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South Coast Homeowners Association

P.O. Box 1052
Goleta, CA 93116
805.964.7806
www.southcoasthoa.org
gartzke@silcom.com

IN THIS ISSUE

UPCOMING SOUTH COAST HOA MEETING – JUNE 6

**"Board Member Interactions with Sellers, Buyers and Lenders-
What you don't know may surprise you!"**

- What to know when listing a unit
- What the Association should know and do about a listed unit
- What the Association is responsible for during the sale, escrow and lender review process
- Lender Certifications – Do's and Don'ts
- Questions and Answers

Speaker – Roy Helsing, CCAM – CEO of the Helsing Group, Association Management, Consulting and Reserve Study Services, San Ramon, CA

Date and Time – Monday – June 6, 2016 – 7 PM (Refreshments at 6:45)

Location – Encina Royale Clubhouse – 250 Moreton Bay Lane, Goleta

Our meeting materials from the March 2016 program are now available online at http://www.southcoasthoa.org/resources.html. A number of prior meeting materials are also available there. Prior issues of the newsletter are also archived on the site and useful links to other resources can be found on the home page.

EUCALYPTUS HILL HOMEOWNERS ASSOCIATION
WATER HERO AWARD

Source: City of Santa Barbara

The Eucalyptus Hill Homeowners Association (HOA) is the 2015 City of Santa Barbara Water Hero! The City gives out the Water Hero award every year to highlight individuals, businesses, or organizations that have gone above and beyond to make lasting changes to conserve water and serve as an example of resource efficiency in our community. The Eucalyptus Hill HOA is being honored for their extraordinary efforts saving water outdoors by transforming their communal lawn areas to water wise landscaping with efficient irrigation.

The Eucalyptus Hill Homeowners Association (HOA) was established in the early 1970s. Originally, the HOA had large communal lawn areas, and therefore, high water bills. The Association saw value in water wise landscaping and took actions to retrofit their communal areas within the HOA. But that's not all. If you were to take a stroll within the HOA, you would see water wise plants in every front yard and even a few rain gardens.

"I think the value to the community is, as a whole, we feel a part of the water savings efforts for the City," said Mary Lu Edick, who is on the Eucalyptus Hill HOA Board of Directors and a realtor in the Santa Barbara area. About the old lawn areas, she added, "I've always heard that the landscaping looked too old fashioned. I think it helps property values overall."

The Eucalyptus Hill HOA began their landscaping upgrade project in late 2014. By November of 2015, they had replaced nearly 5,000 square feet of lawn with a beautiful water wise landscape, increased the efficiency of the irrigation system by utilizing drip irrigation, installed a weather-based irrigation controller, and participated in the City's Smart Landscape Rebate and Free Sprinkler Nozzle programs. Once plants are established, the new landscape is projected to use 65% less water than the old lawn.
Barbara Calder, resident and former Chairman of Architecture, helped initiate this project. She and the Planning Committee worked with landscape architect Erin Carroll and landscape contractors Cold Springs Landscapes to create a plan and install the new landscaping. The landscape plan, along with education, helped get the HOA Board and 27 homeowners excited and engaged with the project.
"We ripped out all the spray heads from the old lawn, installed the new drip valves, and put in a new backflow preventer and pressure regulator. The pressure here is really high, and drip systems like lower pressures. We also put in a smart irrigation controller and weather sensor on the side of the clubhouse," explained Erin Carroll. The communal landscape now has a wide variety of water wise plants including blue atlas palm, cycads, oak trees, western redbud, and California natives.

Overall, these plants have transformed the landscape by adding an abundance of color, flowers, and creating an ecosystem rich with birds and butterflies. In addition to making long-term efficiency upgrades, they have set an example for other homeowners associations to follow in their path. As Barbara Calder said, "The most rewarding part is to see it! I think the finished job is beautiful and I think the community as a whole has been very positive." Congratulations, Eucalyptus Hill Homeowners
Association for being a Water Hero!

If you are interested in learning more about the Water Hero award and past winners, please visit www.SantaBarbaraCA.gov/WaterHero or call (805) 564-5460. Let's Save Together!

HOME EQUITY LINES OF CREDIT
THE NEXT FORECLOSURE WAVE?

