or owner may request a "meet and confer" to resolve a dispute concerning a violation of the Association's Governing Documents, the Davis Sterling Act or the Corporations Code.

B. Attendance at the "meet and confer" was, under prior law, limited to one Board member and the owner.

II. New Law

A. Now the Board member and owner attending the "meet and confer" may attend with an attorney or another person to assist in presenting their position.

B. Any agreement reached must be in writing and shall be binding if: (1) Not in conflict with the law; (2) Not in conflict with the Association's Governing Documents and; (3) Is within the authority granted by the Board or ratified by the Board.

Documents to be Provided on Sale or Transfer of Unit

AB 2430; Civil Code 4528 & 4530

I. Prior Law

A. An owner selling their Unit must provide to a perspective purchaser those Documents specified in Civil Code section 4525.

B. Upon an owner's request, the Association must, within 10 days, deliver to the requesting owner those documents which the seller is required to deliver to the perspective purchaser.

C. The Association may collect a reasonable fee in an amount equal to the Association's actual cost of producing the documents.

II. New Law

A. If an owner requests, in writing, a statement of the fee to produce the documents, prior to processing the request the Association must provide a written statement of the cost.

B. The cost statement must be provided using the form required by Civil Code section 4528 (see attached form).

C. The fees charged to the selling owner to produce the documents must be stated and billed separately from all other charges the Association may charge an owner upon the sale or transfer of their Unit.

D. The documents an owner is to provide to a prospective purchaser are to be provided by the Association to the owner separately. They may not be bundled with other documents the owner may request in connection with the sale of their Unit.

Exemption From Civil Code 5100 Voting Requirements Where All Members Serve On Board

AB 569; Civil Code 5100 (f)

I. Prior Law

A. Regardless of the size of an Association, all Associations were required to follow the election procedures set forth in Civil Code section 5100.

B. This was true even for small Associations (e.g. an Association of 5 Units) where all members of the Association served on the Board.

II. New Law

A. Where an Association's Governing Documents state that all members of an Association are to serve on the Board, the Association does not need to follow the election procedure set forth in Civil Code section 5100 (f).

B. It is important to remember that the exemption from the voting requirements provided in Civil Code section 5100 (f) only apply to a vote for Directors. When voting for all other issues covered by section 5100 (i.e. election assessments, amendments to Governing Documents, grant of Exclusive Use Common Area) the provisions of section 5100 must be complied with.

An Association's Governing Documents Cannot Prohibit the Use of Backyards For Personal Agriculture

AB 2561; Civil Code 4750

I. New Law

A. Any restriction which prohibits the use of a homeowner's "backyard" for personal agriculture is void.

B. The stated need for this legislation is due to the fact that "*many Associations have rules prohibiting homeowners from growing food in their yards.*"

C. The stated benefits of allowing owners to grow food in their backyard as allowed by this legislation are:

1. Will reduce air pollution;

2. Lower obesity;

3. Will assist in eliminating poverty; and

4. Will reduce water consumption.

New Cases

An Association's Foreclosure for Unpaid Assessments May be Prevented by Partial Payments

I

Huntington Continental Townhouse Association v. Miner (2014) 230 Cal. App. 4th 590

A. An Association may only foreclose for unpaid assessments where the total amount of the delinquent assessments equal or exceed $1800 or the assessments are one year past due regardless of amount.

B. Once a lien is filed the Association must accept partial payments notwithstanding that it is the intent of the owner to lower the amount of the assessments to a sum just below $1,800 and/or ensuring that the amount up to $,1800 is not more than one year past due.

C. An owner can perpetually prevent an Association from foreclosing on its lien, for unpaid assessments, by simply maintaining a balance owing of less than $1,800 and ensuring that the amount under $1800 is not more than one year past due.

When Associations Fail to Repair, They May Be Held Liable For Breaching Their Fiduciary Duty & Negligence

Bonito v. Huntington Condominium Association (2014) 4th Appellate Dist.
[Not Published]

A. Where an Association fails to take action to repair that which it is responsible to repair, the Association may be held liable for damages under theories of negligence and breach of fiduciary duty.

B. An Association may not use the defense of "judicial deference" where it knows repair is needed and takes no action.

Form No. 44
California Civil Code § 4528
(8/13)

CHARGES FOR DOCUMENTS

**THIS DOCUMENT IS PROVIDED TO YOU
AS REQUIRED BY
CALIFORNIA CIVIL CODE Sections 4525 & 4528**

Property Address: _____

Owner of Property: _____

Owner's Mailing Address: _____
(If known or different from property address.)

