HOW TO BE A GOOD DIRECTOR

Beyond the Basics

2019 Edition

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THE BUSINESS JUDGMENT RULE

A director is required to uphold his or her fiduciary duties regardless of whether or not the director is a volunteer director or a director who is compensated. Directors of community associations must perform their duties:

- In good faith;
- In a manner the director believes to be in the best interests of the corporation; and
- With such care as an ordinarily prudent person in a like position would use in similar circumstances, including engaging in reasonable inquiry. (Corp. Code § 7231.5.)

Ordinary Prudent Person Standard

Note that directors are required to act as ordinary, prudent people and NOT as ordinary prudent business people.

Reasonable Inquiry

One aspect of reasonable inquiry is the ability and right of a director to rely on information, opinions, reports or statements of employees, counsel, independent accountants and committees so long as the director believes that the person on whom they are relying is reliable and competent.

When should a director seek professional advice? When an ordinarily prudent person faced with the same facts would seek the advice of an expert in order to be able to come to a reasonable decision.

A cause of action may be pleaded, but there is no liability for individual directors if they adhered to their fiduciary duty when they made the decision. = **Business Judgment Rule.** (Corp. Code § 7231.5.)

Application of the Business Judgment Rule

Courts recognize that directors are faced with difficult decisions and a court will not second guess those decisions as long as the directors acted in good faith, in a manner they believed to be in the best interests of the community association as a whole, as reasonably prudent people, and within their authority under applicable law and the governing documents. (See *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*. (1999) 21 Cal.4th 249.)

A board will be able to rely on the business judgment rule if the directors adhered to their fiduciary duty when they made the decision, even if the decision, though reasonable, turned out later to be a mistake. (See *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*. (1999) 21 Cal.4th 249.)

A board will NOT be able to rely on the business judgement rule if:

(1) The board knows of a common area maintenance issue and it did nothing to act when the reason for its inaction was not the result of a decision making process. (See *Affan v. Portofino Cove Homeowners Ass'n.* (2010) 189 Cal.App.4th 930.)

(2) The board acted beyond its authority as stated in the association's governing documents or applicable law. (See *Ekstrom v. Marquesa at Monarch Bay Homeowners Ass'n.* (2008) 168 Cal.App.4th 1111.)

A board may be able to rely on the business judgment rule if it knows of a common area maintenance issue and it elected not to act to address the issue and if the repair would be "prohibitively expensive." (See *Affan v. Portofino Cove Homeowners Ass'n.* (2010) 189 Cal.App.4th 930.)

An individual board director may NOT rely on the business judgment rule if he/she believes that the decision in question is right for the community, but fails to follow the requirements of the governing documents or applicable law (e.g., the director fails to review limitations on the board's powers contained in the governing documents, fails to obtain required consents before entering into contracts with or firing vendors, fails to obtain required membership approval before taking out a loan which encumbered the association's assets), or the director acts negligently (e.g., the director failed to confirm whether a contractor was licensed before the director signed the vendor's contract). (See *Palm Springs Villas II v. Parth* (2016) 248 Cal.App.4th 268.)

THE DUTY OF LOYALTY - BOARD DIRECTOR CONFLICTS OF INTEREST

Civil Code section 5350 sets forth six situations in which a board director is not allowed to vote on a matter that is in front of the board because that director has an inherent conflict of interest. These situations are as follows:

1. Discipline of that director;
2. The imposition of an assessment against that director for damage to the common area or facilities;
3. A request by that director for a payment plan for overdue assessments;
4. A decision whether to foreclose a lien on the separate interest of that director;
5. A review of a proposed physical change to the separate interest of that director;
6. A grant of exclusive use common area to that director.

Transactions in Which a Director Has a Material Financial Interest

If an association is considering entering into a transaction/contract and one of the directors has a material financial interest, the director with the material financial interest must fully disclose that fact. If the interested director has made a full disclosure and the membership or the board as applicable still votes to approve the contract, then the contract is valid. Note, however, that the interested director is not allowed to vote with regards to approving the contract. (See Corp. Code § 7233(a)(1)-(2).)

If, however, the membership or the board votes to approve the transaction and the interested director did NOT disclose the fact that they have a material financial interest and/or the interested director voted regarding the matter, then the contract is VOIDABLE. (See Corp. Code § 7233(a)(3).)

PRACTICE TIP:

There is nothing in the law which precludes community associations from choosing to adopt stricter conflict-of-interest rules for board directors and committee members than those imposed by the Davis-Stirling Act and the Corporations Code. Such rules can include prohibitions regarding:

- Accepting gifts of any type worth more than a certain dollar amount from any resident, contractor, or supplier;
- Divulging information received in confidence during executive sessions to persons other than other board members, professional advisers, and others whose work is essential to the work of the board as a whole;
- Engaging in any writing, publishing, or speech that defames any other member of the board, an employee, or a resident of the community;
- Interfering with community association or vendor employees or contractors implementing a contract in progress;
- Interfering with the system of management established by the board as a whole and the management company;
- Harassing, threatening, or attempting through any means to control or intimidate a member of the staff;
- Abusing drugs, alcohol, or other substances;
- Promising anything to any subcontractor, supplier, or contractor during negotiations unless approved by the board as a whole;
- Conducting personal attacks against owners, residents, officers, directors, and employees; or
- Knowingly misrepresenting any facts to anyone involved in anything with the community which would benefit himself/herself in any way.

The problem most often encountered in cases of director misconduct is how to administer discipline or otherwise control the director's misconduct. Any code of conduct adopted by the association should outline possible penalties (e.g., censure, removal of the director from an office, petition for the owners to remove/recall the director, etc.).

BOARD MEETINGS

A "board meeting" is defined as "a congregation, at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business that is within the authority of the board." (Civ. Code § 4090.)

Executive Sessions

Pursuant to the Common Interest Development Open Meeting Act, board meetings must be open to the members except for executive session board meetings and emergency meetings (Civ. Code § 4900 et seq.). A common complaint by members is that the community association board of directors abuses its right to meet in executive (closed) sessions. However, there are important reasons why some deliberations by boards of directors must be "behind closed doors."

The only topics that may be discussed in executive sessions board meetings are as follows:

1. To consider matters relating to litigation;
2. Matters relating to the formation of contracts with third parties;
3. Personnel matters;
4. Member discipline;
5. Proposed member payment plans for overdue assessments (Civ. Code § 4935).

SEE ARTICLE ENTITLED "THE 'WHY' OF EXECUTIVE SESSIONS" STARTING ON PAGE 35 WHICH EXPLAINS WHY IT IS IMPORTANT TO DISCUSS THE ABOVE REFERENCED TOPICS IN EXECUTIVE SESSION.

Board Emails

One area where directors can run afoul of the Open Meeting Act is using emails to discuss community association business with other directors. Civil Code section 4910 states that a board cannot take any action on any item of association business outside of a board meeting. Moreover, a board cannot conduct a meeting via a series of electronic transmissions, which includes emails, unless it is an emergency meeting and the board has unanimously consented to conduct an emergency board meeting through electronic transmissions. (Civ. Code § 4910(b).) Since a "board meeting" is defined as "a congregation, at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss or deliberate upon any item of business that is within the authority of the board. . ." (Civ. Code § 4090(a)), it's easy to be involved in a "board meeting" (which should be posted with an agenda attached), without really thinking about it. And the ease of access via email compounds the problem.

The rule of thumb regarding the use of email is email communication between a majority of the directors (serially or all at once) is PROHIBITED if the emails are used to develop a collective concurrence

as to action to be taken on an item, which includes any exchange of facts, or substantive discussions which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue.

SEE ARTICLE ENTITLED "EMAIL DO'S AND DON'TS FOR COMMUNITY ASSOCIATIONS" STARTING ON PAGE 38 WHICH EXPLAINS THE NUANCES OF DIRECTORS USING EMAILS TO COMMUNICATE WITH EACH OTHER.

SEE ARTICLE ENTITLED "EMAIL POLICIES FOR COMMUNITY ASSOCIATIONS" STARTING ON PAGE 42 WHICH GIVES GUIDELINES FOR USING EMAILS FOR ASSOCIATION COMMUNICATIONS.

