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2017 Year-End Review of California Legislation and New 2018 Laws As They Affect Community and Homeowners' Associations

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NEW 2018 LAWS:

AB 407: Assembly and Free Speech Rights on HOA Common Areas (New Law). *New Civil Code Section 4515 will be added to the Davis-Stirling Act effective January 1, 2018,* and will give HOA members, residents, their invitees, and guests expanded speech and assembly rights, and allow them to use common areas during reasonable hours without charge for purposes relating to "common interest development living", association elections, legislation, election to public office, and other election process topics. This bill also allows members and residents to canvas and petition others during reasonable hours, invite public speakers to common areas, and distribute or circulate information without prior permission concerning information about the HOA community, elections, or other "issues of concern" to its members. The new law will invalidate any governing document, rule, or restriction which prohibits any of the above activities, and authorizes the court to assess a civil penalty for violations.

Recommendation: *HOAs should have their legal counsel review their current rules, policies, and governing documents with respect to campaigning, solicitation and common area usage and may wish to consider creating specific reasonable rules and regulations in anticipation of such requests.*

AB 534: Mechanics Liens (New Law). This law allows owners in planned developments to obtain releases of mechanics liens, by paying a portion of the amount of the lien attributable to that owner's fractional interest in the development, or by obtaining a lien release bond in such amount. The law prohibits a mechanics lien from being recorded against a separate interest in a condo or common interest development, unless consent was expressly provided or that owner requested the performance of labor or furnishing of materials or services, except in the case of emergency repairs. This does not change the existing provision implying consent as to work on the common area approved by the Association. *Effective January 1, 2018, it will act to amend Sections 4615 and 6658, and also add Sections 4620, 6660, and 8119, to the Civil Code.*

AB 634: Solar Energy Systems (New Law). This new law allows homeowners to install solar panels on HOA common area roofs without a 2/3 vote of the Association's membership. When reviewing a request to install a solar energy system on a roof area shared by more than one family or homeowner, the Association must require an applicant to notify each homeowner in the building on which the solar installation will be placed, and requires the applicant owner to maintain a homeowner liability coverage policy. Owners must provide Association Certificate of Insurance within fourteen days of approval and annually thereafter. The Association may impose reasonable restrictions that do not significantly increase the costs of the system or decrease its performance. The application must be processed in the same manner as an architectural modification. Associations may wish to create reasonable rules and regulations in anticipation of solar panel requests.

Note: This is a very significant change in the law because it will severely impact the Association's ability to properly and fully maintain the common area roofing systems both because additional equipment will be located on the roof and because its control over access on to the roof will be limited. It is likely that this will create conflicts between owners who want to have such panels installed but there is not enough room left on the roof for such installations.

*This bill will result in the following **Civil Code Sections** being affected, as highlighted below:*

714.1 – Amended to specify that an Association shall not establish a general policy prohibiting the installation or use of a rooftop solar energy system on a common area roof, and shall not require approval by a vote of members owning separate interests affected by the common area roof where the solar panels are to be installed.

4600 – Amended to provide that an Association may not require approval of the membership to grant exclusive use of the common area to a member for the installation of a solar energy system.

4746 – Added to require the Association and applicant to take certain actions regarding insurance and notification to other affected homeowners. It also requires the applicant to submit a solar site survey showing the solar placement by a licensed contractor or the contractor's knowledgeable, registered salesperson, and requires the owner *and each successive owner* to bear the costs for homeowner liability coverage insurance, any specified damage caused by the installation, maintenance, repair, removal or replacement of the solar energy system, as well as the costs for maintenance, repair, and replacement of the solar energy system until the common area is restored. The Association shall also require the applicant to disclose to prospective buyers the existence of the solar energy system and the responsibilities that go with it. Though not specifically referenced in the legislation, a recorded covenant may be the appropriate instrument to deal with many of these requirements.

AB 690: Managers' Conflict of Interest (New Law). Managers and management companies must disclose conflicts of interest to the Association's Board of Directors, and this new law(s) codifies how and when they must make that disclosure, including but not necessarily limited to, the following:

- receiving any referral fee or other financial benefit that could be derived from a business providing products or services to the association;
- ownership interests or profit-sharing arrangements with service providers recommended to, or used by, the Association;
- receiving a referral fee or other financial benefit from a third-party provider distributing documents pursuant to Civil Code §4528;
- disclosing any business or company in which the property manager or common interest development management firm has any ownership interests, profit-sharing arrangements, or other financial incentives provided to the management firm or managing agent.