Provider of the section 1368 Items:

_____

Print Name	Position or Title	Association or Agent	Date form Completed

Check or Complete Applicable Column or Columns Below:

DOCUMENTS	**CIVIL CODE SECTION**	**FEE FOR DOCUMENT**	**Not Available (N/A), Not Applicable (N/App), or Directly Provided by Seller and confirmed in writing by Seller as a current document (DP)**
Articles of Incorporation or statement that not incorporated	4525(a)(1)		
CC&R's	4525(a)(1)		
Bylaws	4525(a)(1)		
Operating Rules	4525(a)(1)		
Age restrictions, if any	4525(a)(2)		
Rental restrictions, if any	4525(a)(9)		
Annual budget report or summary, including reserve study	5300 and 4525(a)(3)		

Assessment and reserve funding disclosure summary	5300 and 4525(a)(3)		
Financial statement review	5305 & 4525(a)(3)		
Assessment enforcement policy	5310 and 4525(a)(4)		
Insurance summary	5300 and 4525(a)(3)		
Regular assessment	4525(a)(4)		
Special assessment	4525(a)(4)		
Emergency assessment	4525(a)(4)		
Other unpaid obligations of seller	5675 and 4525(a)(4)		
Approved changes to assessments	5300 and 4525(a)(4), (8)		
Settlement notice regarding common area defects	4525(a)(6), (7), and 6100		
Preliminary list of defects	4525(a)(6), 6000, and 6100		
Notice(s) of violation	5855 and 4525(a)(5)		
Required statement of fees	4525		
Minutes of regular meetings of the board of directors conducted over the previous 12 months, if requested	4525(a)(10)		

Total fees for these documents: $_____

*The information provided by this form may not include all fees that may be imposed before the close of escrow. Additional fees that are not related to the requirements of Section 4525 may be charged separately.

"Caution"

This form is provided as a courtesy by James H. Smith, Esq., of the law firm of Grokenberger & Smith. Telephone: (805) 965-7746. Your Association's Governing Documents and/or changes in the law may require this form to be modified.

Loewenthal, Hillshafer & Carter, LLP
"Your team and our team, working together..."
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Newsletter

LHC Newsletter Vol. 7, No. 5

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REVIEW OF NEW LEGISLATION AND APPELLATE DECISIONS AFFECTING HOMEOWNER'S ASSOCIATION IN 2014

Robert D. Hillshafer, Esq.
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Important Appellate Court Decisions

1. **Huntington Continental Townhouse Association, Inc. v. Joseph A. Minor** (2014) 2014 S.O.S. 4543.

Why significant: It represents a continuing trend that is limiting the use of the foreclosure remedy specifically, holding Association's to a high standard of compliance while ignoring the prejudice to Association's when owners do not pay assessments.

This appellate court decision may prove to have a dramatic impact on how Association's operate in the context of collections and may have a significant impact on Association vendors who are hired to effectuate collection of delinquent assessments. Following in the footsteps of the Diamond case from 2013, the Appellate Courts seem to be leaning heavily in favor of protecting individual owner rights while making the Association's ability to collect assessments and the costs are necessarily incurred in exercising the Association's remedies for collection.

Civil Code Section 5655(a) provides that "any payments made by an owner of a separate interest toward a debt described in subdivision (a) of Section 5650 shall first be applied to assessments owed and, only after the assessments owed are paid in full shall the payments be applied to the fees and costs of collection...."

This case stands for the proposition that under Civil Code Section 5655(a), Associations **MUST** accept partial payments tendered by homeowners, regardless of when tendered or how much was tendered, and apply them first to the amount of assessments owed and then to collection costs, without regard to pending collection actions or remedies. The basic language of this statute has been present for years and most legal counsel and collection companies interpreted the statute to mean that "payments accepted by the Association" must be applied to pay down assessment liability first, which "could" impact collection remedies based on the $1800 requirement for foreclosures on assessment liens. However, this language had never been construed to mandate that the Association was obligated to accept partial payments whenever tendered. In fact, good collection practice has been not to accept partial payments at a certain point in the collection process because doing so would undermine the Association's ability to collect already incurred fees and costs and would allow the owner to "game" the system. Practically, this decision gives an owner the ability to unilaterally derail a non-judicial foreclosure action merely by submitting a partial (or even nominal) payment to bring the delinquent assessments under $1,800 (foreclosure threshold) even on the day of a notice Trustee's Sale. The impact of that is to leave the Association responsible for collection fees and costs with no immediate way to collect without starting a lawsuit.

The court rejected arguments that other statutory provisions regarding payment proposals did not mandate that Association's had to agree to terms proposed by members and if that was the case, why should an Association have to accept a partial payment which impairs its remedies. The court did not consider the lack of legislative intent or lack of clear language discussing acceptance of partial payments outside of a payment agreement to be significant. It seems the court was focused on preventing the Associations from effectively using the foreclosure remedy provided in statute. The court was entirely unsympathetic to the Association's difficulty in recovering collection costs caused entirely by the delinquent owner.

I see this case as potentially forcing the Association to use a combination of judicial foreclosure/money judgment action as opposed to the faster and less expensive non-judicial foreclosure process to collect delinquent assessments. Either that or simply a straight breach of CCRs action to obtain a money judgment. By taking that path, even if a partial payment is made, the Association can proceed to obtain a judgment for the remainder of the assessments and all collection costs, even if the assessment balance falls below $1,800.

The case does not attempt to limit the waiver of the right to make partial payments pursuant to a written payment plan or foreclosure forbearance agreement which is defaulted upon. Therefore, it should become standard practice in payment plans to require an express waiver of the right to submit partial payments after a default on the payment plan, at least until another decision rules otherwise.

2. **Beacon Residential Community Association v. Skidmore Owings and Merrill** (2014)

Why significant: Provides Association's with a clear right to pursue claims against designers of residential housing in construction defect cases and should eliminate the standard practice of such defendants attempting to escape responsibility based on lack of contractual privity with the architect.

This case involved an Association that sued for construction defects in a condominium project and included negligence claims against the architects/designers of the project that were hired by the developers.