Procedural Policies for Board Meetings

It is not uncommon for an open board meeting to get heated when members are present and the board is discussing an issue that is controversial in the community. While some association governing documents specify a type of "rules of parliamentary procedure," e.g., Robert's Rules of Order, most do not. As such, boards should consider adopting their own parliamentary procedures for their meetings. (Homeowner meetings, such as the annual meeting, do require adoption of some recognized system of parliamentary procedure.)

Members Right to Speak at Meetings

Civil Code section 4923(b) states that the board shall permit members to speak at any meetings of the association or the board, except for board meetings held in executive session. However, the board may establish a reasonable time limit for all members to speak at those meetings. (Civ. Code § 4923(b).)

PRACTICE TIP:

- Board meetings are supposed to enable the conduct of essential community association business; they are not social events. Prohibiting alcohol consumption at board meetings is recommended.

- The Open Meeting Act restricts the ability of community association boards to take action on non-agenda items, albeit with certain limited exceptions. (Civ. Code § 4930.) However, these statutory restrictions can be helpful to boards challenged by meeting interruptions and by the temptation to engage in excessive dialogue with those in the "audience." In other words, stick to the meeting's agenda.

SEE SAMPLE STANDING RULES OF PROCEDURE FOR MEETINGS STARTING ON PAGE 68.

Meeting Minutes

Two key things to remember with regard to meeting minutes:

- Less is more; and
- Minutes should only reflect actions and not discussion.

Minutes should include the following information:

1. When was the meeting held? (date, time, place)
2. Who was present at the meeting? (board members, manager, others)
3. Who was absent? (board members)
4. What topics were discussed?
5. What decisions were made?
    - Any consent agenda for routine items to expedite the meeting. (Approval of minutes, payment of bills payable, etc.)
6. Other actions agreed upon, who is assigned to do them and when?
7. Any materials distributed? Copies attached to minutes or in board packet?
8. Is there anything special the reader of the minutes should know or do?
9. Next meeting? Regular time or special meetings scheduled? Agenda items.

Minutes should NOT include the following information:

1. Items of correspondence;
2. Recitations of comments made in homeowner forum;
3. He said/she said dialogue of board members.

The Civil Code provides that certain items/information must be included in the open board meeting minutes:

- Election results (Civ. Code § 5120(b).)
- The decision to record a lien (Civ. Code § 5673.)
- The vote to foreclose a lien (Civ. Code § 5705.)
- The reasons for the transfer of reserve funds to the operating account (Civ. Code § 5515(c).)
- Any matter discussed in executive session shall be generally noted in the minutes of the immediately following a meeting that is open to the entire membership (Civ. Code § 4935(e).)

Members are entitled to copies of minutes (or a draft or summary of the minutes), except for executive session minutes, within thirty (30) days after the meeting upon request and payment of a reasonable cost. (Civ. Code § 4950; Corp. Code § 8330 et seq.)

SEE ARTICLE ENTITLED "RECORDS TO KEEP" STARTING ON PAGE 45 WHICH DETAILS WHAT RECORDS AN ASSOCIATION SHOULD KEEP INCLUDING HOW LONG THOSE RECORDS SHOULD BE KEPT, INCLUDING MEETING MINUTES.

Meeting Notices

Except for an emergency meeting and unless the association's bylaws provide for a longer time period, the association must give notice of board meetings to members at least four days before an open meeting and two days before an executive session. The board must post the agenda for the meeting with the notice. Notices of board meetings may be given by "general delivery" as described in Civil Code section 4045. (Civ. Code § 4920.) The board may not consider items not listed on the agenda except for specified "emergencies." See Civil Code section 4930 for details. However, the association must send notice by "individual delivery" as described in Civil Code section 4040 to any member who requests notice of board meetings by "individual delivery." This may include delivery by email or other forms of electronic delivery if the member consents. (Civ. Code § 4045(b).)

BOARD OF DIRECTORS FISCAL DUTIES

Budgets

One of the most fundamental duties of an association is the preparation and creation of a budget for the association. The pro forma operating budget must be distributed annually, pursuant to Civil Code section 5300, not less than 30 days nor more than 90 days prior to the beginning of the association's fiscal year.

Tax Returns

Associations must file a federal and state tax return or exemption statement by the 15th day of the third month after the fiscal year ends. Since requirements can vary, it is best to consult the association's C.P.A. or tax advisor regarding applicable filing or reporting requirements.

Annual W-2 and 1099 Forms

Associations that have their own employees (regardless of compensation paid) or that have non-incorporated independent contractors (paid $600 or more during the year) must file appropriate forms with the state and federal government at various intervals during the year. Consult the association's C.P.A., tax advisor, manager or payroll contractor to be sure all forms are being processed. Calling employees independent contractors does not make them independent contractors any more than calling a cow a horse makes it a horse.

Annual Review or Audit

Within 120 days after the fiscal year ends, a C.P.A. must prepare at least a "review" (or an audit, if the governing documents call for it), and the association must distribute it to the members, if the association's gross income exceeds $75,000. (Civ. Code § 5305.) However, any incorporated association which had at least $10,000 in gross revenue must make available a balance sheet, income statement and statement of changes in financial position which is (1) accompanied by report from a C.P.A. or (2) an officer's certificate that its balance sheet was prepared without audit. (Corp. Code § 8321.) The annual report must also contain a statement indicating where the names and addresses of the current members are located. (Corp. Code § 8321(b).) It must also contain a statement of any corporate "indemnifications or material financial transactions" between the corporation and any officer, director or holder of 10% or more of the voting power. The statute contains many details. (Corp. Code § 8322.) Note that the governing documents may require more, and Davis-Stirling requires production of an annual budget report, discussed below.

Reconciling Bank Accounts

At least monthly, the board must review a current reconciliation of the association's operating and reserve accounts. (Civ. Code § 5500(a)&(b).)

Review of Budget

At least monthly, the board must review the current year's actual operating revenues and expenses compared to the current year's budget. (Civ. Code § 5500(c).)

Review of Income Statement

At least monthly, the board must review an income and expense statement for the association's operating and reserve accounts. (Civ. Code § 5500(e).)

Review of All Bank Statements

At least monthly, the board must review the latest account statements from each financial institution where the association has its operating and reserve accounts. (Civ. Code § 5500(d).)

Review of Other Financial Documents

At least monthly, the board must review the check register(s), monthly general ledger, and delinquent assessment receivable reports. (Civ. Code § 5500(f) (effective Jan. 1, 2019).)

Who Can Review the Association's Financials?

The review requirements set forth in Civil Code section 5500 may be met when every individual member of the board *or* a subcommittee consisting of the treasurer and at least one other board member reviews the documents and statements described in Section 5500 independent of a board meeting. This review – by either each individual board member or the subcommittee – can take place outside of a board meeting, but the review must then be ratified at the next board meeting. The ratification must also be noted in the meeting minutes. In practice, ratification means a statement in the minutes indicating that the full board or the subcommittee reviewed the financials. (Civ. Code § 5501 (effective Jan. 1, 2019).)

Bank Signature Cards

Be sure that the signature cards on all reserve accounts require at least two signatures. All signatures must be either board members, or one may be an officer who is not on the board. (Civ. Code § 5510(a).)

Annual Budget Reserves and Other Required Disclosures

Between 30 and 90 days before the new fiscal year begins, an association must prepare an annual budget report ("Report") and distribute it to the owners. (Civ. Code § 5300(a).) [As an alternative to distributing the full Report under Civil Code section 5300 or the Annual Policy Statement under Civil Code section 5310, the association may distribute only a summary of the items required by Civil Code section 5300 or Civil Code section 5310. (Civ. Code § 5320.) However, the members must be given a notice, in at least 10-point boldface type on the front page of each summary with instructions for how

a member can request a complete copy of either report at no cost to the member. If a member requests a copy of the full Report required by Civil Code section 5320, the association must mail a copy to the member presumably as provided for "individual delivery" under Civil Code section 4040.]

SEE CHECKLIST ENTITLED "ANNUAL DISCLOSURES, MANDATORY" STARTING ON PAGE 58 WHICH FURTHER DETAILS WHAT AN ASSOCIATION IS OBLIGATED TO PROVIDE TO THE MEMBERSHIP IN ITS ANNUAL BUDGET REPORT AND ANNUAL POLICY STATEMENT.