Effective January 1, 2018, AB 690 will be codified through amendment to various existing statutes (Business & Professions Code §11504, Civil Code §§ 4528, 4530, 5300, and 5375), and through the addition of Civil Code §§ 5375.5 and 5376.

AB 1412: Volunteer Director and Officer Liability (New Law). Current (2017) law only grants specified immunity from personal liability to board members of HOAs that are exclusively residential. This bill extends the liability protections to those in mixed use associations. It also authorizes Associations to use the last address(es) on file for off-site owners if they do not provide mailing addresses annually. *(Effective January 1, 2018, this bill can be found in amended versions of Civil Code §§ 4041 and 5800.)*

SB 2: Recordation Fees (New Law). This bill now requires a fee of $75 on every real estate instrument, paper, or notice required or permitted by law to be recorded, per single transaction per single parcel of property, not to exceed $225.

PROPOSED OR PENDING LEGISLATION – NOT LAW YET AND MAY NEVER BE:

SB 451: No Liability Based on Governing Documents Omitting Harassment Reference

No association shall be liable to any person because the governing documents of the association do not contain a provision authorizing the Association to stop harassment of a member by another member.

AB 721: Inspection and Repair of Balconies, Decks, and Walkways. This bill would obligate Associations to inspect balconies and all structural components every 5 years through a licensed, structural engineer, who would be permitted to order destructive testing and any repairs he or she deemed appropriate without consideration

of financial means to pay or the timing of the repair work. This bill would have substantial financial impact on Associations.

AB 731: Personal Income Tax Deduction on HOA Assessments. This amended bill allows qualified taxpayers (HOA members whose income does not exceed $150,000) to deduct from their income taxes an amount not to exceed $1,500 for HOA assessments. *(This bill is for taxable years beginning on or after January 1, 2017 and before January 1, 2022, and is intended to amend Section 17072 of, and add/repeal Section 17208 of the Revenue and Taxation Code.)* **Recommendation:** If adopted, consult with your tax adviser.

AB 786: Statements of Information. This bill allows associations to file their required statements of information online with the Secretary of State.

AB 1426: Uncontested Elections. This bill exempts Associations from balloting requirements if the election is uncontested. This could conceivably save association's the expense of conducting elections when the election is uncontested. This would allow for efficiency and cost savings.

AB 1569: Disability Accommodations of Animals. This bill would allow a landlord and Associations to request verification of a disability from a reliable third-party source such as a doctor to determine the need for a support animal when the disability is not readily apparent.

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2017 Year-End Review of California Court Decisions Affecting Community and Homeowners' Associations

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Published Decisions:

1. ***Tract No. 7260 Association, Inc. v. Parker*** (2017) 10 Cal. App. 5th 24

(The Association can deny a homeowner member access to its membership list when the request was made for an "improper purpose", in this case aiding a party the Association was suing.)

Significance: The right to inspect and copy certain Association records is not absolute, as some records may be withheld from a member when the Association has evidence that the request is actually being made for an improper purpose.

Facts: Parker was a homeowner and Treasurer of the Association. Eveloff was the HOA President who founded a company [Fix the City], and with Parker's help, convinced the Association to transfer funds to that company, which used the HOA funds without any benefit received by the Association or its members as a whole. Shortly after the transfer, both Parker and Eveloff simultaneously resigned from the Board, but not before making an emergency request to pay $49,000 to the attorneys for the HOA who opined that the transfer was legal. The same date that the Association filed suit against Eveloff's company, Parker requested seven categories of corporate information from the HOA, including its membership list, and stated "legitimate" reasons such as wanting to ascertain that the HOA was following generally accepted accounting principles, and for possible communications with members to ascertain whether there were any corporate misdeeds. This request for records and the membership list was made pursuant *Corporations Code* § 8331, et. seq. A representative of the HOA met briefly with Parker and let him review certain of the documents, but not all of them, including the membership list. Parker filed a writ in court seeking an order compelling the HOA to allow him to inspect and copy the membership list and the other books and records he sought.

Disposition: The Court of Appeal denied Parker's request for disclosure of the HOA's membership list and all other documents due to Parker's improper, substantiated purpose.

Key Findings: (1) Substantial evidence supported finding that homeowner sought inspection for improper purpose, (2) mere speculation of an improper purpose is not sufficient to nullify member's inspection rights, (3) the homeowner's asserted purpose for seeking records' inspection was insufficient to defeat a finding of improper purpose, (4) failure of HOA to seek court relief first against homeowner's records' inspection did not bar the Association from subsequently relying on improper purpose defense to challenge inspection, and (5) Parker sought the membership list and records as an individual, and not on behalf of an authorized number of members (as he later tried to contend), thus the HOA was not required to first petition the Superior Court for an order setting aside the demand as required by Corporations Code § 8331(i).

