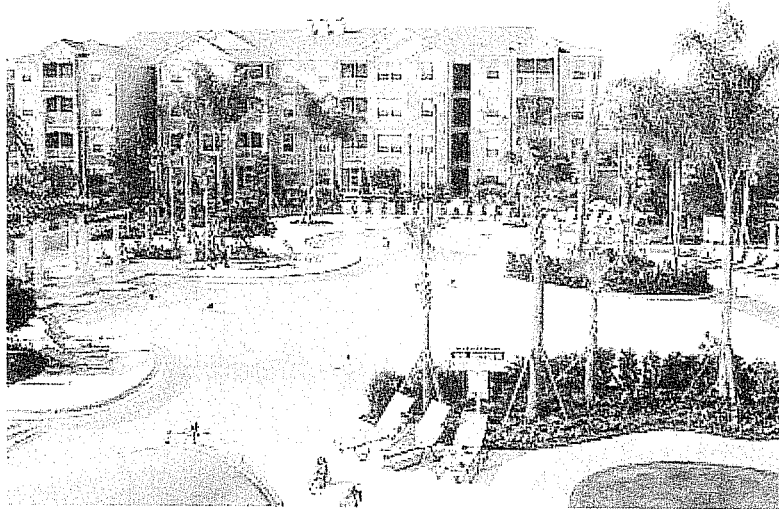


# SOUTH COAST HOMEOWNERS ASSOCIATION

## ANNUAL LEGISLATIVE FORUM

January 26, 2016



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.

JAMES H. SMITH, Esq.  
GROKENBERGER & SMITH  
Attorneys at Law  
152 East Carrillo Street  
Santa Barbara, CA 93101  
Telephone: (805) 965-7746  
Fax: (805) 845-2356  
Email: [jhs@grokenberger.com](mailto:jhs@grokenberger.com)  
Website: [www.grokenberger.com](http://www.grokenberger.com)

## New Legislation

### Annual Budget Report Must Now Include FHA & VA Certification Disclosures

AB 596; Civil Code section 5300

#### Existing Law

- A. Existing law requires Associations to distribute an *Annual Budget Report* not less than 30 days nor more than 90 days before the end of its fiscal year.
- B. The *Annual Budget Report* must include all of the information described in Civil Code section 5300.
- C. Revised *Annual Budget Report* form is attached.

#### New Law

- D. Effective 2016, the *Annual Budget Report* must also include a statement, in the form prescribed by Civil Code section 5300, indicating whether the Association is or is not certified by the *Federal Housing Administration*.
- E. Effective 2016, the *Annual Budget Report* must also include a statement, in the form prescribed by Civil Code section 5300, indicating whether the Association is or is not certified by the *Department of Veteran Affairs*.

### Effective January 1, 2017 Law Governing Owner & Association Maintenance, Repair and Replacement Obligations Becomes Effective

AB 968 (2014); Civil Code section 4775

#### Existing Law

- A. Existing law divides maintenance, repair and replacement responsibilities between the Owners and the Association as follows:
  - 1. Unless otherwise provided in an Association's CC&R's, the Association is responsible for repairing, replacing and maintaining the Common Area, other than the Exclusive Use Common Area appurtenant to the Owner's Unit.
  - 2. Unless otherwise provided in an Association's CC&R's, Owners are responsible for maintaining their Unit and any Exclusive Use Common Area appurtenant to their Unit.

- B. Since the enactment of Civil Code section 4775 in 1985 (originally Civil Code section 1364), unless specifically stated in an Association's CC&R's, which generally was not the case, there has been nothing addressing who, in the event of damage or destruction, is responsible for repair and replacement of Units and Exclusive Use Common Areas.

New Law  
Effective January 1, 2017

- C. Unless otherwise provided in an Association's CC&R's, maintenance, repair and replacement responsibilities are as follows:
1. Associations are responsible for maintenance, repair and replacement of the Common Area.
  2. Owners are responsible for maintenance, repair and replacement of their Units.
  3. Associations are responsible for repair and replacement of Exclusive Use Common Areas.
  4. Owners are responsible for maintenance of Exclusive Use Common Areas.