Proper Reserve Expenditures

Do not spend reserve funds except for reserve items, or for litigation involving the repair, restoration, replacement or maintenance of any major component which the association is obligated to maintain. The board may borrow money from the reserve fund for operating expenditures following the procedures in the law. Specifically, the board may authorize the temporary transfer of money from the reserve fund to the operating fund to meet short-term cash flow requirements, if the board has provided notice of its intent to consider the transfer in a board meeting notice. The notice must include the reasons for why the transfer is needed, some options for repayment, and whether the board is going to consider a special assessment. If the board decides to authorize the transfer, then the board must issue a written finding recorded in the board's meeting minutes, explaining the reasons for why the transfer is needed and describing how and when the money will be repaid. However, any borrowed funds must be restored within one year from the date of the first transfer, with limited exceptions. (Civ. Code §§ 5515 & 5520.)

Transfers Requiring Board Approval

Under the newly added Civil Code section 5502, the board must provide written approval before transfers of greater than $10,000 or 5 percent of an association's total combined reserve and operating account deposits, whichever is lower, are authorized from the association's reserve or operating accounts. (Civ. Code § 5502 (effective Jan. 1, 2019).)

Common Area Taxes

We have found that some associations are paying property taxes on their common areas. Most, if not all, associations should be exempt from the bulk of such taxes. Check with your legal counsel or your C.P.A. (Rev. & Tax. Code § 2188.5.)

PRACTICE TIP:

If your association owns common area lots, be sure the county assessor has your association's correct mailing address, even if you do not normally get tax bills. If a tax bill appears for any reason, or if you become subject to a mechanic's lien, the only address may be the address in the public records. You want to be sure you know about any tax liens or other liens against the property. Many of these mailing addresses are still old addresses for the developer.

Water Meter Errors

Associations often end up paying water bills on meters that serve other properties, or they encounter claims to pay water bills that someone else has been paying. It is critical for boards and managers to know that the water bills match up to a meter serving the association and that meters serving the association correlate to a water bill received by the association.

Annual Notice of Owner Information

Civil Code section 4041 requires associations to solicit an annual notice to each owner and have the data entered into its books and records at least 30 days prior to the association making its own required annual disclosures pursuant to Civil Code section 5300 et seq. Specifically, Section 4041 requires each owner to provide written notice to the association of all of the following:

(1) The address or addresses to which notices from the association are to be delivered;

(2) An alternative or secondary address to which notices from the association are to be delivered;

(3) The name and address of the owner's legal representative, if any, including any person with power of attorney or other person who can be contacted in the event of an owner's extended absence from the separate interest; and

(4) Whether the separate interest is owner-occupied, is rented-out, if the parcel is developed but vacant, or if the parcel is undeveloped.

If an owner fails to provide to the association the primary and alternative/secondary addresses to which notices from the association are to be delivered, then the last address provided in writing by the owner or, if none, the property address in the association shall be deemed to be the address to which notices are delivered. (Civ. Code § 4041.)

Note, however, that Section 4041 was amended in 2018 to provide that to the extent time-share units are part of a common interest development in a mixed-use project, the association shall be deemed to have complied with the statute by at least annually obtaining a copy of a complete list of the names and addresses of all owners of the time-share units, and entering that data into its books and records. (Civ. Code § 4041(d).) Section 4041(d) becomes effective on January 1, 2019.

SEE SAMPLE ANNUAL REQUEST FOR OWNER'S ADDRESS FOR ASSOCIATION COMMUNICATIONS STARTING ON PAGE 72.

COLLECTIONS ISSUES

The power to assess homeowners is derived from the association's governing documents, deed restrictions, and the California Civil Code. Usually, the power to assess is found in the association's Declaration of Covenants, Conditions and Restrictions ("CC&Rs"). However, the Civil Code also provides the association with the power to assess. In older projects, the power to assess may actually be in the owner's grant deed.

Assessment Increases

Under the Civil Code, the board of directors may increase regular and special assessments without a vote of the membership under certain circumstances, despite what the CC&Rs provide. If the board has complied with the Civil Code, it may impose a regular assessment that is up to twenty percent (20%) higher than the regular assessment for the association's preceding fiscal year, or it may impose a special assessment which, in the aggregate, does not exceed five percent (5%) of the budgeted gross expenses of the association for that fiscal year. To exceed these limits, approval of the owners is required, according to the voting requirements set forth in the Civil Code.

A board, however, can still increase the assessments in certain emergency situations. For example, an extraordinary expense required by a court order, an extraordinary expense necessary for repair or maintenance where there is a threat of personal safety, or where an extraordinary expense is necessary for repair or maintenance and the board could not have reasonably foreseen it when preparing the budget. Whenever you are proposing an emergency assessment, you should seek the advice of legal counsel. Strict compliance with the Civil Code is necessary in order to take advantage of the assessment increase provisions. (Civ. Code § 5605.)

When Late Fees and Interest Can be Charged on Delinquent Assessment

To determine what late fees and interest can be charged for delinquent assessments, the first step is to review the association's governing documents to determine what late charges and interest may be imposed. If the association's governing documents set forth both the late charge amount and the interest amount, you must abide by the governing documents. However, if the governing documents are silent on one or both of the prongs, then you follow the Civil Code. The Civil Code states that a late charge not exceeding ten percent (10%) of the delinquent assessment, or $10.00, whichever is greater, may be charged unless the CC&Rs specify a late charge in a smaller amount, in which case any late charge imposed shall not exceed the amount specified in the CC&Rs. Interest may also be charged on all the sums owed, including the delinquent assessments, reasonable costs of collection and late charges, at an annual rate not to exceed twelve percent (12%), commencing thirty (30) days after the assessment becomes due, unless the CC&Rs specify a late charge in a smaller amount, in which case any interest imposed shall not exceed the amount specified in the CC&Rs. The Civil Code provides that assessments are delinquent fifteen (15) days after they become due. However, if the governing

documents state that the assessments are delinquent thirty (30) days after they become due, the governing documents take precedence over the Civil Code. (Civ. Code § 5650.)

Options for Collecting Delinquent Assessments

Basically, there are three (3) ways to collect delinquent assessments:

1. Small Claims Court to obtain a money judgment against the delinquent owner;
2. Nonjudicial foreclosure action;
3. Superior Court action to either foreclose the property or obtain a monetary judgment.

Collection Option	When To Use the Collection Option/When Is the Option Available	Advantages	Disadvantages
Small Claims Court	Smalls claims court actions are typically utilized when a property has already been foreclosed by a lender or there are small amounts owed to the association. The maximum an association can seek to recover in small claims court is $5,000. As such, if an association is seeking to recover delinquent assessments in small claims court and the amount of the delinquent assessments are over $5,000, the association must write off any delinquent assessments over $5,000 to meet the jurisdictional requirements for small claims court. (Code Civ. Proc. § 116.220(a).) Also, an association cannot file more than two small claims actions in a year in which the amount demanded exceeds $2,500. (Code Civ. Proc. § 116.231(a).)	Allows the association to represent itself and obtain a monetary judgment against the owner. It is inexpensive, relatively quick, and can be quite successful.	In pursuing a small claims action, you may be waiving your right to foreclose on the property. Also, use of courts may require serial, multiple suits to recover all monies owing. And, unless the association has access to owner's funds (e.g., local employer, local bank accounts, etc.), collecting on the judgment may result in further costs.

Collection Option	When To Use the Collection Option/When Is the Option Available	Advantages	Disadvantages
Nonjudicial Foreclosure	Nonjudicial foreclosure is a process similar to foreclosing a trust deed, though there are a number of additional preliminaries an association must satisfy. The procedure entails the recording of a Notice of Default and subsequently a public sale of the property. Nonjudicial foreclosures are probably the most popular method of collecting delinquent assessments. To proceed with foreclosure of an association's lien after it is recorded, the amount of delinquent assessments must equal or exceed $1,800.00 or 12 months.	Nonjudicial foreclosures are relatively quick with definite deadlines and can be handled entirely by legal counsel.	Once the sale is completed, if title reverts to the association, it is difficult to obtain title insurance. Further, if there are problems with title (divorce, death, suspicious liens), the association might be better off filing a court action for judicial foreclosure of the lien. If the lender begins foreclosure, it could extinguish the association's lien. In that event, if the association has not already foreclosed, the association will likely be forced to switch to a small claims action or a Superior Court action.