The California Supreme Court clarified several prior decisions which seemed to indicate that architects and engineers could not be held responsible by end users of real property based on negligence because they owed no duty of care to the Association or its members. The Supreme Court held that architects do owe a duty of care to future homeowners based on common law interpretation of duty. This decision was based on the fact that the architect's work was intended to affect the ultimate homeowner and defective design would foreseeably impact the homeowner, among other factors.

3. **Bel Air Glen Homeowners Association v. Dwlatshahi** (2014) not certified for publication.

Why significant: This case is significant because it illustrates just how expensive enforcement actions can be, even when the issue appears to be simple. It also illustrates that court's can make strange and inexplicable decisions.

This case involved an Association's attempt to enforce a provision in its CCRs which entitled the Association to have a copy of a lease between an Owner and Tenant for the purpose of determining who the tenant was and that the lease contained terms consistent with the requirements of the CCRs relative to leases and tenants. The Association made a demand for a copy of lease from the owner because the property was being resided in by a third person, who ultimately was the Owner's attorney. The Owner and the attorney indicated that the property was not leased and there was no lease in place. They did not advise the Association that the property had been transferred to the attorney via an unrecorded Quitclaim Deed. At one point in time, the attorney represented in writing to the Board that the Owner was still the owner of the property, even though it had been deeded previously. When told there was no lease, the Association did not request information about any other possible reason why the attorney was residing at the property. The Association levied a total of $13,000 in fines against the Owner based on the failure to provide the lease.

The Owner sued the Association alleging harassment and the Association cross-complained to recover the fines and damages for the Owner's failure to produce the lease. Prior to trial, the Owner dismissed its harassment claims and the Association dismissed all of its claims except for $2,000 in fines.

The trial court found that the Owner had a defense to the fines because there was no lease, but the court further found that the Owner had conspired with the attorney or aided the attorney in deceiving the Association. The trial court also found that the attorney had defrauded the Association by stating that the Owners remained the owners when he was the recipient of a quitclaim deed to the property. The court found that Association was entitled to know and had the need to know that the property had been transferred. The court awarded the Association $2,000, declared the Association the prevailing party and awarded $63,910 in attorney fees and costs.

The appellate court reversed the trial court decision, finding that the Association had only sought the lease and had not asked for any other alternative explanation or documentation. The Association offered no authority for the Owner having a duty to disclose the transfer by unrecorded quitclaim deed in the absence of an express request for such disclosure. The parties were ordered to bear their own costs.

4. **Talega Maintenance Corporation v. Standard Pacific Corporation** (2014) 225 Cal. App. 4th 722.

Why significant: Provides guidelines as to when "speech" that occurs at a Association board meeting is not "protected" such that not "all" speech at meetings is protected and inadmissible.

In a growing trend in HOA cases, the anti-SLAPP (strategic lawsuit against public participation) is again a central theme in this construction defect and breach of fiduciary duty case. This statute forms the basis for attacking claims which arise out of certain communications in certain settings that are deemed privileged based on public interest so as to avoid the chilling effect of being sued from exercising free speech rights.

The Associations sued the developer and three former employees of the developer (who had been appointed to the Board by the developer) relative to construction defects in certain trails constructed by the developer in the community. Association alleged

that the former directors/employees committed fraud, negligence and breach of fiduciary duty as directors of the Association concerning the developer's obligations to pay for repairs to the trails. The employees filed the anti-SLAPP motion to dismiss claiming that the claims against them arose from protected statements made at HOA board meetings. The trial court denied the motion and the employees appealed the decision. The court of appeal affirmed the trial court's decision.

The alleged protected statements made during an HOA Board meeting concerned what entity was responsible for paying for the maintenance and repair of these trails. The employee directors represented to the rest of the Board and the membership that the Association was responsible for these costs. The Association contended that these statements were false and a breach of fiduciary duty.

The importance of this case is the appellate court's decision to narrowly apply and construe the anti-SLAPP laws and not adopt a general approach that all statements made in an HOA Board meeting necessarily constitute a "public issue" but instead require that the alleged protected speech and statements relate to or involve a public issue, controversy or dispute. In this context, the statements which were the basis for the claims against the developer directors were not properly viewed as a public issue, controversy or dispute that would render them protected.

5. **KB Home Greater Los Angeles, Inc. v. Allstate Insurance** (2014) 168 Cal. Rptr. 3d 142.

Why significant: This case is significant because it means under the Right to Repair Act, mitigation and repair efforts by owners and associations may necessarily be delayed until notices are given to developers and builders. As a practical matter, it also means that owners and association's are going to be held to a strict standard for compliance with notice under the Act, even if they weren't aware the loss was caused by a construction defect at the time repairs were started.

This case involved the property insurer of the purchaser of a new home from KB filing a subrogation claim against KB for property damage caused by a water leak in the home. When the leak occurred the owner contacted Allstate, who in turn hired a mitigation/remediation contractor to perform emergency services and repair the damage to the home. After paying for the repairs, Allstate sent KB a notice of its intent to seek recovery of the amounts paid to correct the damage from the defective plumbing pipe which burst. KB did not respond so Allstate filed suit alleging a violation of the Right to Repair Act.