**Summary of Recent Regulatory Changes**  
**Impacting Maintenance of HOA Swimming Pools**

The Following is a Summary of Recent Regulations Governing Pools Which Became Effective in 2014 & 2015

- A. Associations with 25 or more units must test and record pool and spa water chemical composition and temperature daily (22 California Code of Regulations section 65523(a)).
- B. Associations with less than 25 units must test and record pool and spa water chemical composition and temperature 2 days a week at intervals of no more than 4 days apart (Health & Safety Code Section 116048(a)).
- C. At least one gate/door into a pool enclosure must allow for egress without a key for emergency purposes. If there are multiple points of egress, and only one provides for keyless egress, the gate/door providing for keyless egress must be marked "Emergency Exit" (Building Code section 3119(b)).
- D. There must be a maintained and readily available, 17-inch diameter life ring with a throw rope (3/16-inch diameter) and a 12-foot rescue pole with body hook (22 California Code of Regulations section 65540(a)).

**Technical Change to Reserve Funding Disclosure  
to Correct Syntax Error in Wording of Form**

AB 1516; Civil Code section 5570

Existing Law

- A. Civil Code section 5570(b)(3) requires Associations to distribute a *Reserve Funding Disclosure* in the form shown at section 5570(a).
- B. The *Reserve Funding Disclosure* must be distributed annually with the Annual Budget Report.

New Law

- C. The required form set forth in Civil Code section 5570(a) contained a syntax error which has now been corrected.
- D. Revised *Reserve Funding Disclosure* form is attached.

**New Cases**

***The Villas in Whispering Palms v. Tempkin***  
**2015 Unpublished Decision**

**Enforcement of any Restriction in an Association's CC&R is Dependent upon the  
Restriction & Enforcement Procedures Being Reasonable**

- A. You may place any Restriction in your CC&R's you want provided the Restriction is reasonable. A Restriction is reasonable when:
  - 1. The Restriction bears a rational relationship to the protection, preservation, operation or purpose of the Complex;
  - 2. The Restriction does not violate public policy and;
  - 3. The burden of the Restriction does not outweigh the benefit of the Restriction.

- B. A reasonable Restriction, as defined above, is enforceable provided an Association's enforcement procedures are reasonable. Enforcement procedures are reasonable when:
1. The decision to enforce a Restriction is made in good faith;
  2. Enforcement of the Restriction is not arbitrary or capricious and;
  3. The Association follows its own standards and procedures for enforcement.

**Bel Air Ridge HOA v. Rosenberg**  
**2015 Unpublished Decision**

**A Meeting to Count Ballots May Be Extended**  
**to Allow Additional Ballots to Be Received**

- A. When voting on: (1) Election and removal of Directors; (2) Amendments to Governing Documents or; (3) Grants of Exclusive Use Common Areas, Associations must conduct the vote in accordance with California Civil Code section 5100.
- B. Ballots distributed to the owners must comply with the provisions of Civil Code section 5115(a) & Corporations Code section 7513(i). That requires there to be stated on the ballot the deadline for voting (Corporations Code section 7513(i); Civil Code section 5115(a).
- C. Nothing in Civil Code Section 5100 et. seq. set forth any restriction on extensions of time to cast ballots. Therefore, for good reason, the Board may extend the voting deadline.
- D. The preferred practice is to note, on both the ballot and in the Association's voting rules and procedures adopted as required by Civil Code section 5105(a), the following: *By providing written notice of such extension to the owners prior to any envelope containing a ballot being opened, the Board reserves the right to extend the deadline date by which ballots are to be returned, opened and tabulated.*

# ANNUAL BUDGET REPORT

Unless the Governing Documents of the Association impose more rigid standards, within 30 to 90 days before the end of the Association's fiscal year, California Civil Code section 5300(a) requires the Association to distribute an *Annual Budget Report* to the Members containing the information specified in California Civil Code section 5300(b)(1) – (9).