Collection Option	When To Use the Collection Option/When Is the Option Available	Advantages	Disadvantages
Superior Court Action	The process entails the filing of a Superior Court lawsuit to either foreclose the association's lien or alternatively to seek a monetary judgment against the owner.	The court can award attorneys' fees to the plaintiff. As noted above, if there are title issues, a superior court action may be the wisest course of action.	There is a risk of a cross complaint by the homeowner, usually for the association's alleged failure to fulfill some responsibility, often the maintenance of the common area or the homeowner's property. Litigation is expensive and time consuming.

Monetary Penalties, i.e., Fines

Civil Code section 5725(b) provides that a monetary penalty cannot be treated as an assessment for which the property can be liened and foreclosed upon, even if the governing documents state otherwise. The exception is a monetary penalty imposed to reimburse the association for costs incurred to repair damage to common area caused by a member.

Assessing a Homeowner for Damage He or She Caused to the Common Area

Whether an association can assess a homeowner for damage he or she caused to the common area depends on what the association's governing documents allow. Most CC&Rs allow the association to assess a homeowner for damages he or she has caused to the common area. Such an assessment may be lienable. In the event it is not lienable, the board of directors should actively pursue the collection of this money through Small Claims Court if it is within the monetary jurisdiction limits (up to $5,000.00). This type of "special assessment" usually requires a hearing.

How Payments are Applied to a Delinquent Account

Civil Code section 5655 requires payments to be applied first to assessments owed, and only after the assessments are paid in full may payments be applied to interest, late charges, and the costs of collection.

The Restrictions on Recording and Foreclosing a Lien Besides What is in an Association's Governing Documents

The Civil Code provides that before an association may record an assessment lien, the association must make a laundry list of disclosures to the homeowner in writing. You should contact your association's legal counsel for a complete list of requirements. The lien itself must contain the following information: (1) the amount of the assessment and other sums imposed; (2) a legal description of the homeowner's interest in the project (not just the address); (3) the name of the record owner or owners; and, (4) in order for the lien to be enforced by nonjudicial foreclosure, the name and address of the trustee authorized by the association to enforce the lien by sale, and a copy must be mailed via certified mail to record owners within ten (10) days of recordation. The association must offer the homeowner internal dispute resolution and alternative dispute resolution throughout the process. If an owner requests internal dispute resolution pursuant to Civil Code section 5900 et seq., the association must participate before recording a lien. If an owner requests alternative dispute resolution pursuant to Civil Code section 5925 et seq., the association must participate before initiating nonjudicial foreclosure.

Homeowners Withholding Payments

A homeowner does not have the right to withhold payment of their assessments if he or she disputes what is owed. However, the homeowner is entitled to internal dispute resolution and alternative dispute resolution.

Collection Policies

An association must adopt a collection policy because the Civil Code requires that the association provide to the members during the sixty (60) day period immediately preceding the beginning of the association's fiscal year an annual statement describing the association's policies and practices in collecting delinquent assessments. (Civ. Code § 5730.)

SEE ARTICLE ENTITLED "ASSESSMENT RECOVERY PROCESS: A SUMMARY" STARTING ON PAGE **ERROR! BOOKMARK NOT DEFINED.**.

RULES OF ENFORCEMENT

Most governing document violations can be effectively handled by using internal enforcement procedures. The purpose of rules of enforcement is to set forth procedures for enforcing the governing documents. Such procedures should include:

- Procedures for reporting an alleged violation, e.g., allegations of governing document violations must be made in writing and reports of violations cannot be made anonymously;
- Procedures for investigations;
- Notice and hearing standards;
- Fine schedules and other disciplinary remedies, e.g., membership privilege suspensions.

Failing to follow the association's rules of enforcement may result in the association's inability to impose discipline.

Hearing and Notice Requirements

Civil Code section 5855 provides the procedural requirements for hearings. Specifically, section 5855 provides that when a board meets to consider or impose discipline on a member, including the imposition of a monetary charge imposed to reimburse the association for costs incurred by the association to repair common area damaged by a member or a member's guest or tenant, the association must notify the member in writing at least ten (10) days prior to the hearing. The notification must be delivered by either personal delivery or individual delivery pursuant to Civil Code section 4040.

The hearing notice must contain:

> (1) The date, time, and place of the meeting;
>
> (2) The nature of the alleged violation for which a member may be disciplined or the nature of the damage to the common area and facilities for which a monetary charge may be imposed; and

PRACTICE TIP:

The notice should specifically reference the governing document provision the member or the member's guest or tenant allegedly violated.

(3) A statement that the member has a right to attend and may address the board at the meeting. (Civ. Code § 5855(b).)

Civil Code section 5855(b) provides that the board shall hold the hearing in executive session if requested by the member.

PRACTICE TIP:

The association's enforcement policy should also state that the board has the option of holding the hearing in executive session.

If the board imposes discipline on a member or imposes a monetary charge on the member for damage to the common area and facilities, then the board has to notify the member in writing of their decision by either personal delivery or individual delivery pursuant to Civil Code section 4040 within 15 days following the hearing. (Civ. Code § 5855(c).) Note that sometimes an association's governing documents may require earlier notice for either the hearing or the ruling; make sure your notices comply with the version of the requirement which provides the greater protection to the owner.

Again, if a board does not meet the above-stated requirements of Civil Code section 5855, the disciplinary action or reimbursement charge for common area damage will not be effective. Also, if an association's governing documents provide stricter notice and hearing requirements than what section 5855 provides, then the association must meet the stricter notice and hearing requirements as provided in the governing documents.

Fine Schedules

An association cannot impose a monetary fine on a member unless and until the association has adopted a fine schedule. (Civ. Code § 5850.) Moreover, the association cannot impose a fine in an amount which exceeds the fine amounts stated in the fine schedule. (Civ. Code § 5850(c).)

PRACTICE TIP:

- The amount of a fine to be levied must be proportionate to the violation for which the fine was levied.

- Review the association's fine schedule periodically to determine whether the fine amounts for the association are too low. Remember that the purpose of imposing discipline is deterrence. Associations that have not updated the fine amounts in decades may find that the current fine amounts are too low to be an effective deterrent.

- Fine schedules should contemplate "continuous violations" (defined as violations that are continuing in nature such as an unremedied landscaping or architectural violations) and allow the association to impose a daily fine for said continuous violations after the initial hearing. Owners should be notified in the initial hearing notice that the alleged violation may be deemed a continuing violation, potentially subjecting the owner to periodic fines without further notice.

ARCHITECTURAL ENFORCEMENT PROCEDURES

Implementing an Effective Architectural Enforcement Procedure

The process of implementing effective architectural enforcement procedures is to review the CC&Rs. Many contain an application submission process, a decision-making process according to specific criteria, including deadlines for action by the association, and even a construction monitoring procedure with time limits for improvement completion. In addition, California law provides minimum steps for architectural review procedures (Civil Code section 4765) and provides certain decision-making deadlines, with failure to meet those deadlines resulting in automatic application approval (e.g., Civil Code section 714 on solar energy systems and Civil Code section 4745 on electric vehicle charging stations).

If the governing documents require association approval before a physical change is made to a separate interest or the common area, the association must provide a fair, reasonable and expeditious procedure for making a decision. The procedure shall provide prompt deadlines and the maximum time for response to an application. A decision on a proposed change must be made in good faith and not be unreasonable, arbitrary or capricious. The decision may not violate any governing provision or law.

A decision on a proposed change must be in writing. Thus, the architectural committee or board should take minutes of the meetings at which these decisions are made, noting reasons for application approval or denial. If a proposed change is disapproved, the written decision must include a description of the procedure for reconsideration by the board. An applicant is entitled to reconsideration at an open meeting of the board.

An association must annually provide its members with notice of any requirements for association approval of physical changes to property. The notice must describe the types of changes that require association approval and shall include a copy of the procedure used to review and approve or disapprove a proposed change.