By: Michael J. Gartzke, CPA

From 2005 through 2008, many banks offered very generous terms on home equity lines of credit where homeowners with sufficient equity could borrow money against their homes with few questions asked. Many homeowners took advantage of the "easy" money. Interest rates were tied to bank rates which have descended to near zero. Many of these interest rates are currently 3-4%. The draw period was for 10 years and the required payments were interest only.

Now that the 10 year draw periods are coming to a close, principal payments are now required. Some owners will not have the income necessary to refinance these loans. Under the terms of the HELOC, principal and interest payments are required over 15 years to pay the HELOC off.

One of my retired tax clients requested my assistance in dealing with her bank on an expiring HELOC. Interest payments had been nearly $600 per month. With principal payments now required, the payment has increased to over $1,800 per month, more than triple the previous payment. The bank advertises that it will work with borrowers to adjust the loan terms for those who cannot afford to pay.

As I write this article (January 2016), the process is ongoing. It started in April 2015. Countless hours have been spent dealing with the lender in at least 3 states to obtain a loan modification to allow the client to remain in her home. Voluminous documents have been provided to the bank. Sometimes more than once. Telephone appointments have not been kept. Assurances that were made about the client's qualifications were denied. Information provided at the outset was not taken into consideration by the bank in their decision making until 6 months later. The "team member" assigned to this modification request was removed 6 months into the process (fired?). At one point in the process, a bank representative threatened foreclosure even though payments were current. This has been an education of the worst kind as to how banks will deal with these expiring lines of credit.

In November, the client was tentatively approved for a 40-year principal amortization which reduces the monthly loan payment by $700 per month. Currently, the client is in a 3 month "trial" period where the reduced loan payment is made. At the conclusion of the three-month period, the loan is supposed to permanently convert to a 40-year loan. We'll see.

I will not be able to do this for another client. The hours spent to this point have been staggering. The angst and the turmoil is dealing with "idiots" (polite term) have been nerve-wracking. My client has had a banking relationship with this bank all her adult life. To see how the bank has treated her has been disgusting.

Your association may have owners in the same situation. The inability to refinance these loans may adversely impact their ability to pay assessments. Monitor assessment collections carefully and try not to let outstanding balances get out of hand.

A CASE FOR A MEETING PROTOCOL
RUNNING A MEETING WITH ROBERT'S RULES

By: Sharon D. Brimer

13-year Board Member Cedar Glen Homeowners' Association, CAI Member, Former Community Association Volunteer Council (CAVC) Member

I have served on my HOA's board of directors for 13 years. After sitting through 13 years of board meetings, I have seen what happens when a Board does not understand the meeting process or the principles and procedures in Robert's Rules.

What can help make a meeting go smoother? One method that helps is for the Board to develop a written meeting protocol. With the protocol, the Board decides how the meeting will be conducted. The purpose for this article is to encourage Boards to set up a meeting protocol that is simple and follows Robert's Rules.

Much of the information in Robert's Rules is intended to provide guidelines for large assemblies. If there were no ground rules, large meetings would have a tendency to become unruly. Small meetings can become unruly too; better to have a writ ten protocol than spend time debating process issues.

Did you know there is a section in Robert's Rules for small boards? This section is for a dozen or so board members or less. The rules governing small meetings are different from the rules that hold in other assemblies in the following respects:

ROBERT'S RULES OF ORDER, NEWLY REVISED 11th EDITION - §49 PROCEDURE FOR SMALL BOARDS.

1. (Board) Members may raise a hand instead of standing when seeking to obtain the floor, and may remain seated while making motions or speaking.
2. Motions need not be seconded.
3. There is no limit to the number of times a (Board) member can speak to a debatable question.
4. Informal discussion of a subject is permitted while no motion is pending.
5. When a proposal is clear to all present, a vote can be taken without a motion having been introduced. Unless agreed to by unanimous consent, however, all proposed actions must be approved by vote under the same rules as in larger meetings, except that vote can be taken initially by a show of hands, which is often a better method in small meetings.
6. If the chairman is a member, he may, without leaving the chair, speak in informal discussions and in debate and vote on all questions.