Pursuant to California Civil Code section 5320(a)(2), all Members of the Association are hereby notified that wherever in this *Annual Budget Report* there is reference to a "summary" of a report or document, any Member may request a complete copy of the summarized report or document by contacting the Association's Manager as follows:

---

---

---

The *Annual Budget Report* for the Association follows:

## I

### Pro Forma Budget

Pursuant to California Civil Code section 5300(b)(1), the Association's *Pro Forma Budget*, showing the estimated revenue and expenses on an accrual basis must be provided. A copy of the *Pro Forma Budget* is attached hereto.

## II

### Summary of Reserves

Pursuant to California Civil Code section 5300 (b)(2), a summary of the Association's reserves, prepared pursuant to California Civil Code section 5565, must be provided to the Members. A summary of the Association's reserves, prepared in the format required by California Civil Code section 5570(a), is attached hereto entitled *Assessment and Reserve Funding Disclosure Summary*.

California Civil Code section 5565(a) also requires there be provided an inventory of the major components the Association is responsible for maintaining and/or replacing together with the current estimated replacement cost, estimated remaining life and estimated useful life of such components. Attached hereto you will find the Association's *Inventory of Major Components* as required by section 5565(a).

**III**  
**Reserve Funding Plan**

Pursuant to California Civil Code section 5300(b)(3), a summary of the reserve funding plan adopted by the Board, as described in subparagraph (5) of subdivision (b) of California Civil Code section 5550, must be provided to the Members of the Association. A summary of the Association's reserve funding plan prepared in the format required by 5570(a) is attached hereto entitled *Assessment and Reserve Funding Disclosure Summary*. A copy of the complete Reserve Study and Funding Plan may be obtained by contacting the Association's Manager or Board.

**IV**  
**Deferral of Repairs and/or Replacement**

Pursuant to California Civil Code section 5300(b)(4), a statement as to whether the Board has determined to defer or not undertake repairs and/or replacement of any major components with a remaining life of 30 years or less, including a justification for the deferral or decision not to undertake the repairs or replacement, must be provided to the Members of the Association.

The Association has / has not elected to defer repairs and/or replacement.  
Circle One

If the Association has elected to defer repairs and/or replacement of major components with a remaining life of 30 years or less, the components which the Association has elected not to repair and/or replace are as follows:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

The reason (s) the Board has elected not to repair and/or replace the identified items is as follows:

---

---

---

**V**  
**Need for Special Assessments**

Pursuant to California Civil Code section 5300 (b)(5), a statement as to whether the Board, consistent with the reserve funding plan adopted pursuant to section 5560, has determined or anticipates the need for the levy of one or more special assessments must be provided to the Members. Said statement, prepared according to the format required

by California Civil Code section 5570(a), is found in paragraphs 3 and 4 of the attached *Assessment and Reserve Funding Disclosure Summary*.

**VI**  
**Funding of Reserves**

Pursuant to California Civil Code section 5300(b)(6), a statement as to the mechanism or mechanisms by which the Board will fund reserves, including assessments, borrowing, use of other assets, deferral of selected replacements or repairs, or alternative mechanisms must be provided to the Members of the Association. The Board will fund reserves consistent with that set forth in this *Annual Budget Report* as well as the *Assessment and Reserve Funding Disclosure Summary* attached hereto and the Reserve Study and Funding Plan adopted by the Board pursuant to California Civil Code sections 5550 and 5560. A copy of the complete Reserve Study and Funding Plan may be obtained by contacting the Association's Manager or Board.

**VII**  
**Procedure Used for Calculation and Establishment of Reserves**

Pursuant to California Civil Code section 5300(b)(7), a statement addressing the procedure used for the calculation and establishment of reserves to defray the future repair, replacement, or additions to those major components that the Association is obligated to maintain must be provided to the Members of the Association.