PRACTICE TIP:

The best way to develop architectural guidelines in four steps:

1) Include any "criteria" for approval specified in the CC&Rs.
2) Cover as many of the major items as possible for which owners are likely to request approval. Applications for fences, patio covers, balcony improvements, decks, and landscaping are frequently encountered.
3) Ensure that guidelines are easy to understand. Owners should be able to tell exactly what the application should include, what items are totally prohibited and what items may be approved if they meet specified criteria.
4) Consider pre-approvals; that is, a list of improvements an owner can complete without applying for prior approval, such as painting a structure its original color or constructing a patio cover whose size, materials, design and color are all "pre-approved."

What Role Should Neighbors Play in the Approval Process?

To avoid the anger of disgruntled neighbors, it is a good practice to require the notification of nearby owners when an application is submitted. Allow them to offer input; however, avoid permitting neighbor consent or apathy to result in automatic approval or disapproval. Owners should be told on the application form that neighbor input is merely "information" used in the application consideration process.

Can Approvals be Given Orally or Informally?

Avoid a procedure which permits any form of approval other than written approval after a vote of the entire committee or the board. One court decision upheld the oral approval of only one committee member because the owner relied upon it, believing it represented the committee's decision, and proceeded to build the improvement. Guidelines should specify that oral approvals are invalid and that the only effective approval is the one on the authorized form and/or otherwise issued in writing by the association after the above-described vote.

How Much Subjectivity can go into Architectural Decisions?

Many architectural decisions are inherently subjective, yet will be enforced. The key is having "criteria" such as "harmony with the architectural scheme of the community." Always develop general criteria

used or referred to in making a subjective decision. Many CC&Rs already contain such general criteria. When this occurs, it is a good idea to repeat those criteria in the guidelines.

Can Variances or Exceptions to the Architectural Guidelines be Granted?

Generally, yes, if there is authority for a variance in the CC&Rs. However, variances should be used very judiciously, only in rare instances when it is necessary (for example, to make use of a unique lot and where there is minimal or no effect on other owners). If you contemplate variances, at least some reference to them should also be made in the guidelines. The idea behind using variances is to accomplish a desired result (e.g., aesthetic uniformity) despite a technical violation of the guidelines. In other words, you are adhering to the "spirit" rather than the "letter" of the guidelines. One effective tool is the recorded Restrictive Use and Indemnity Agreement whereby the owner agrees to defend and indemnify the association if another owner complains or files a lawsuit because a violation is allowed to exist. This type of agreement can also be used to limit the duration of time a structure can be kept and to require the owner to maintain it.

PRACTICE TIP:

Davis-Stirling provides that if the association's architectural committee rejects an application, the written rejection notice must include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board. (Civ. Code § 4765.)

What Should be Done if an Owner is Ignoring the Architectural Procedures?

This depends on the situation. If the committee or the board seeks to compel the owner to take some particular action, a hearing should be held before the association acts further. If an architectural improvement is already in place, the committee should rule upon it as if an application had been filed; if the committee would have approved the project but for the failure to submit an application, the association should probably approve the project (though the association could fine for the failure to submit, if the fine schedule so provides). If the owner is in the process of constructing something clearly prohibited, immediately consult legal counsel about seeking a restraining order. Undue delay when construction is underway can result in a court refusing to issue an order prohibiting further construction.

How can the Association Rule Upon an Application and Avoid Setting Precedents?

If there is nothing unique about a particular situation, it may well be a precedent to rule on it differently. Accordingly, keep this in mind when ruling upon applications, including those for variances. If there is a unique situation or a variance is granted, document in writing the reason why an approval was issued. Doing so will help you appropriately respond if other owners ask for the same approval, but the association desires to limit its decision to the unique situation of one owner.

What is The Best Way to Ensure Success in The Architectural Approval and Enforcement Process?

First, ensure that every step of the process is documented in writing. Second, be fair and develop architectural guidelines responsive to community needs. Third, maintain perspective on the entire community rather than what one particular owner is doing. Fourth, be mindful of the fact that architectural disputes can end up in mediation, arbitration or court, and that you may be asked to explain everything the association has done. The best way to do this is through written documentation. An unbiased, documentation-oriented approach to architectural enforcement has consistently proven most effective.

SEE ARTICLE ENTITLED "ARCHITECTURAL DECISIONS: HOW SHOULD DECISIONS BE MADE WHEN AN OWNER FAILS TO SUBMIT AN APPLICATION?" STARTING ON PAGE 60 WHICH EXPLORES WHAT AN ASSOCIATION SHOULD DO WHEN AN OWNER CONSTRUCTS AN IMPROVEMENT, BUT DOES NOT SUBMIT AN ARCHITECTURAL APPLICATION.

MAINTENANCE AND CIVIL CODE SECTION 4775

One of the primary purposes of common interest developments is to protect, enhance and maintain the common area. The first step in fulfilling that purpose is knowing which components the association is required to maintain, repair and replace.

Civil Code section 4775 states:

> (a) (1) Except as provided in paragraph (3), unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, and maintaining the common area.
>
> (2) Unless otherwise provided in the declaration of a common interest development, the owner of each separate interest is responsible for repairing, replacing, and maintaining that separate interest.
>
> (3) Unless otherwise provided in the declaration of a common interest development, the owner of each separate interest is responsible for maintaining the exclusive use common area appurtenant to that separate interest and the association is responsible for repairing and replacing the exclusive use common area.
>
> (b) The costs of temporary relocation during the repair and maintenance of the areas within the responsibility of the association shall be borne by the owner of the separate interest affected.

In other words, if your CC&Rs specifically state who will be responsible for maintaining, repairing and replacing certain components, then follow the assigns as laid out in your CC&Rs. If your CC&Rs are silent on this issue, then Civil Code section 4775 is the fall back.

Exclusive Use Common Area

Civil Code section 4145 defines the term "exclusive use common area" and contains a list of components that are considered exclusive use common area if an association's governing documents are silent on this issue. For example, shutters, awnings, window boxes, exterior doors, and patios. However, if an association's governing documents contains a definition of exclusive use common area, under the *Dover Village*[1] case, that definition prevails and Civil Code section 4145's definition and component list does not apply.

Does that mean Civil Code section 4145 has been rendered meaningless by the *Dover Village* case? No. Civil Code section 4145 still operates as a default definition of the term exclusive use common area if an association's governing documents do not define this term.

[1] *Dover Village Association v. Jennison* (2010) 191 Cal.App.4th 123.

To determine what is exclusive use common area, look first at your governing documents for a definition. An association's CC&Rs or Condominium Plan may define the term exclusive use common area as one of the following: (1) a component that is solely used by one or more, but less than all, separate interests in the community or (2) specifically stated components, such as roofs, exterior doors, exterior windows, balconies, patios, etc.

Effect of Civil Code Section 4775

If your CC&Rs expressly assign the repair and replacement of exclusive use common areas to the owners, then Civil Code section 4775 will not affect your community.

Conversely, if your association's CC&Rs do not currently specifically assign the obligation to repair and replace exclusive use common areas to the owners, then your association is responsible for repairing and replacing those exclusive use common area components. Having your association assume this responsibility will likely result in an increase in assessments as the association will need to budget additional funds for repair and replacement of these components. Moreover, your association will need to add these exclusive use common areas as line items to the reserve study as well as further fund reserves for these additional items.

Maintenance vs. Repair vs. Replacement

What can be considered a replacement is likely obvious, but the difference between maintenance and repair can be more difficult. Maintenance likely consists of routine acts that keep an exclusive use common area component in working order. Think of it in terms of scheduled maintenance or preventative maintenance - periodic cleaning, painting, staining, oiling hinges, caulking, etc. Repair implies fixing something that is broken. An association may need or want to define these terms in its CC&Rs or Rules in order to alleviate any argument regarding the definitions of these terms.

Maintenance Matrices

One of the most effective ways of eliminating confusion or ambiguities surrounding whether owners or an association is responsible for certain components is adopting a maintenance matrix. The typical maintenance matrix lists each component within a community and specifically assigns each component either to the owners or the association to maintain, repair, and replace.

If your association prepares a maintenance matrix which summarizes the current maintenance, repair and replacement responsibilities as found in your association's governing documents, then the maintenance matrix can be adopted like any other rule, i.e., the board can adopt the maintenance matrix at an open meeting after considering any comments made by the membership regarding the matrix (and the membership had at least thirty (30) days (twenty-eight (28) days starting January 1, 2019) to voice their comments to the association). See Civil Code section 4360 for the specific requirements regarding association rule adoption.