2. ***Colyear v. Rolling Hills Community Association of Rancho Palos Verdes*** (2017) 9 Cal.App.5th 119. *(Statements made by homeowner to HOA seeking to invoke HOA's dispute resolution against his neighbor for refusing to trim his trees, were protected by the anti-SLAPP statute.)*

Significance: Homeowners' detailed, written applications for internal dispute resolution against other neighbors will be protected if their applications are based on statements made in connection with an issue of public interest and ongoing controversy or debate, which may be protected by California's anti-SLAPP statute.[1] This is part of a recent trend of expanding areas of public interest in the HOA context of protected speech.

Facts: The HOA had in place resolutions to "establish procedures for its members to utilize the authority of the HOA to correct view impairments created by trees or other plantings." Resolution 220 quoted the tree-trimming provision in the CC&Rs and stated that "it applies to some, if not all, properties ..." Defendant homeowner submitted a view impairment application to the HOA seeking to invoke its' internal dispute resolution process against a neighbor who refused to trim trees blocking his view in accordance with the applicable tree-trimming provisions in the CC&Rs. Plaintiff, another neighbor and HOA member, sued Defendant and the HOA, claiming that Resolution 220 did not encumber his property, and that Defendants were wrongfully trying to cloud his title by applying such an encumbrance. (Plaintiff believed some of the offending trees were really on his property and was concerned that the Defendant homeowner might seek to enforce the Tree and Plantings Covenant against his lot in the future.) Defendant filed a Special anti-SLAPP motion to strike the Complaint, arguing that his view impairment application was protected under CCP § 425.16(e)(4), as it constituted a written statement made in connection with an issue of public interest. He also asserted that Plaintiff could not establish a probability of success since Defendant withdrew his application for dispute resolution and the HOA never issued a decision on it. Plaintiff opposed the Motion to Strike, arguing that Defendant's

[1] California *Code of Civil Procedure* ("CCP") Section 425.16 is also known as the anti-SLAPP statute. "SLAPP" is an acronym for "Stategic Lawsuit Against Public Participation."

application involved a private matter, and was not protected conduct. Other homeowners, even those without view issues, wrote in and said they were "vitally interested" in the issue because of the potential for expensive litigation exposure to the HOA, resulting in increased fees to members.

Disposition: The Court of Appeal affirmed and upheld the Superior Court's granting of the Defendant homeowner's anti-SLAPP Motion to Strike.

Key Findings: Defendant met his burden to establish his conduct was a "protected activity" under the anti-SLAPP statute because the "issue of view" was one of "general concern" to the homeowners in the HOA community. The Court noted that the issue of the Board's authority to apply tree-trimming covenants to all lots in the community was a subject of interest to the entire membership of the community, and one of "ongoing topic of debate" between the Board and homeowners; therefore, it met the definition of "public interest". Because Defendant withdrew his application and the HOA never acted upon it, Plaintiff could not show a probability of success on the merits to his quiet title claim since there was no adverse claim.

3. Mashiri v. Epsten, Grinnell & Howell (2017) 845 F.3d 984 (9th Cir.) *(Law Firm for HOA was held to be a "debt collector", subject to Fair Debt Collection Practices Act ("FDCPA"), in collecting a homeowner/consumer's overdue assessment fee.)*

Significance: Although a law firm may believe it is only enforcing CC&Rs, or perfecting a security interest, lawyers who demand that the delinquent homeowner also make payment, or otherwise engage in debt collection activities, must follow the FDCPA, an act which regulates debt collection practices to prevent consumer abuses. This is another example of the courts holding Associations and agents to an absolute standard of compliance with applicable laws in order to collect delinquent assessments.

Facts: Plaintiff failed to pay an overdue assessment for $385, and was sent a collection letter by the HOA's law firm. The letter contained a notice and warning that failure to pay the assessment fee would result in the HOA recording a lien against Plaintiff's property. Plaintiff argued that the letter violated 15 U.S.C. §1692 of the FDCPA because the firm's letter also demanded payment sooner than the expiration of the debtor's thirty-day dispute period, and threatened to record a lien within thirty-five days irrespective of whether she disputed the debt. The Epsten firm presented a legal issue concerning the full applicability of FDCPA when a debt collector seeks, in part, to perfect a security interest and preserve the creditor's right to record a lien. It argued that it was, therefore, *not* acting as a debt collector.

Disposition: The Appellate Court disagreed and reversed the District Court's dismissal for failure to state a claim of an action under the FDCPA, in favor of Plaintiff, finding that she stated a claim at the pleading stage.