**Calculation of Reserves:** As provided in California Civil Code section 5570(b)(4), the reserve fund amounts required to be disclosed per California Civil Code sections 5565, 5570(a)(6) and 5570(a)(7) were calculated by computing the current cost of replacement or repair of each reserve component multiplied by the number of years each component has been in service, divided by the useful life of each component. These amounts were then totaled to yield the net depreciation as of the date of the reserve study for all listed reserve components the Association is obligated to maintain. The resulting total is listed as the "amount required in the reserve fund" per California Civil Code section 5570(a)(7) and shown in the attached *Assessment and Reserve Funding Disclosure Summary*. (Note, however, that California Civil Code section 5570(b)(4) also states: "This shall not be construed to require the board to fund reserves in accordance with this calculation.") The percent-funded estimates as shown in the *Assessment and Reserve Funding Disclosure Summary* are then calculated by dividing the Association's total reserve funds by the total depreciation to date of all reserve components as calculated above.

**Establishment of Reserves:** The procedure used for the establishment of reserves was determined by either of the following calculations:

1) As provided in California Civil Code section 5570(b)(4), determine annual depreciation per reserve component and thereafter fund reserves annually at a rate



corresponding to the annual depreciation for all reserve components, including funding prior shortfalls in reserve funding; or

2) Use a traditional funding method, such as cash flow analysis, to establish a proper reserve funding plan to pay for projected reserve component expenses during the required 30-year period.

Refer to the Association's actual reserve funding plan and most recent reserve study to determine which reserve funding method was utilized.

Pursuant to California Civil Code section 5300(b)(7), the rate of return on the cash reserves was computed at a sum not in excess of 2% above the discount rate published by the Federal Reserve Bank of San Francisco at the time the calculation was made.

### **VIII** **Disclosure of Outstanding Loans**

Pursuant to California Civil Code section 5300(b)(7), the Association must disclose any outstanding loans it has with an original term of more than one year, including identification of the payee, interest rate, amount outstanding, annual payment and when the loan is scheduled to be retired. The outstanding loans which the Association has, falling within the scope of California Civil Code section 5300(b)(7), are:

1. \_\_\_\_\_
2. \_\_\_\_\_

### **IX** **Summary of Association's Insurance Policies**

Pursuant to California Civil Code section 5300(b)(7), the Association must disclose to its Members a summary of the Association's property, general liability, earthquake, flood, and fidelity insurance policies. A summary of said policies is attached herewith entitled *Summary of Association's Insurance Policies*.

### **X** **FHA Certification**

Pursuant to California Civil Code section 5300(b)(10), when a Common Interest Development is a condominium project, the following statement must be provided describing the status of the Common Interest Development with respect to Federal Housing Administration Certification.

*"Certification by the Federal Housing Administration may provide benefits to members of an association, including an improvement in an owner's ability to refinance*

*a mortgage or obtain secondary financing and an increase in the pool of potential buyers of the separate interest.*

*This common interest development [is / is not / (circle one)] a condominium project. The association of this common interest development [is / is not] certified by the Federal Housing Administration."*

The Association believes the above FHA Certification disclosure, when made, was accurate. However, you can check the current status of the Association's FHA Certification yourself by contacting the US Department of Housing and Urban Development. Therefore, before relying on the above FHA Certification disclosure, you should check with U.S. Department of Housing and Urban Development to confirm the current status of the Association's FHA Certification.

## **XI**

### **VA Certification**

Pursuant to California Civil Code section 5300(b)(11), when a Common Interest Development is a condominium project, the following statement must be provided describing the status of the Common Interest Development with respect to Department of Veterans Affairs Certification.

*"Certification by the federal Department of Veteran Affairs may provide benefits to members of an association, including an improvement in an owner's ability to refinance a mortgage or obtain secondary financing and an increase in the pool of potential buyers of the separate interest.*

*This common interest development [is / is not (circle one)] a condominium project. The association of this common interest development [is / is not (circle one)] certified by the federal Department of Veteran Affairs."*

The Association believes the above VA Certification disclosure, when made, was accurate. However, you can check the current status of the Association's VA Certification yourself by contacting the US Department of Housing and Urban Development. Therefore, before relying on the above VA Certification disclosure, you should check with U.S. Department of Housing and Urban Development to confirm the current status of the Association's VA Certification.