Conversely, if while preparing a maintenance matrix, your association desires to change any of the maintenance, repair, or replacement assignments currently stated in your CC&Rs, then the maintenance matrix would technically be amending your CC&Rs; CC&Rs amendments must be approved by a vote of the membership pursuant to your association's CC&R amendment provisions.

PORTION OF A SAMPLE MAINTENANCE MATRIX

COMPONENT(S)	*OWNER*	*ASSOC.*
Air Conditioning System - Each Unit	*X*	
Bathroom Fixtures	*X*	
Ceilings		*X*
Common Area Improvements		*X*
Electrical Wiring – Interior	*X*	

CONTRACTS

Contracts set forth the rights and duties of the parties to the contract, and help to reduce or eliminate misunderstandings regarding the work to be completed and the money to be paid. In resolving any dispute or problem under the contract, such as whether a payment is due, a reviewing court will look to the language of the contract to determine which party will prevail. Thus, the contract provisions should be carefully considered in every contracting situation.

Know Your Contractor

Make sure the contractor your association is seeking to hire is not only licensed but licensed in the area for which the contractor is providing services for the association. In California, anyone who contracts to perform work on a project that is valued at $500 or more for combined labor and materials costs must hold a current, valid license from the California's Contractors State License Board ("CSLB").

PRACTICE TIP:

Before your association signs a contract, the fact that the contractor has a license should be confirmed by looking on the California State Contractors License Board (CSLB) website.[1] The CSLB has 44 different classifications of contractor's licenses.[2]

1. https://www2.cslb.ca.gov/onlineservices/CheckLicenseII/checklicense.aspx
2. http://www.cslb.ca.gov/About_Us/Library/Licensing_Classifications/

Know Your Governing Documents

Bidding Requirements

Confirm that your governing documents do not require your association to obtain a certain number of bids.

Limits on the Term of a Contract

Governing Documents, typically in the "Board Powers and Duties" provisions, can contain language which limits the ability of the board to enter into certain long term contracts. So check your documents.

Typically, boards are prohibited from entering into contracts for services longer than one (1) year without a vote of the association's membership.

Common exceptions to this rule are contracts for utilities and management contracts.

Important Contract Provisions

The most important issues to address in a contract are the provisions that most frequently lead to problems or disputes.

Scope of Work

Make sure that the description of the work the contractor is to perform is detailed. One option to meet the requirement of having a detailed scope of work is to attach the contractor's proposal as an exhibit to the contract.

Detailed Payment Provisions

Make sure the contract provides when payments are due, when payments can be withheld and if there are any retentions of payment.

PRACTICE TIP:

- An association's best protection against financial loss resulting from a contract problem is to not allow the contractor to receive more money than the percentage of work that has been completed.
- In regular maintenance contracts such as landscaping and pool service, payment should be made after the service has been provided.
- In construction projects, the contract should provide that progress payments can be submitted only for work actually completed, and should also provide for the association to retain a percentage of each progress payment until the job is completed.
- Avoid provisions that require payment "upon delivery" or "upon completion," as few associations are set up to have a check waiting for the contractor immediately after the job is completed.

Contractor Insurance Requirements

Contractor insurance requirements can vary depending upon the type of job, but all contractors should have at least a comprehensive general liability policy, an owned, non-owned and hired automobile policy and workers' compensation coverage.

PRACTICE TIP:

- Some contractor's insurance policies contain an exclusion for all work performed on a community association. Contractors who are not insured to work on community associations should not be hired.
- The association should be named as "additional insured" on the contractor's insurance policies, except for the contractor's workers' compensation policy because the association cannot be named as additional insureds under those policies.

Indemnification Clauses

Indemnification is the contractual obligation of a party to a contract that requires the party to pay the expenses of the other party under certain conditions, such as when the party being indemnified is named in a dispute or lawsuit.

The indemnification clause defines when this obligation arises. Most often, the obligation arises when the party being indemnified is not legally liable for the alleged damage, loss or injury, while the party providing the indemnification is legally liable.

Many "standard form" contracts contain clauses that require the owner/association to indemnify the contractor unless the contractor is negligent.

PRACTICE TIP:

Boards of directors should be aware that most association insurance policies contain an exclusion for "contractual obligations" such as indemnification. It is recommended for boards to check with the association's insurance agent to determine whether the association's insurance policies provides such coverage. If the answer is "no," then provisions requiring the association to indemnify the contractor should be stricken from the contract before it is signed.

ARTICLES

The "Why" of Executive Sessions

By Mary M. Howell, Esq.

"Executive session": fighting words in most associations! The general complaint is that the board abuses its right to meet in "executive" (closed) session. But the fact is that most owners, and some directors, don't understand why it is very important to keep some of the board's deliberations under wraps, even to the point of not discussing these items with homeowners. This article explains why boards can, and *should*, preserve the confidentiality of executive sessions.

At the outset, let's review the very short list of items which a board is permitted to take up in executive session under the Davis-Stirling Act: litigation, personnel, contract negotiation, member discipline, and proposed member payment plans for overdue assessments. There is a distinctive reason for each of these items to be kept in confidence.

Litigation. Most readers are familiar with the attorney-client privilege, that is, the right to refuse to disclose, even in court, communications between an attorney and his or her client. This is considered proper because without the guarantee of confidentiality, often neither the client nor the attorney would feel safe in being completely honest. The client might withhold relevant information, and the attorney might not give an answer critical to the client's proper defense, if either had reason to fear civil or criminal actions based on what was said. This privilege is considered of paramount importance to our system of jurisprudence: "The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."

Homeowners are often confused about the nature of the attorney's representation. It is not uncommon to hear a homeowner contend that the attorney really represents individual owners, and so should answer all questions posed by owners about association (board) actions. Not so. By the rules of professional conduct, an attorney representing an organization does so by receiving information and giving advice to that organization's highest governing body—the board of directors of a homeowners association. Nor does the owner "pay the attorney's fees." Rather, the owner pays assessments and the board pays bills.

California courts have already considered the issue of who the attorney represents, and in the face of a claim by an owner to confidential communications between the association and its attorney, the court clearly indicated that the board, not the owner, is the holder of the privilege:

> [Homeowners] argue they were the "true clients" of [the Association's attorney] rather than [the association], a "faceless" association which could only act in a "representative" capacity of the general membership. They contend [the association] owed them a fiduciary duty to act in their best interests as "the rightful owners who are paying with their assessments for the legal services being rendered on their behalf." They

> characterize as the "crux" of the matter the question: "For whose benefit is the lawsuit being brought?" … We have squarely rejected this equation … The Supreme Court was not persuaded to the contrary because the beneficiaries were indirectly paying attorney fees which came out of the trust. That is because "[p]ayment of fees does not determine ownership of the attorney-client privilege. . . . [T]his question of cost allocation does not affect ownership of the attorney-client privilege." (*Wells Fargo Bank v. Superior Court, supra*, 22 Cal. 4th at p. 213.)

Smith v. Laguna Sur Villas Community Ass'n. (2000) 79 Cal.App.4th 639.

To summarize, the confidentiality of communications between an attorney and his or her client is considered a valuable social policy, encouraging free exchange of information and the fair administration of justice.

Personnel. In our highly litigious, employment-challenged society, one of the fastest ways to get sued is to interfere with someone's ability to find employment. When directors openly discuss with others—even homeowners—any perceived failings of a vendor or employee, the association (and the directors) have essentially invited a suit for defamation, invasion of privacy, or a related employment tort. See, e.g., *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468. In construing the Brown Act's very similar provision allowing personnel discussions to take place in closed sessions, the court noted that, "The purposes of the personnel exception are (1) to protect employees from public embarrassment and (2) to permit free and candid discussions of personnel matters by a local governmental body." *Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424. The same is true for personnel decisions in the association context.