Key Findings: Because Epsten sent a letter notice attempting to collect payment, irrespective of whether it also sought to perfect the HOA's security interest and preserve its right to record a lien in the future, it is subject to the full scope of the

FDCPA. The Court distinguished between cases like this one and simply sending a notice of default or foreclosure to "inform" and enforce a secured loan without requesting payment. The Court also found some of the language in the letter notice violated the FDCPA in terms of timing and actions the homeowner needed to take to dispute the debt. It noted that "the threat of recording a lien is a debt collection activity", which under the FDCPA must cease if the debtor-homeowner disputes the debt and no verification of the debt has yet been mailed to that homeowner.

4. ***Lee v. Silviera*** *(*December, 2016) 6 Cal.App.5th 527 *(A Complaint for declaratory relief about obtaining bids and taking verbatim notes at board meetings was filed by three HOA Board Members against six other Board Members, and was later stricken under the anti-SLAPP statute.)*

Significance: The California anti-SLAPP statute CCP § 425.16 can act as a defensive weapon against legal in-fighting between Board Members. Also, this case represents another clarification as to what constitutes public interest in the HOA context and expands the kinds of disputes to which CCP 425.16 may apply. It also is interesting in the context of whether Boards "should" take verbatim notes or record board meeting, as opposed to recording primarily the motions and the votes on the Board motions.

Facts: Three HOA directors or Board members filed a lawsuit against six other directors and the HOA manager for declaratory judgment arising out of disputes involving whether the Board was required to allow the Board's Secretary to take verbatim notes of Board meetings, and about whether they were obtaining a required number of bids for HOA projects.

Disposition: The Court of Appeal reversed the trial court's decision to deny the anti-SLAPP motion to strike, and held that the anti-SLAPP statute did apply because the Complaint involved protected activities, and there was no actual controversy. The trial court was directed to grant the anti-SLAPP motion to strike with respect to each director Defendant.

Key Findings: The Court concluded that the meetings of the Board in which the director Defendants allegedly engaged in the "wrongful conduct" constituted a "public forum" within the meaning of the anti-SLAPP statute, and the acts regarding their failure to obtain at least three bids for projects and allow the secretary to take verbatim board meetings (as she was a court reporter), constituted issues of "public interest" and because the project(s) involved multiple buildings in the community. Once the Defendants met that burden, Plaintiffs were not able to meet their burden of probable success on the merits since there was no evidence that the Secretary was required to, or had the discretion, to record verbatim board minutes, nor was there any "actual controversy" about the alleged failure to obtain the necessary bids because the evidence showed at least three bids were obtained.

Unpublished Decisions (Cannot be cited, but nonetheless interesting to see how the courts have ruled):

5. Lingenbrink v. Del Reyo Estates Homeowners Association - 2017 No. D070194 and WL 1079989. *(An Association Board was found to have acted outside its authority when it applied an unambiguous restrictive covenant in a manner other than as written).*

Significance: A Board cannot rewrite a restriction in the governing documents, or use their discretion, when the restriction's meaning is perfectly clear. The *Lamden* judicial deference rule is not extended to interpreting unambiguous CCR provisions.

Facts: When Plaintiff Lingenbrink purchased his lot, he selected it for its highest elevation and panoramic ocean views. The property across the street was vacant and had no vegetation. Another homeowner bought the lot across from Plaintiff's and planted trees which eventually grew tall enough to block Plaintiff's ocean view, even though Defendant trimmed them annually. The restrictive covenant in the CC&Rs at issue here stated:

> "*No trees,* hedges or other plant materials *shall be* so located or *allowed to reach a size or height which will interfere with the view from any Lot* and, in the event such trees, hedges or other plant materials do reach a height which *interferes with the view from another Lot,* then the Owner thereof shall cause such tree(s), hedge(s) or other plant material[(]s) to be trimmed or removed as necessary." (Italics added in case report).

Although the Board agreed that Plaintiff's view was obstructed and told the other homeowner to significantly reduce them, it was later decided that Plaintiff's view was not "unreasonably impeded "after "balancing the interests" of the two homeowners, such that the Board took no enforcement action. This decision was made after a meeting with the homeowner who owned the trees, and was generally popular and well-liked, while Plaintiff was not, and was considered a troublemaker. This lawsuit followed for breach of the CC&Rs and injunctive relief.

Disposition: The trial court determined that the view protection provision in the CCRs was unambiguous and must be enforced, which the Court of Appeal affirmed. In a post judgment order, the Superior Court determined Plaintiff to be the prevailing party and ruled that he was entitled to recover $200,000 in attorney fees and $20,621.15 in costs from the Association (Order).