## **XII**

### **Distribution of Annual Budget Report**

Pursuant to California Civil Code section 5300(c), this *Annual Budget Report* is to be made available to the Members of the Association as required by California Civil Code section 5320. Section 5320 requires this Report to be individually delivered to the Members as required by California Civil Code section 4040.



**ASSESSMENT AND RESERVE FUNDING DISCLOSURE SUMMARY FOR THE  
FISCAL YEAR ENDING: \_\_\_\_\_**

California Civil Code section 5300(a) requires that this Assessment and Reserve Funding Disclosure Summary be distributed to all owners not less than thirty (30) days nor more than ninety (90) days prior to the beginning of the Association's fiscal year. The summary is to be provided with, and accompany, the Association's Pro Forma Operating Budget or Summary thereof that is delivered to all owners pursuant to California Civil Code section 5300. This Form is required to be in the format described in California Civil Code Section 5570.

- (1) The regular assessment per ownership interest is \$ \_\_\_\_\_ per \_\_\_\_\_.  
 Note: If assessments vary by the size or type of ownership interest, the assessment applicable to this ownership interest may be found on page \_\_\_\_ of the attached summary.
- (2) Additional regular or special assessments that have already been scheduled to be imposed or charged, regardless of the purpose, if they have been approved by the board and/or members:

| <b>Date assessment will be due:</b> | <b>Amount per ownership interest<br/>per month or year</b><br>(If assessments are variable, see<br>note immediately below): | <b>Purpose of the assessment:</b> |
|-------------------------------------|---|-----------------------------------|
|                                     |   |                                   |
|                                     |   |                                   |
|                                     |   |                                   |
|                                     | Total:  |                                   |

Note: If assessments vary by the size or type of ownership interest, the assessment applicable to this ownership interest may be found on page \_\_\_\_ of the attached report.

- (3) Based upon the most recent reserve study and other information available to the Board of Directors, will currently projected reserve account balances be sufficient at the end of each year to meet the Association's obligation for repair and/or replacement of major components during the next 30 years?  
 Yes \_\_\_\_ No \_\_\_\_
- (4) If the answer to (3) is no, what additional assessments or other contributions to reserves would be necessary to ensure that sufficient reserve funds will be available each year during the next 30 years that have not yet been approved by the board or the members?

| Approximate date assessment will be due: | Amount per Ownership Interest per month or year: |
|--|--|
|  |  |
|  |  |
|  |  |
|  |  |
|  | Total:   |

(5) All major components are included in the reserve study and are included in its calculations.

(6) Based on the method of calculation in paragraph (4) of subdivision (b) of section 5570, the estimated amount required in the reserve fund at the end of the current fiscal year is \$ \_\_\_\_\_, based in whole or in part on the last reserve study or update prepared by \_\_\_\_\_ as of \_\_\_\_\_ (month), \_\_\_\_\_ (year). The projected reserve fund cash balance at the end of the current fiscal year is \$ \_\_\_\_\_, resulting in reserves being \_\_\_\_\_ percent funded at this date.

If an alternative, but generally accepted, method of calculation is also used, the required reserve amount is \$ \_\_\_\_\_. (See attached explanation).

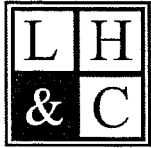
(7) Based on the method of calculation in paragraph (4) of subdivision (b) of section 5570 of the Civil Code, the estimated amount required in the reserve fund at the end of the next five budget years is \$ \_\_\_\_\_, and the projected reserve fund cash balance in each of those years, taking into account only assessments already approved and other known revenues, is \$ \_\_\_\_\_, leaving the reserve at \_\_\_\_\_ percent funded. If the reserve funding plan approved by the Association is implemented, the projected reserve fund cash balance in each of those years will be \$ \_\_\_\_\_, leaving the reserve at \_\_\_\_\_ percent funded.

Note: The financial representations set forth in the Summary are based on the best estimates of the preparer at that time. The estimates are subject to change. At the time this Summary was prepared the assumed long-term before-tax interest rate earned on reserves funds was \_\_\_\_\_ percent per year, and the assumed long-term inflation rate to be applied to major component repair and replacement costs was \_\_\_\_\_ percent per year.