If nothing else, adopting the Procedure for Small Boards makes it easier for business to be conducted. Some boards have set up a process to document various operating procedures. A meeting protocol is an operating procedure. When a written policy exists, it certainly ends the back and forth discussions that drag down a meeting on whether something exists or doesn't exist. Statements I have heard are – the president cannot vote. I need a second. We need a motion before we can discuss the topic. The Procedure for Small Boards answers those questions and provides a clear path for an orderly meeting.

RESERVE FUNDING VS. FUTURE OBLIGATIONS – AN ADDITIONAL FINANCIAL DATA ANALYTIC

By: Michael J. Gartzke, CPA

During 2015, I shared with you a number of financial data analytics that I have been collecting over the past 10 years. See prior issues of the newsletter for these historical comparisons. An additional data point that I have collected (and until now haven't done anything with) is the amount of future reserve expense per unit if each component of the reserve study were replaced one time. For example, a condominium roof replacement might appear one time during the 30-year forecast while seal coating the private streets might appear 7 times if done every 4 years. In most reserve studies, you will see a schedule showing all components and their current replacement costs. If you add up the total costs of each replacement or repair done once and divide by the number of units in the association, you would generate an amount per unit. For example, if the association had $1,000,000 in reserve components and had 40 units, $1 million divided by 40 = $25,000 per unit. It is not necessary for an association to have all the reserve cash in hand to do all this work one time now. Some components may not have to be replaced or repaired for 20 years or more. The annual funding amount from your reserve study attempts to set aside enough money to meet these future obligations when they occur. The annual funding amount also assumes that reserve funds will only be used for those components identified in the reserve study.

As you know, our area associations are quite diverse in size and major components. The range in costs per unit goes from $4,151 to $80,376 in the 73 area associations I currently review. The median amount is currently $19,932 per unit (half of the associations are above and half are below this amount). How has this median amount changed over time and how does it compare to the median amount of reserve funds associations have on deposit:

Year	Median Costs	Reserves/Unit	Ratio
2006	$ 14,453	$2,886	19.97%
2009	15,925	3,543	22.25
2012	17,840	4,468	25.04
2015	19,932	5,290	26.54
Percentage Change	37.91%	83.3%	

The ratio is the reserves/unit divided by the median costs expressed as a percentage. The reserves per unit have increased significantly more than the increase in the median costs per unit during the past 9 years. The results have been greater percent funded reserve calculations and fewer special assessments.

REVIEW OF NEW APPELLATE COURT DECISIONS AFFECTING HOMEOWNER'S ASSOCIATION IN 2015

Robert D. Hillshafer & David A. Loewenthal
Loewenthal, Hillshafer & Rosen, Attorneys at Law
(See contact information at the end of the newsletter

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.

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 attorney's 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 attorney's 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 attorney's 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 Naciemento 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) 9th 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 9th 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. 4th 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.

SOUTH COAST NEWSLETTER PROFESSIONAL SPONSORS

ACCOUNTANTS

Michael J. Gartzke, CPA
5669 Calle Real #A
Goleta, CA 93117
805-964-7806

James L. Hayes, CPA
2771 Santa Maria Way #A
Santa Maria, CA 93455
805-937-5637

Gary Vogel, CPA
17130 Devonshire Street, #201
Northridge, CA 91325
818-357-5535

Mary Widiner – Walpole & Co. CPAs
70 Santa Felicia Dr
Goleta, CA 93117
805-569-9864

Robert A. Ayres, CPA
25050 Avenue Kearney, #207
Valencia, CA 91355
661-430-9276 x302

BOOKKEEPING SERVICES

The Bottom Line
Nancy Gomez
P. O. Box 91809
Santa Barbara, CA 93190
805-683-3186

Laura McFarland, CPA
McFarland Financial
720 Vereda del Ciervo
Goleta, CA 93117
805-562-8482
www.mcfarlandfinancial.com

Debbie Quigley – Accounting Services
P. O. Box 62157
Santa Barbara, CA 93160
805-967-8117
Debbie@debbiequigley.com

Oasis Bookkeeping
Patti Karr
P. O. Box 132
Carpinteria, CA 93014
805-684-7461

ATTORNEYS

Beth A. Grimm
3478 Buskirk #1000
Pleasant Hill, CA 94523
925-746-7177
www.californiacondoguru.com