Contract Negotiations. There is considerable discussion as to why "contract negotiations" should take place in executive session. Generally the rationale for doing so overlaps with the exception for personnel issues discussed above: as with personnel issues, in contract negotiations the Board needs to be able to discuss not only what it knows to be true, but what the directors or the manager speculates may be true—all without fear of being sued. In addition, discussing contract negotiations can be particularly problematic where the association is attempting to work through a valid competitive bidding procedure—open discussion of a competitor's bids can result in information being transmitted to other bidders, and may tempt the recipient of that information to be less than frank about pricing or qualifications.

Member Discipline. While many boards (and some aggrieved neighbors) would like to broadcast the Board's disciplinary activities, that is very unwise. As with personnel matters, the board needs to be free to discuss what is known, both about the violation and about the violator. The goal of discipline is compliance, not punishment—unless punishment is the only effective tool to secure compliance. And which "tool," whether it be fines, suspension of privileges, or the like, is likely to be effective can only be determined if the board and management are free to discuss what each knows about the violator. The question of whether to file suit against an owner, and whether such would be well-founded or defensible, are matters deserving of frank and open discussion.

Member Payment Plans. In happier economic times, some boards were in the habit of posting the names of delinquent homeowners—a "hall of shame" aimed at forcing the owner to pay up. Since then, massive delinquencies, coupled with state and federal fair debt collection laws, have combined to make this practice very unwise. An owner's finances are private, and to the extent that information is given to the board to allow it to evaluate a proposed payment plan, the information must remain confidential.

Conclusion. As one court, in rejecting a homeowner's claim to see privileged documents, noted, "It is no secret that crowds cannot keep them. Unlike directors, the residents owed no fiduciary duties to one another and may have been willing to waive or breach the attorney-client privilege for reasons unrelated to the best interests of the association…" *Smith v. Laguna Sur Villas Community Ass'n.* (2000) 79 Cal.App.4th 639, 645. The same may be said of the other types of confidential information received by the board from time to time. There are, quite simply, some items that are best kept confidential. And while the Association may, eventually, win a case based on the improper disclosure of confidential information by a resident or director, the cost to defend the suit, and the resulting community-wide acrimony, would be unnecessary but for "loose lips."

Email Do's and Don'ts for Community Associations

By Mary M. Howell, Esq.

Amendments to the Davis-Stirling Common Interest Development Open Meeting Act (the "Act") which restrict the use of emails by board members have resulted in many questions, some of which remain unanswered. While the Act itself does not address some of the more common questions about use of email, the Brown Act (which regulates the meetings of *public* agencies, and upon which the Act is modeled) has the virtue of quite a bit of case and law commentary. It appears to answer many of the questions regarding Davis-Stirling, so even though the Brown Act does not, itself, apply to community association board meetings, the following discussion, based on the Brown Act, will be helpful.

Question: Can a director email the rest of the board purely to discuss a possible action the board might take in the future? It's not on the agenda yet, and all that would happen is a discussion of the issue, not any action.

Answer: Probably not. A lot depends on the extent to which the current prohibitions on email meetings are intended to mirror what's already in the Brown Act. The Davis-Stirling Act now defines a "meeting" as a congregation of the majority of the directors "to hear, discuss or deliberate" on some action that is within the board's purview. The language in the Brown Act defining "meeting" (Gov. Code § 54952.2) is very similar.

By analogy to the Brown Act, such communication would be prohibited, even if there isn't a vote on the issue. As one court put it (in connection with the Brown Act), "It is clearly the public policy of this state that the proceedings of public agencies, and the conduct of the public's business, shall take place at open meetings, and that the deliberative process by which decisions related to the public's business are made shall be conducted in full view of the public…[T]he legislature has considerably broadened the [Brown Act] by passing amendments 'intended to bring the informal deliberative and fact-finding meetings within [the Brown Act's] scope…" *Wolfe v. City of Fremont* (2006) 144 CA4th 533, 541-542.

It's *dangerous* too: those email exchanges are not privileged. In case of litigation, those are going to be the first thing opposing counsel will demand in discovery, so count on everything you write (with the possible exception of emails directed to the association's attorney) being shown in court. Beware!

Question: Can a director email the community association manager with directions? What if that email goes to all the other directors too?

Answer: Generally, a director can email the manager with either directions or questions. And that email can be copied to the other directors. What is prohibited is using the manager as an intermediary, to obtain the concurrence of the other directors on a possible issue of association business, outside of a meeting. Thus, in *Stockton Newspapers v. Redevelopment Agency* (1985) 171 CA3d 95 (another Brown Act case), the court condemned the use of an intermediary (in this case, the attorney for the agency) to take a "poll…for the purpose of obtaining a collective commitment or promise" from the members on an

issue to go before the board. Accordingly, if the direction given by the initial email is 'go ask the others how they would vote on this issue,' the email to the manager would violate the Davis-Stirling Act. But if it's simply, 'put this item on the agenda' or 'here's how I want you to handle that situation,' the email does NOT violate the Act.

Question: Can a director email one or two, but less than all, the directors about anything that remotely concerns the association?

Answer: It depends on what constitutes a majority of the board. If the board only has three members, such an email would violate the Act. If there are five directors, emailing one other director would be appropriate, but emailing two others would constitute a congregation of the majority of the board. If there are seven directors, then one director could safely email two others. Note, however, that if such emails are part of a serial attempt to obtain the concurrence of all other board members (discussed below), the numbers don't matter: such a communication is not allowed.

Question: Can one director individually email each of the other directors what they think about an issue the director proposes to bring up?

Answer: As above, that would be permissible UNLESS the emails were part of a serial attempt to obtain a concurrence of the board on an issue of association business. Part of the problem with drawing bright lines of distinction is that the permissibility of such communications depends on the subjective intent of the parties to the communication. A director might not start out with that goal in mind, but over time as responses come in, that director might shift to the "polling" mentality condemned in the *Stockton Newspapers* case discussed above. To avoid this, refrain at all times from forwarding "threads" about a subject, which contain other directors' observations and thoughts.

Question: Can one director individually email each of the other directors to discuss what a committee (say, the budget committee) has said during its deliberations?

Answer: Yes, provided the communication is not a direct or indirect action leading to a concurrence of the other directors as to the subject matter of the communication.

Question: Can a director instruct a manager by email to contact each of the other directors to get their input on a certain issue?

Answer: No. As noted above, the use of an agent or intermediary to take a poll or obtain a consensus on anything pertaining to the association circumvents the Act.

Question: That's dumb! By this logic, the board can't even take a poll on what's a good meeting date, or where to hold the annual meeting. Can this really be the law?

Answer: Dumb doesn't even begin to cover it. Bottom line is that what's ***prohibited*** is the use of emails, between a majority of the directors (serially or all at once) "to develop a collective concurrence

as to action to be taken on an item, which includes any exchange of facts, or substantive discussions which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue." Cal. Department of Justice, The Brown Act, Open Meetings for Local Legislative Bodies (2003), page 12. On the good side, the same document states that the Attorney General "does not think the prohibition against serial meetings would prevent an executive officer from planning upcoming meetings by discussing times, dates, and placement of matters on the agenda. It also appears that an executive officer may receive spontaneous input from any of the board members with respect to these or other matters so long as a quorum is not involved." *Ibid*.

Question: So exactly what can a director legally do in terms of emails to other directors?

Answer So far, as is clear today, and by analogy to the Brown Act:

1. The directors can meet/communicate via email when there is an emergency, and the individual directors have consented, in writing (including email), to such an email meeting. The consents must be filed with the minutes. (Civ. Code § 4910(b)(2).)

2. An individual director may communicate (back and forth) with another director or directors, even about association business, PROVIDED the total number of directors involved does not exceed a majority of the board, and FURTHER PROVIDED that the communication isn't part of a serial attempt to obtain board concurrence on an issue, outside of a meeting. 84 Ops. Cal. Atty. Gen. 39 (2001)

   A "serial meeting" is "a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the board's members." As one commentator put it, "[o]nce serial communications are found to exist, it must be determined whether the communications were used to develop a concurrence as to action to be taken. If the serial communications were not used to develop a concurrence as to action to be taken, the serial communications do not constitute a meeting and the Act is not applicable…" Note, however, the Attorney General goes on to say, "conversations which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications which contribute to the development of a concurrence as to action to be taken by the legislative body. Accordingly, with respect to items that have been placed on an agenda or that are likely to be placed upon an agenda, members…should avoid serial communications of a substantive nature concerning such items."