KB argued to the trial court that neither Allstate or its insured had complied with the notice provisions of the Right to Repair statute which entitled KB to inspect the damage and have an opportunity to propose a repair that it would perform. The trial court rejected that argument based on a decision in the Liberty Mutual case by the California Supreme Court decided in 2013, and the trial court decisions were appealed. That case allowed an insurer to recover from the builder for actual property damages the carrier paid as a result of a construction defect.

The court of appeals ruled that the issue in this case was whether the Act requires notice of a claim under the Act prior to making repairs and indicated that the Liberty Mutual case did not involve that scenario because the builder was given the opportunity to repair. The court of appeals ultimately found that the subrogation claim was barred because Allstate and the insured did not give notice of the claim under the Act until after repairs were completed, thereby denying KB the opportunity to repair.

6. **Seahaus La Jolla Owners Association v. Superior Court** (2014) 224 Cal. App. 4th 754.

Why significant: Clarifies that the attorney-client privilege applies to members of the Association whose "common interests" are protected in a lawsuit for common area defects.

The Association filed a construction defect lawsuit against the developer relative to common area water intrusion problems. The Association's litigation counsel conducted meetings with homeowners to inform them of the status and developments in the case. The developer sought discovery of the information disclosed by counsel to the members of the Association at these meetings and the Association objected that the attorney client privilege applied. The trial court ruled against the Association and the Association appealed.

On appeal, the appellate court looked at the disclosures made in the context of the Davis-Stirling Act obligations owed by an Association to its members and other factors which mandate the involvement of owners in Association members in decisions regarding construction defect actions. The appellate court ultimately concluded that the Association's duties and powers included communications with members, as parties with closely aligned interests. The court further concluded that the litigation meetings were held to accomplish the purpose for which the association lawyer's were consulted, including disclosures which the Association was obligated to make. Consequently, the communications at these meetings were deemed privileged and protected under the common interest doctrine.

NEW LEGISLATION IN 2014

1. AB 968: **Exclusive Use Common Area**: Civil Code Section 4775 provides that unless the governing documents provide otherwise, the Association is responsible for replacing, repairing or maintaining common areas but that owners of separate

interests are responsible to maintain the exclusive use common areas serving their units. This always raised the question as to who was responsible to "repair or replace" the exclusive use common areas: Owners or the Association. AB 968 now clearly provides that the Association shall have the obligation to repair and replace exclusive use common area and the Owners simply "maintain" it. This law still doesn't clarify or define what "maintain" really means but it does seem to support a conclusion that maintenance is different than repairing or replacing, therefore placing it more on a cosmetic or appearance level rather than a functionality or structural level.

2. AB 1738: **Attorneys at IDR**: Allows both Association's and owners to bring attorneys to Internal Dispute Resolution meetings, which in some ways defeats the intent of the IDR process in the first place and will necessarily increase expenses. However, the flip side of that is that many IDR meetings are not productive in any event because the Board representative and homeowner are "afraid" to enter into an agreement to resolve without having legal advice, which results in many IDR's being a waste of time and the dispute ends up involving attorney's in any event. There is a fair amount of debate concerning whether the IDR process is truly beneficial in resolving the types of disputes which seem to arise in the Association context, which are often personal and emotionally charged with one side being fundamentally unreasonable or using the process to delay.

3. AB 2100: **Drought Restrictions**: This law prohibits Associations from fining owners for failing to water during the drought emergency resulting in aesthetically unpleasing landscaping. The one exception is where reclaimed water is available for irrigation purposes within a development. This law also prohibits Associations compelling owners to power wash during the drought unless using non-potable water.

4. AB 2561: **Fruit/Vegetable Gardens**: This law limits the ability of Associations to regulate or prohibit personal agriculture activities in the "backyards" of private lots within common interest developments.

5. AB 2064 **Earthquake Insurance/Mandatory Offer**: Prior law prohibits a policy of residential property insurance from being issued or delivered or initially renewed in this state unless the named insured is offered coverage for loss or damage caused by an earthquake, as provided, and, if the offer of earthquake coverage is accepted, requires the insurer to provide certain disclosures based on whether the policy was issued by the California Earthquake Authority. This law revises the disclosure language an insurer is required to use in offering earthquake coverage, making the contents of that disclosure language dependent upon whether the insurer is a member of the CEA or not, *and by* requiring insureds to be provided with specified disclosures with regard to coverage of losses, the CEA's liability limitations, and premiums concurrent with the issuance or renewal by the CEA of a residential earthquake insurance policy. The bill would require a participating insurer, at least once each year, to provide each of its residential property insured with marketing documents produced at the CEA's expense. The bill would make these provisions operative on January 1, 2016.

6. AB 2104 **Water efficient landscapes**: This law requires that a provision of the governing documents or of the architectural or landscaping guidelines or policies shall be void and unenforceable if it prohibits, or includes conditions that have the effect of prohibiting, low water-using plants as a group or as a replacement of existing turf, or if the provision has the effect of prohibiting or restricting compliance with a local water-efficient landscape ordinance or water conservation measure.