James H. Smith
Grokenberger & Smith
152 East Carrillo
Santa Barbara, CA 93101
805-965-7746

David A. Loewenthal
Loewenthal, Hillshafer & Carter, LLP
21 E. Carrillo #230
Santa Barbara, CA 93101
866-474-5529

Steven McGuire/
Christopher Haskell
Price, Postel & Parma
200 East Carrillo, Suite 400
Santa Barbara, CA 93101
805-962-0011

Adrian Adams
Adams Kessler PLC
2566 Overland Ave #730
Los Angeles, CA 90064
310-945-0280

Kathleen Weinheimer
Attorney at Law
420 Alameda Padre Serra
Santa Barbara, CA 93103
805-965-2777

ATTORNEYS (Continued)

Myers, Widders, Gibson, Jones & Feingold, LLP
Kelton Lee Gibson
5425 Everglades Street
Ventura, CA 93003
805-644-7188

ASSOCIATION MANAGEMENT

Coast Community Property Management
Sandra G. Foehl, CCAM
P. O. Box 8152
Goleta, CA 93118
805-968-3435

St. John & Associates
Kristin St. John CCAM
5266 Hollister Ave, #108
Santa Barbara, CA 93111
805-683-1793

Team HOA
Geoff McFarland
720 Vereda del Ciervo
Goleta, CA 93117
805-562-8482
www.teamhoa.com

Crowley Management Company
Bill Crowley, CCAM
P. O. Box 286
Summerland, CA 93067
805-684-0989

Goetz Manderly
The Management Trust
Gordon Goetz
3710 State St, Suite C
Santa Barbara, CA 93105
805-348-4080

Professional Association Management
Paula Scott
P. O. Box 7934
Santa Maria, CA 93456
805-714-3823

Spectrum Property Management
Cheri Conti
1259 Callens Rd #A
Ventura, CA 93003
805-642-6160

RESERVE STUDIES

Stone Mountain Corporation
Chris Andrews
P. O. Box 1369
Goleta, CA 93116
805-681-1575
www.stonemountaincorp.com

Reserve Studies, Inc.
Les Weinberg
9420 Topanga Canyon Blvd.
#201
Chatsworth, CA 91311
800-485-8056
www.reservestudiesinc.com

INSURANCE

Timothy Cline Insurance Agency
Tim Cline, CIRMS
725 Arizona Ave #100
Santa Monica, CA 90401
805-299-0899

Bill Terry Insurance Agency
Barbara Terry
4213 State St #205
Santa Barbara, CA 93110
805-563-0400

Baxter Insurance Services
Dan Baxter
225 East Carrillo #201
Santa Barbara, CA 93101
805-963-4048

CONTRACTORS

Raymond Arias Construction
1 N. Calle Cesar Chavez
#230-B
Santa Barbara, CA 93103
805-965-4158

Blake Fuentes Painting, Inc.
79 S. Kellogg Avenue
Goleta, CA 93117
805-962-6101

United Paving
Justin Rodriguez
3463 State Street #522
Santa Barbara, CA 93105
805-563-4922

Santa Barbara Painting
Gustavo Dabos
5874 Hollister Ave
Goleta, CA 93117
805-685-3548

Bethany Construction
Consulting & Management
21 E. Carrillo #230
Santa Barbara, CA 93101
888-9BETHCO

LANDSCAPE CONTRACTORS

TriValley Landscapes
Colin Anderson
35 W. Main Street, Suite B
#152
Ventura, CA 93001
805-535-0119

ARBORISTS

Kenneth A. Knight
Registered Consulting Arborist
69 Calaveras Ave.
Goleta, CA 93117
805-968-8523

FINANCIAL SERVICES

Union Bank
Mahendra Sami
445 S. Figueroa St, 10th Floor
Los Angeles, CA 90071
877-839-2947

RECORDING SECRETARY

Sharon D. Brimer
949-233-0107
sbrimer@gmail.com

ORGANIZATIONS

Community Associations Institute (CAI) Channel Islands Chapter
P. O. Box 3575
Ventura, CA 93006
805-658-1438
www.cai-channelislands.org

Executive Council of Homeowners - ECHO
1602 The Alameda #101
San Jose, CA 95126
408-297-3246
www.echo-ca.org