Findings: Even though the Association argued that the Court should defer to the Board's judgment to exercise its discretion, the Court disagreed when the meaning and language in a restriction is clear and unambiguous. The appellate court was not sympathetic to the assertion that the tree cutting would leave the neighbor's property barren or with mutilated tree trunks, finding that both the Association and neighbor were aware of the restriction when the trees were planted, and also may have acted in bad

faith by favoring one homeowner over another.

6. ***Ocean Windows Owners Association v. Spataro*** - 2017 WL 1075056
(Court allows Association to amend CC&Rs without a supermajority vote.)

Significance: The Court of Appeal allowed an Association to amend its Declaration of CC&Rs to, among other things, impose short-term rental restrictions on homeowners with less than a supermajority vote after the trial court found such restriction reasonable as required by statute.

Facts: The original 1972 CC&Rs of a 45-unit condo development provided that the CC&Rs could be amended if at least 75 percent of the unit owners and every mortgage holder agreed. In 2013, the Association drafted a comprehensive amendment and restatement of the CC&Rs that complied with existing law and eliminated obsolete language. After following all required notice procedures including a description of the proposed changes, the members of the Association voted. The Association received 42 signed ballots: 32 in favor and 10 against the amended CC&Rs. Since the votes in favor fell short of the required 75 percent, the Association filed a petition with the trial court to obtain discretionary approval of the amended CC&Rs under the Davis-Stirling Common Interest Development Act, (since the Act allows for that when more than 50 percent of the necessary votes are obtained). The main issue of change in the CC&Rs was the elimination of short-term rentals, but which only three owners opposed. It was noted that only a small group of owners rented their units like a hotel, and increased trash, security, and repairs to common areas resulted in more costs for the HOA. Also, other owners complained about noise and public drunkenness. The opposition argued that the amended declaration was a "power grab" by the Association, and not in the best interests of all owners, and would cause harm to those who rented their units.

Disposition: The trial court granted the Association's Petition based on compliance with the statutory requirements and allowed the amended CC&Rs, which the appellate court affirmed on appeal.

Findings: The appellate court noted that the relevant test is not whether the proposed amendment is necessary, but whether it is *reasonable.* The court found that there was ample evidence that the proposed changes, including the rental restrictions, were rationally related to protecting and preserving the condominium development as a whole. It also based its decision on the facts that notice was properly given, a reasonable effort was made to permit all members to vote, and that more than fifty (50) votes were obtained in favor of the amended CC&Rs.

7. ***Castillo v. Cinnamon Tree HOA*** – 2017 WL 770671
(No homeowner association liability owed to resident who was unforeseeably attacked by other residents from the same condominium complex.)

Significance: Homeowner Associations, management companies, and landlords will not be held liable or responsible for a criminal attack if there is no evidence that the attack was foreseeable, and the Plaintiff cannot show what specific action would have prevented the attack had it been taken by the Defendants. In this context, the Association is being treated the same as a landlord.

Facts: Plaintiff Castillo resided in a large condominium complex owned and managed by the Defendants, an HOA and a management company. Late at night, Castillo was smoking a cigarette in a common area outside his unit when two assailants residing in the same complex, suddenly attacked him from behind and shot Castillo in the chest. Tragically, Castillo was rendered a quadriplegic, and sued his HOA and their management company for failing to provide adequate security to prevent the attack. The complex was in a high crime area which evidence Plaintiff presented. Defendant had a security guard company patrol the complex on foot during certain parts of the day, and one was on duty during the time of the attack. There were also 16 surveillance cameras scattered throughout the complex, which the guard or management could monitor from the office, in addition to two closed circuit cameras. Defendants moved for summary judgment on the basis that Plaintiff could not establish the necessary duty or causation elements required.

Disposition: The trial court granted the HOA's summary judgment, and the Court of Appeal affirmed the decision in favor of Defendants.

Findings: Although Castillo contended that the HOA had a duty to conduct a security audit to identify security measures that could have prevented the attack, the Court noted that an audit would be an intermediate step that may or may not have identified a security measure capable of preventing the attack. The Court also stated that governing law requires evidence of similar acts by Castillo's assailants which would show the HOA had notice of their violent propensities. This Court was not persuaded by evidence of public drinking, using drugs, or loud partying. "Foreseeability and the extent of the burden to the defendant are ordinarily the crucial considerations ..." California courts analyze third party criminal acts differently from ordinary negligence and require a heightened sense of foreseeability before an HOA or landlord will be held liable.