**SUPPLEMENT TO ASSESSMENT AND RESERVE  
FUNDING DISCLOSURE SUMMARY**  
[Civil Code §5570(b)(3)]

Due to factors beyond the control of the Directors, including but not limited to the rate of inflation, the rate at which the major components actually deteriorate, unanticipated damage to the major components, fluctuations in material and labor costs and changes in building codes and regulations, the accuracy of the information set forth in paragraphs 3, 4, 5, 6 and 7 above is not, and cannot be, guaranteed. Depending upon the accuracy of the present and future assumptions used in providing the information in paragraphs 3, 4, 5, 6 and 7 the information and conclusions set forth in said paragraphs may not be correct. Therefore, any person reviewing this Assessment and Reserve Funding Disclosure Summary should not, without conducting their own independent investigation and analysis, rely





Loewenthal, Hillshafer & Carter, LLP

Web Site:  
[www.lhclawyers.net](http://www.lhclawyers.net)  
E-mail: [info@lhclawyers.net](mailto:info@lhclawyers.net)

Robert D. Hillshafer  
David A. Loewenthal  
Kevin P. Carter  
Michael D. Attar  
Barbara A. Higgins

5700 Canoga Avenue, Suite 160  
Woodland Hills, CA 91367  
Tel: (818) 905-6283  
Fax: (818) 905-6372  
Toll Free: (866) 474-5529

# **SOUTH COAST HOMEOWNERS ASSOCIATION**

**2016 LEGAL UPDATE**  
JANUARY 26, 2016

**By: David A. Loewenthal**



5700 Canoga Avenue, Suite 160  
Woodland Hills, California 91367  
Tel: (818) 905-6283  
Fax: (818) 905-6372  
Toll Free: (866) 474-5529

## REVIEW OF LEGISLATION AND APPELLATE DECISIONS AFFECTING HOMEOWNER'S ASSOCIATIONS IN 2015

Robert D. Hillshafer, Esq.  
David A. Loewenthal  
Loewenthal, Hillshafer & Carter, LLP

### 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. **Ryland Mews Homeowners Association v. Munoz** (2015) 2015 S.O.S. 1065

Why significant: Because the appellate court refused to accept a “form over substance” argument to allow a homeowner to delay the prosecution of a lawsuit when he claimed no prejudice.

This case involved an association suing a member who installed hardwood flooring in his unit without applying for or obtaining approval. Downstairs neighbors were complaining about excessive noise from above. As required by law prior to filing suit, the Association sent Munoz a “request for resolution” which offered the opportunity to mediate prior to a lawsuit being filed. Munoz did not reply to this offer to mediate within the 30 day time limit provided and did not communicate with the Board concerning the noise complaints. The Association sued for an injunction and Munoz filed a technical challenge to the complaint alleging that the Association had not fully complied with Civil Code Section 5935. That section requires the Association in conjunction with a request for resolution to provide the owner with a fully copy of the

statutes relative to pre-litigation, alternative dispute resolution. Munoz claimed that the notice he received did not include a full copy of the statute.

The appellate court found that the Association had indeed not provided Munoz with a full copy of the statute explaining the applicable laws concerning ADR. However, the court pointed out that although this was a technical violation, Munoz did not claim he was prejudiced in any way by not receiving this full statute and noted that Munoz did not respond whatsoever to the notices and never complained to the Association that the full statute had not been supplied. The court also noted that Munoz was an attorney and there was nothing to indicate he would have responded differently had the full text been provided.

**3. Tract 19051 Homeowners Association v. Kemp (2015) 2015 S.O.S. 1293**

Why significant: Clarifies that the prevailing party attorney fee provision in Civil Code Section 5975 (c) applies in certain circumstances even when a development is not actually a common interest development subject to the Davis-Stirling Act.

The Association filed a lawsuit against Kemp which alleged, among other things, that the Association constituted a common interest development as defined in the Davis-Stirling Act and therefore could enforce architectural restrictions in recorded CCRs. At trial, the court determined that the subdivision was not a common interest development under the Act due to the fact that the CCRs recorded by the original developer had expired and the attempt to extend the CCR term was not effective. The trial court awarded attorneys fees to Kemp as a prevailing party under the Act and initially, the appellate court reversed that award. Kemp appealed the reversal and upon a second look, the appellate court changed its mind about the attorneys fees.