7. AB 2430: **Transfer Disclosure**: The Davis-Stirling Common Interest Development Act requires an association, upon written request, to provide the owner of a separate interest, or a recipient authorized by the owner, with a copy of specific documents relating to transfer disclosures that the owner is required to make to a prospective purchaser of the owner's separate interest. That act authorizes the association to collect a reasonable cost for delivery of those documents but prohibits any additional fees for electronic delivery. This bill would require the cost for providing the required documents to be separately stated and billed from other charges that are part of the transfer or sales transaction. This bill would authorize an association to collect a reasonable fee from a seller for its actual costs in providing documents under these provisions and would require a seller to be responsible for compensating an association, person, or entity for providing documents under these provisions. This bill would also require a seller to provide a prospective purchaser with certain current documents that the seller possesses free of charge. This bill would prohibit a seller from giving a prospective purchaser the required documents bundled with other documents.

8. SB 752: **Commercial and Industrial Common Interest Development Act**: The Davis-Stirling Common Interest Development Act provides for the creation and regulation of common interest developments, as defined, but exempts common interest developments that are limited to industrial or commercial uses from specified provisions of the act. This law establishes the Commercial and Industrial Common Interest Development Act, which provides for the creation and regulation of commercial and industrial common interest developments.

9. AB 2188: **Solar Energy**: Prior law prohibited any covenant, restriction, or condition contained in any provision of a governing document from effectively prohibiting or restricting the installation or use of a solar energy system. Prior law exempted from that prohibition provisions that impose reasonable restrictions on a solar energy system that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance. Prior law defined the term "significantly to mean an amount exceeding 20% of the cost of the system or decreasing the efficiency of the solar energy system by an amount exceeding 20%, and with regard to photovoltaic systems that comply with state and federal law, an amount not to exceed $2,000 over the

system cost or a decrease in system efficiency of an amount exceeding 20%. This law defines the term "significantly," for these purposes, with regard to solar domestic water heating systems or solar swimming pool heating systems that comply with state and federal law, to mean an amount exceeding 10% of the cost of the system, not to exceed $1,000, or decreasing the efficiency of the solar energy system by an amount exceeding 10%, and with regard to photovoltaic systems that comply with state and federal law, an amount not to exceed $1,000 over the system cost or a decrease in system efficiency of an amount exceeding 10%. Prior law required an application for approval for the installation or use of a solar energy system to be processed and approved by the appropriate approving entity as an application for approval of an architectural modification to the property and prohibits the approver from willfully avoiding or delaying approval. Prior law required the approving entity to notify the applicant in writing within 60 days of receipt of the application if the application is denied, as specified. This time period has been reduced to a written notification of denial within 45 days.

10. AB 1360: **Proposed Electronic Balloting Bill:** Current law requires that a common interest development be managed by an association and that elections related to the governance or administration of the common interest development conform to specified requirements. This bill allows associations to conduct elections by optional electronic voting. If electronic voting is to be conducted, each member must be given an opportunity to indicate that he or she will be voting electronically and to provide ballots. The electronic balloting service provider is to retain the electronically submitted ballot data until the time allowed for challenging the election has expired.

11. AB 746: **Proposed Bill re Smoking in Multifamily Dwellings**: This bill would prohibit the smoking of a cigarette or other tobacco products in all areas of multifamily dwellings, except those areas designated as areas where smoking is permitted, as specified. This bill would define, for the purposes of these provisions, multifamily dwellings to mean residential property containing 2 or more units with one or more shared walls, floors, ceilings, or ventilation systems. This bill would provide that any person who violates the requirements of the bill is guilty of an infraction, punishable as specified. The bill would require the State Department of Public Health to develop, implement, and publicize a smoking cessation awareness and educational program, including a description of the penalties that shall be imposed for a violation of the bill's provisions.

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I.

Neighbor to Neighbor Disputes

The Top Ten List

Homeowners associations, their directors, management companies, lawyers and most importantly, the homeowners themselves can be and frequently are confronted by neighbor to neighbor disputes. If not handled properly, these disputes and related costs can get out of control.

This article outlines general areas of common disputes between neighbors and Homeowners Associations, as well as examples and possible mechanisms for resolution.

1. What right does a homeowner have against a neighbor who may be in violation of the Association's governing documents?

Since both parties are and hopefully will remain neighbors; it is best to resolve any problems in an informal and collaborative manner. Failing this and depending on the specific issues, the aggrieved neighbor may contact the Board. A Board's failure to take action under such circumstances could be a breach of the Board's duties and obligations. However, this varies on a case by case basis. Conversely resolution of certain issues affecting one neighbor against another may not be the responsibility of the board. Generally, if the issue affects multiple members, affects common area, is dangerous, illegal or is an architectural violation; then the board should get involved.

If the neighbor is unwilling to comply with a legitimate request for resolut ion; the aggrieved homeowner may make a demand for Alternative Dispute Resolution (ADR) [Civil Code Section 5975 and 5925 through 5945]. These sections generally state that before filing of such a lawsuit and if the amount in controversy is $5,000 or more; the aggrieved party, prior to the filing of a civil action, must make a demand for ADR to the aggravating party. ADR allows for mediation, binding arbitration or non-binding arbitration. An aggravating party, when served, has thirty (30) days in which to either accept or reject or not respond to the request. A non-response is the same as a rejection. If there is a non-response or rejection, the aggrieved party may file a civil action.

If the parties actually proceed to ADR, and there is no resolution, assuming that it is either mediation or a non-binding arbitration, then the aggrieved party can then

proceed forward with the filing of a lawsuit. Given the heavy cost in time and money, a lawsuit should be a last resort.