The appellate court ruled that the prevailing party attorney fee provision in Section 5975 applied to allow Kemp's fees because the intent of the statute was to award the prevailing party attorneys fees in an action brought to enforce governing documents or the Act. The court's decision that the Association was no longer a common interest development did not change the fact that the Association alleged that it was and sought remedies as if it was. The court reasoned that if the Association had won the case, it would have been entitled to fees, then the fact that it did not prevail (for whatever reason) should not impair the defendant's ability to the same award.

**4. Watts v. Oak Shores Community Association (2015) 2015 S.O. S 1565**

Why significant: Court approved the Association's right to adopt rules which impose fees on members relating to short term rentals of property.

This 851 lot single family home development is situated on Lake Nacimiento near Paso Robles. Two owners sued the Association to stop collection of certain fees charged to owners in relation to short term/vacation rentals of their homes. The owners contended that such fees were not reasonably tied to expenses incurred by the Association as required by former Civil Code Section 1366.1 and unreasonably interfered with the owner's rights to lease out their property. That section prohibits levy

of fees or assessments other than those necessary to defray the Association's expenses.

After a protracted trial, which involved much expert testimony concerning the correlation of the fees charged by the Association to owners who rented their homes, the court concluded that the Association had sufficiently demonstrated that the charges were reasonably related to the burdens created by rentals. The court ruled that the Association's burden was not to demonstrate an exact correlation, dollar for dollar, between the rental fees charged and the Association's actual expenses. The court found that the Association had established a good faith relationship between the fees and the amount of administrative and maintenance burden created by the short term rentals because it would have been impossible to tie exact expenses to the burden. The trial court found that the fees were "roughly proportional" to the expenses incurred.

The court of appeals affirmed the decision and found that nothing in Section 1366.1 requires an exact correlation between a fee assessed and the costs for which it was levied, particularly where the cost of a study to determine the exact correlation by be prohibitively expensive or when the correlation would be impossible to determine.

Another salient part of this case was that the Association was awarded in excess of \$1,000,000.00 against the plaintiffs. The attorney for the plaintiffs was the husband of one of the owners.

#### 5. **Legacy Villas at La Quinta Homeowners Association v. Centex Homes** (2015) 9<sup>th</sup> Circuit Court of Appeals

**Why significant:** This recently decided Federal Court case further clarifies the attorney client relationship and associated privilege in the context of Associations and Board of Directors. This case held that attorneys hired by an Association whose Board consists of both members and employees of the Declarant/Developer represented the Association and not the Declarant for purposes of dis-qualification.

The plaintiff Association hired a law firm to represent the Association as general counsel. The Developer (Centex Homes) appointed several of its employees as directors of the Association during the selling phase of the project. In the course of acting as general counsel, the law firm regularly communicated with the Centex employees in the context of their serving on the Board of Directors. After several years the control of the Association and Board was turned over to the membership and the Association filed several lawsuits against Centex (construction defects and breach of fiduciary duty) using the same law firm that had interacted with the Centex directors.

Centex removed the breach of fiduciary duty case to federal court and filed a motion to disqualify the law firm on the basis that it had a conflict of interest because it had communicated with and given advice to the Centex directors while they were on the board. The court granted this motion. However, the law firm continued to represent the Association in the state court construction defect case.

During the discovery phase of the federal court action, the management company inadvertently provided privileged material to Centex relative to both pending cases. The general counsel law firm contacted Centex' attorneys about the mistakenly produced privileged information. Centex' attorneys complained to the federal judge, who then held the law firm in contempt based on the previous disqualification. The judge found the attorneys in contempt. The contempt order and disqualification order were appealed to the 9<sup>th</sup> Circuit Court of Appeals.