2. The use of fines by the Association:

Sometimes the only way to obtain a violating neighbors attention is to threaten and sometimes carry out either discipline and/or a fine. Associations need to include within their Rules and Regulations a written fine policy that specifically spells out for all of the owners the ramifications for violations of the Association's governing documents. Generally, but not always, these policies require a warning letter for a first offense and then a stepped up fining policy for each continuing violation. It should be noted that fines are not assessments and therefore cannot be the subject of a lien or foreclosure action. However, an Association can file an action against an owner in small claims or superior court to collect on such fines.

The Board does have that right to levy as long as they are in compliance with Civil Code Section 4820: Prior to the issuance of a fine or other disciplinary action, an Association must provide at least ten (10) days written notice to the offending homeowner advising them that the Board will meet on a specific date, time and place to determine if discipline or a fine will be instituted against the neighbor for a specific violation.

The offending homeowner has a right to attend the hearing and present any information they believe is relevant to the Board, setting forth why disciplinary action should not be taken. Within fifteen (15) days of the hearing, the Board must provide written notification to the offending homeowner of the Board's decision. The Board does not have to provide continuous notices and offers of hearings to subsequent violations of the same issue. However, if a single, distinct violation leads to an issuance of a fine and the conduct continues in the future; the Board can continue to issue new fines without having a second hearing. Conversely, if the offending homeowner commences a different violation of a separate and distinct rule then that would be the cause for a new notice, hearing and written position.

3. View disputes between neighbors:

Under California law, view rights are not protected, unless you are located in certain scenic corridors that may be protected by city and/or state ordinances or, more generally, the view is protected via the Association's CCR's. Barring these elements, view protection is not deemed a protected right under California law.

If the Association CCR's provide view protection, then the issue is one of absolute protection or partial protection based upon reasonableness. Certain Associations' governing documents will provide for an absolute protection, i.e. there can be no obstruction of view caused by one neighbor against another.

Two steps which may help prevent view issues are: 1) The owner making the improvement review in advance the association's documents to ensure the proposed construction is compliant and 2) if possible, discuss and reach such agreements in advance between neighbors.

4. Neighbor to neighbor noise disputes:

Noise is one of the most frustrating and highly contentious issues that develop between neighbors. Generally, attached condominiums and townhomes will have certain standards set forth within their governing documents including the type of flooring material that can and cannot be used e.g.: carpeting VS wood flooring.

In addition to types of flooring material, the use of a unit can also create problems between neighbors. Specifically, what bothers one neighbor may not bother another. Noise issues can be evaluated scientifically through acoustical tests. However, costs are involved, and subjective opinions may or may not change.

Generally, governing documents will also include a section pertaining to "nuisances" and state that a neighbor's actions cannot be such that could lead to an unreasonable annoyance, disturbance or offensive activity that inhibits another neighbor from using their property.

If the noise issue is limited to a complaining party and aggravating party, the association may not have to get involved since the complaining party can enforce the governing documents directly.

5. Neighbor to neighbor dispute regarding parking issues:

In developments with designated/assigned parking space, parking issues generally center upon street and guest parking. Where Association streets are private and street parking is allowed; disputes arise when one neighbor consistently parks in front of another's residence. Generally an owner does not have exclusive control over the street parking in front of their residence nor is allowed to use guest parking for their own vehicle(s). However, if one party parks in a manner disallowed by governing documents or municipal ordinances; the complaining homeowner and association may act against the violating homeowner.

6. Neighbor to neighbor disputes for water damage between units:

A serious problem affecting neighbors is water intrusion. Generally this issue arises between neighbors in a condominium or townhome setting where there are attached walls and ceilings. In single family home communities, irrigation water between neighboring lots can also be a source of confrontation.

Generally, if the item that is the source of the water is a separate interest item, such as a washing machine hose, refrigerator water line, etc.; then the owner in control

of that separate interest item would be responsible for the costs associated with the damage. Conversely, if the source is a common area source such as a common area pipe, then the cost of remediation and repair fall to the Association.

In most instances, drywall on the ceiling and walls is considered to be common area. Therefore, even if the neighbor refuses to pay for the repair to the drywall; the aggrieved homeowner may have a legitimate claim against the Association since a "common area" has been damaged and the Association is responsible. The Association can generally proceed against the aggravating homeowner and/or their insurer for reimbursements of costs.

7. Neighbor to neighbor disputes regarding landscaping:

Most often landscaping issues occur in planned unit developments with single family homes, versus multi-unit. In such instances, governing documents generally outline rules for exterior improvement or alteration, and plans and specifications must be submitted to the Board and/or Architectural Review Committee (ARC). In many HOA's, specific restrictions may be set. Disputes may arise over the issue of views. Though as noted above, not all Associations protect views.

Homeowners should attempt to work out these issues via an agreement between neighbors prior to beginning significant landscaping. If a dispute still arises; neighbors, as noted above, can make demands to proceed with ADR. If that fails, the parties may seek judicial intervention.

8. Disputes involving tenants and guests:

Frequently, disputes arise between neighbors when one owner is either renting their residence or consistently entertaining guests who violate the rules. Violations by tenants and/or guests are ultimately the responsibility of the owner regardless of whether they had actual notice of the violations as they were occurring.