The appeals court found that the nature and content of the communications between the Centex directors and the law firm were limited in nature and quantity and that the attorneys learned of no confidential information about Centex and never paid any fees to the attorneys. The court found that Centex, being a very experience developer had no reasonable belief that the law firm represented both the Association and Centex. The appeals court reversed the disqualification order and the contempt order.

6. **Trilogy at Glen Ivy Maintenance Association v. Shea Homes** (2015) 235 Cal. App. 4<sup>th</sup> 361)

Why significant: Further interprets the murky application of the Anti-SLAPP statute in the context of Associations.

The Association and members filed suit against the developer alleging breach of fiduciary duty and unfair business practices relating to diversion of funds from the Association. The developer filed a motion to dismiss alleging that the lawsuit was really an attempt to interfere with its rights of free speech. The court found that the developer had not established that the Association's suit stemmed from or was based on protected speech, instead finding that the developer controlled board owed fiduciary duties to the Association and its members and that the suit was a result of conduct, not speech.

Unpublished Case which is not a binding legal decision

**Bel Air Ridge HOA v. Rosenberg**

In a petition to have the Superior Court approve the amendment of CCRs based on less than the required supermajority, a group of members opposed the petition at least partially based on the fact that the Board had extended the voting period a number of times in an attempt to obtain sufficient votes to allow the amendment to achieve a supermajority. The court found that extending the time period was not prohibited by law and was part of the reasonable efforts of the Board to provide members the opportunity to vote.

## NEW LEGISLATION

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. Civil Code Section 4735/AB 349: **Artificial Turf:** This law makes void and unenforceable any provision in governing documents or architectural guidelines that prohibited the use of artificial turf or other synthetic surface that resembles grass.
3. Civil Code Section 5570/AB 596: **Annual Budget/FHA and VA Certification Disclosure:** This bill would require the annual budget disclosure to contain a statement as to whether a condominium project is FHA or VA certified (which can impact sales and refinancing).
4. Civil Code Section 4750.10/AB 1448: **Clothesline Bill/Solar Energy:** This law prohibits governing documents from effectively restricting the installation or use of a clothesline to dry clothes. The law does recognize Association’s ability to impose reasonable restrictions and applies only to areas which a homeowner is entitled to use exclusively.
4. SB 290: **Foreclosure Notice:** This bill would modify the procedure for service of a notice by an association to foreclose for non-payment of assessments to allow substituted service by serving the notice on an adult present at the address identified by the Owner to receive legal notices. Currently, personal service on the Owner is required, which has resulted in many Owners avoiding personal service.
5. Civil Code Section 1941.7/SB 655: **Mold:** This law proscribes standards for habitable buildings which could be applied to condominium projects relative to the existence of mold, which if violated could be charged as a misdemeanor. This raises the possibility of an Association, a board or a manager being held responsible for mold in common areas.
6. **Pool Maintenance Regulations:** Title 22 of the California Code of Regulations have been modified impose certain obligations on operators of pools, including HOA’s larger than 24 homes. These new requirements set parameters for water characteristics, require daily monitoring of pool facilities and record keeping, presence of specific safety and first aid equipment, require at least one keyless exit and

impose health restrictions for employees and pool users. Association Board's will need to make sure that the pool maintenance vendors are up to speed on these testing and record keeping requirements and make sure that the required safety equipment is present. Additionally, Association's should consider posting a notice prohibiting use of the pool or spa by persons having an infectious communicable disease, which includes relatively minor ailments.

7. AB 786: **Recycled Water** Existing law prohibits an association from fining or disciplining an owner for reducing watering or stopping watering landscaping during drought emergencies. This law provides that an owner that receives recycled water from a retail water supplier but fails to use that water to irrigate landscaping may be fined or assessed by an Association for that failure.

8. AB 807: **Recordation of Notice of Transfer Fees** Current law requires the entity imposing the transfer fee to record a specified document which describes the fee and calculation of same concurrently with the instrument's recordation. The new law makes unenforceable a transfer fee recorded against a property on or before December 31, 2007 which incorporates by reference another recorded document, such as CCRs, unless it is recorded against the property on or before December 31, 2016 in a single document that complies with Civil Code Section 1098.