If an owner's tenants and/or guests violate Association rules and regulations to an extent that impacts another neighbors' ability to reasonably use and occupy their property; then that neighbor would have a right to proceed with an ADR demand, and if that fails, litigation. In the case of a continuing nuisance, the Association can also seek a judicial remedy, but in doing so, should consider whether the nuisance is affecting multiple owners or only one. Such claims would be against the owner of the unit since they must comply with the Association's governing documents. An owner cannot simply say that she/he cannot control his tenants or guests but rather is contractually responsible for their actions.

9. Pet issues:

Commonly disputes relate to pets, most notably dogs. Disputes can range from dogs barking, to leash issues, to dog "poop." Often these occur between neighbors and

the Association and an offending homeowner. Laws provide certain protections to both associations and pet owners with respect to pet ownership. With proper Association rule amendments, reasonable limitations can be adopted for weight, size, and type of pet so as to avoid potentially dangerous animals. Leash laws do apply in most municipalities, as do requirements to clean up after a dog. Thus certain events may violate both the Association's governing documents and city ordinances.

If violations continue, the aggrieved homeowner may go to the Board for help. The Board may need to be proactive especially with off-leash issues or potentially dangerous dogs. The aggrieved homeowner may also contact the local animal control.

10. Conclusion:

A flexible and collaborative approach to neighbor disputes is by far the best. If this is not possible, ADR is a next step and if that fails and the aggravation to the aggrieved neighbor is severe; then the courts are open to them.

People living within a Homeowners Association agree to be bound by certain restrictions and rules. If such restrictions and rules are not acceptable to a homeowner then a home in a common interest development may not be a good choice for them.

II.

Rogue Directors: Managing the Crisis and Mitigating the Damage

Although it is not necessarily a routine occurrence, an Association director going "rogue" and potentially wreaking havoc within an Association happens often enough that managers and board members should be aware of the possibility, and have potential strategies for controlling the situation and mitigating the harm which has been or could be caused by the rogue director.

A "rogue" director can be described as any director who is acting unilaterally without the consent, authority or approval of a majority of the Board of Directors on which he or she has been elected to, in a manner which is potentially detrimental to the Association or inconsistent with Board action or the Association's governing documents. Such conduct is outside the normal course and scope of a director's duties and responsibilities and is likely to violate the director's fiduciary duty to the Association by creating potential liabilities for the Association and may ultimately not be protected by the Association's errors and omissions insurance for directors.

1. What is "Rogue" Conduct?

Before you can deal with it, you need to have an idea of what constitutes "rogue" conduct. Some common examples of "rogue" conduct by directors include:

Making public statements concerning Association policies or actions which misstate or are contrary to the position of the Board majority or which create potential liability

Disclosing confidential information provided to the Board from legal counsel or related to contract negotiations, personnel matters or disciplinary action against members;

Unilaterally entering into agreements with Association vendors for services or materials without Board approval;

Disrupting Board meetings by combative, hostile, violent or inappropriate behavior;

Attempting to pressure or influence other directors when the rogue director has a conflict of interest on a particular matter of business;

Unilaterally imposing disciplinary action on members without due process and Board approval.

Unilaterally approving architectural applications without proper review.

Each type of conduct described above can result in the Association being liable to others for a director's actions or can result in the Association losing business opportunities or being responsible for contractual obligations that harm it financially. The purpose of this article is to discuss what to do when a Board or a manager learns of such behavior or is concerned that it may occur. Unfortunately, many times the situation is one simply of crisis management after the fact and sometimes mitigating the situation is very difficult.

2. What Can or Should the Board Do?

It is obvious that there isn't necessarily a simple or universal solution when this type of situation arises, but one thing the Board or a manager should definitely consider is contacting the Association's legal counsel for assistance in dealing with the problem board member and developing a strategy to control the director and mitigate the damage caused. Apart from counsel having the legal background to provide solid advice on a case by case basis, using legal counsel to communicate with the rogue director has several distinct advantages. One is that the Association's attorney can convey the seriousness and implications of the conduct to the director with authority, including an explanation of the potential consequences of the conduct which may and should grab the director's attention and make them concerned about possible personal

liability for the conduct. A second advantage is that it removes the other individual directors (board majority) and management from the role of directly communicating with the hostile or adverse director and forces the director to deal with someone that should not be easily swayed or intimidated. Experienced general counsel will have dealt with most types of rogue director situations and should have reasonable recommendations for handling them.

3. Censure Letters

Depending on the nature of the rogue behavior, the responsive action will vary significantly. For example, when the behavior doesn't necessarily have widespread impact or damage, such as poor conduct during meetings or misstating Board policies or positions, a "**censure letter**" may suffice to control the situation. A censure letter is generally written by legal counsel to the rogue director and copied to the rest of the Board and it outlines in detail the offensive conduct and explains why such conduct is inappropriate and unacceptable for any director on the board. The censure letter will usually explain what the legal and fiduciary obligations of the director are in the context of demonstrating undivided loyalty to the corporate entity and to undertake no actions which could potentially expose the Association to risk of claims against it. Censure letters are confidential and should not be made public.

Such letters will also discuss the potential liability implications for the Association and the individual director, including the possibility that if claims are asserted against the director or Association, liability insurance coverage may not cover the claim or provide a defense. Finally, the censure letter will advise the rogue director of the consequence of not ceasing or correcting such behavior in the future, which will be discussed below. Sometimes, depending on the severity of the action, a censure letter will include a demand that the director resign or be subject to public action to address the rogue behavior. The effectiveness of this approach is directly related to the personality of the rogue director.

4. Removal of Director from Board Office

Note that I am referring to removing a director from a board office, not the removal from the Board as a whole. Unfortunately, there are very limited instances that a Board majority can actually cause a director's removal from the Board itself, which are usually set forth in the Association's bylaws, and which are often limited to being convicted of a crime or being judged incompetent. However, upon a majority vote of the Board, a director may be removed from holding a particular office, such as president, secretary or treasurer. Often the "rogue" director is the Board president, in which case the removal as president, which necessarily is disseminated to the membership, sends a significant message that can bring the director under control. But such a removal is largely a symbolic gesture by the majority that does not otherwise impact or impair the Director's service on the Board, access to confidential information or records or voting on Association business.

5. Recall Elections

One of the most potent and direct manner of dealing with rogue behavior is to subject the director to a recall election by the members. Pursuant Corporation Code Section 7222 there are provisions for as little as 5% of the members to call for a special meeting of the members for the purpose of recalling an individual director from the board. In some instances, a single director or board majority has the authority to notice such a meeting wherein the members of the Association are asked to vote for or against the removal of a particular director. In Association's which utilize cumulative voting, there is a somewhat arcane formula which is used to determine the requisite percentage that is necessary to remove a director from the board which can make it difficult. However, the fact that a recall movement is commenced necessarily means that the reason for the recall (actions of the director) is going to become very public, which may prompt a resignation to avoid public humiliation from disclosure. Care does need to be taken that the factual description of the Director's conduct be scrupulously accurate. A recall election is conducted with the same formality and under the same rules as an election of directors, with secret ballots opened at a noticed meeting by appointed election inspectors, to avoid claims by the recalled director that the process is suspect.

6. Lawsuit to Remove Director or Restrict Conduct

Another potent remedy which is available to individual directors or a group of members, is provided in Corporation Code Section 7223 and involves filing a lawsuit to have the court remove a director based on conduct including dishonest, fraudulent or gross abuse of authority or discretion. Unfortunately this remedy is rarely used because the Association really cannot fund the cost of the litigation, as the Association must be named as a defendant in such an action, meaning that individuals must pay to prosecute the action.

7. Communications to Members and Others

Primarily in terms of damage control/crisis management, it is imperative that the Board Majority attempt to effectively and accurately communicate with the membership in the event misstatements by a rogue director are made to prevent reliance upon the misstatements. Such communications should be focused on being accurate, not merely blaming the rogue director. The goal is to prevent damage, not create a scapegoat.

In situations where a Director has improperly interacted with a vendor, the vendor should be contacted by legal counsel in an attempt to unwind whatever agreement was made without authority or ameliorate any other issues created. The vendor should be reminded that all official actions have to be approved by the Board and are to be communicated through management, not a single director.

Where a director has undertaken unilateral actions without authority of the Board, such as imposing discipline or approving an architectural application, the Board should

attempt to address the situations in person, rather than with a one-dimensional written communication. With architectural application issues, the Board should use pragmatism in determining whether it can or should reasonably attempt to "unwind" what the director may have approved, particularly if the approval was in written form.

8. Parting Thoughts

If you serve on a board long enough or manage associations, you will undoubtedly encounter a rogue director whose agenda is completely different than the norm. In my 27 years of representing associations, I have encountered directors that didn't like my opinions actually circulating confidential privileged communications to the membership. I have had to "unwind" contracts in which directors have hired their brother in law to perform hundreds of thousands of dollars of construction work without telling the rest of the Board. I have also seen a "Jerry Springer Show" break out during a board meeting with the police being called to remove combatants. Although it shouldn't be this way, Boards and managers have to be cognizant that these types of conduct can and will occur and be ready to act swiftly and decisively in the manner discussed above to control the director and mitigate the harm.

III.

Board Member's Conflict Of Interest When Does A Board Member Cross A Line?

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

The volunteer status of a board member is essential to this discussion. Pursuant to Civil Code §5800 and Corporations Code §7231.5(a) there is no monetary liability on the part of, and no cause of action for damages shall arise against a voluntary director or voluntary executive officer of a non- profit corporation based upon alleged failure to discharge their duties as a director or officer if the duties are performed in good faith; performed in a manner that the director or officer believes to be in the best interest of the corporation and performed with such care, including reasonable inquiry, as an ordinarily prudent person in a similar circumstance would use. Volunteer is defined as rendering of services without compensation and compensation means remuneration whether by way of salary, fee, or other consideration for services rendered. It should be noted that payment of per diem, mileage or other reimbursement expenses to a director or officer does not affect that person's status as a volunteer. As long as volunteer board

members conduct themselves in this manner, they may avoid any personal liability pursuant to the Business Judgment Rule.

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

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

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

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

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

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

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

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

The Common Interest Development rewrite, which is effective Jan. 1, 2014, includes Civil Code §5350 that sets forth specific prohibited actions by directors and committee members and states as follows:

Civil Code §5350. Prohibited Actions by Directors & Committee Members.

(a) Notwithstanding any other law, and regardless of whether an association is incorporated or unincorporated, the provisions of Sections 7233 and 7234 of the Corporations Code shall apply to any contract or other transaction authorized, approved, or ratified by the board or a 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 area or facilities.

(3) A request, by the director or committee member, for a payment plan for overdue 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 to 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.