   Note that the *Wolfe* case further provides that the Act can be violated by improper communications which lead to a consensus, whether intentional or not. When in doubt, don't.

3. A director can communicate with the manager to give instructions, and can receive from the manager information pertaining to association business. Such information might include

committee reports, legal opinions, copies of correspondence, proposed minutes--even a meeting between the manager and director wherein the manager lobbies the individual director--but generally such one-on-one communications are permissible unless and until they turn into an attempt to find out what other directors think on the issue in question. *Wolfe v. City of Fremont*, *supra,* at 546-547.

4. A director can receive, and respond to, emails from non-director homeowners (though the wise director will not respond unilaterally, but after permissible consultations with fellow directors and on behalf of the board as a whole.)

5. All directors can receive information from other directors so long as they do not deliberate collectively with respect to such information, outside of a meeting. Thus, a director can send an email to all other directors, even about association business, so long as this action is 'one way' and not an invitation to open dialog about the issue. Presumably if a director sent out an email with an opinion or facts, and said 'DON'T REPLY TO THIS EMAIL' (and there were no subsequent replies) then such communication would not violate the Act. *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.

6. The directors can communicate regarding agendas and date, time and place of proposed meetings.

If you see the dilemma, and believe volunteerism will be impaired as a result of these prohibitions, contact your legislators, and request some amendments to allow more communication between directors, or at least to clarify what can and cannot be handled by email.

Email Policies for Community Associations

By Pejman Kharrazian, Esq.

Martin Lomansey, an early twentieth century political boss from Boston, is credited with giving the following warning to young politicians — "*Never write if you can speak; never speak if you can nod; never nod if you can wink*"

When emailing, it is not often we consider what consequences putting our thoughts into writing and pressing "send" will have down the road. The same traits that make email so appealing – the speed and ease of communication – can also expose pitfalls. These potential issues can be even more important when you serve as a volunteer in your association.

As a general rule for email, save discussions for board meetings (*less is more*) and email as if your mom is watching over your shoulder (*watch what you say*). Beyond these common sense warnings regarding brevity and discretion, the following discussion highlights a few issues surrounding email communications in community associations. These issues should be considered when creating or revising an email policy for your association, which is considered good practice.

Emails can be Discoverable

Emails can be discoverable in a litigation context, meaning if the association is involved in litigation, emails sent by directors, officers, committee members, and other volunteers can be sought out by the opposing side. Even outside of litigation, certain emails may be subject to a request for production under Civil Code section 5205, which allows members of the association to make document requests for association books and records.[2] In either scenario, the contents of your email communications, as an association volunteer, could essentially become public.

Separate Email Account for Association Communications

If you serve as a volunteer in your association, then you should have a separate email account for your volunteer role (i.e., happy.acres.board.member@gmail.com). Such an account is quite easy to set up and it's free. Many providers offer free cloud-based email accounts that include storage on the cloud for your emails and the ability to sync the email account to your tablet or smartphone so you don't have to log into a computer separately to gain access (gmail, yahoo and ymail are a few such providers).

Having a separate account helps keep a bright line separation between your communications as an association volunteer and your work or personal communications. This separation is important

[2] Document requests under Civil Code section 5205 have tight deadlines (as little as 10 days). If you receive one, contact your association's legal counsel immediately.

because if your emails become the subject of a discovery request, it will prevent you from having to sift through and separate association communications from other communications. The separation also helps you realize which hat you are wearing when communicating, which helps keep your association communications thoughtful, brief and professional and lets the recipient know the capacity in which you write them.

Further, litigants have the ability to subpoena an employer for access to your work email if they suspect you were using a work account to conduct association business. This can be problematic because an employer may not take the time to separate out association only emails and may simply produce all emails sent by you on your work account. Not to mention, your employer will likely not be thrilled to receive the subpoena and find you were using a work account for non-work communications!

Cloud-Based Services

One caveat to the cloud-based services such as gmail, is that they too can be subpoenaed and often are for production of emails during litigation. Therefore, if you do set up a separate association volunteer email address through a free cloud-based provider, you must still keep in mind that what you say in an email can be shown to the membership, broadcast to the public or published to a jury down the road.

Shared Email Accounts and Shared Communications

It is also not a good practice to have a shared email account with a spouse or significant other (i.e., bob.and.jane@yahoo.com). Certain privileges that may prevent the discovery of an email communication can be waived or defeated because of the joint nature of an email account. In a scenario where one spouse is a board officer and the other is not, a confidential communication meant for the board officer could become discoverable where it otherwise would not. For the same reason it is not wise to forward or share association emails with third parties.

Use of Email for Association Communications

Finally, when you are communicating over email in your capacity as an association volunteer, everything you say can be construed as being on behalf of the board as a whole. If asked a specific question by a member, use caution when answering and in most cases it is best to direct the member to discuss their issue at the open forum of the next board meeting.

Also, as discussed in other articles (See *Email Do's and Don'ts for Community Associations*), except for some very narrow exceptions, email meetings are not allowed and board members should discuss association business at board meetings and not over email.

Conclusion

Next time you are about to press "send," consider the potential impact of your email communication. Remember that when it comes to email, *less is more* and *watch what you say*. It is a best practice for your association to have an approved email policy for the board and volunteers setting forth guidelines for procedural items such as the establishment of separate email accounts and for the use of email for association communications such as communications by an individual board member to a member.

Document Production Issues

By Mary Howell, Esq.

Civil Code Section 5200

The references to financial documents in Section 5200(a) can be translated from the legalese as follows:

Section 5200(a)(1) entitles an owner to "any financial document required to be provided to a member in Article 7 (commencing with §5300) or in Sections 5565 and 5810." The documents required to be produced by Section 5300 et seq. are the annual budget and reserve study (§5300), and insurance and loan information (*ibid.*) The document required by Section 5565 is the summary of association reserves. The document required to be provided by Section 5810 is notice of any expiration of insurance policies.

Section 5200(a)(2) entitles an owner to "any financial document required to be provided in Article 2 (commencing with §4525) of Chapter 4."

"Article 2, commencing with section 4525" requires the production to an owner in connection with a pending sale of the owner's dwelling of the items listed in Section 5235 (viz., all governing documents [that is, Articles, Bylaws, CC&Rs, Rules], a statement if the age restrictions deviate from the Unruh Act, the Section 5300 documents listed above, a statement of the amount of regular and special assessments, unpaid assessments on a requesting owner's property, notices of violation on a requesting owner's property, a copy of a construction defects list generated pursuant to Section 6000, if any, other specified information regarding construction defects, a statement as to whether a change in the assessment structure is pending, rental restrictions and minutes for the last 12 months.

Section 5200(a)(3) requires production of "interim financial statements which contain a balance sheet, and income and expense statement, a budget comparison, and/or a general ledger…"

PRACTICE TIP: Your governing documents may be broader than the statute. Check.

Items commonly requested which are NOT required to be produced in response to an owner request include:

- Correspondence
- A request to identify "each and every document which pertains to …"
- A "report" not otherwise prepared or submitted in final form to the board
- Lists of vendors
- Records of disciplinary actions (usually requested by an owner subject to discipline who demands records for actions "similar" to an owner's alleged violation)

PRACTICE TIP:

Regarding manager salary information, the Code *does* require production of *employee* contracts (though it allows for redaction of personal information.) If the manager is actually an employee of the association, the contract is required to be produced. If the manager is, instead, an employee of the management company, salary information and contract details are not required to be produced (though an owner can make an educated guess based on a copy of the management company contract and/or the budget, both of which ARE required to be produced…)

Mechanics of Production

On site or elsewhere?

Section 5205(c): "The association shall make the specified association records available for inspection and copying in the association's business office within the …development."

Section 5205(d): "If the association does not have a business office within the development, the association shall make the specified … records available for inspection and copying at a place agreed to by the requesting party and the association."

PRACTICE TIP:

It's not a bad idea to have a staff person or director or manager present to inspect the inspection…

Section 5205(e): "If the association and the requesting member cannot agree upon a place…or if the requesting member submits a written request directly to the association for copies of specifically identified records, the association may satisfy the requirement … by delivering copies of the … records to the member …"

- Who gets to do the copying? Owner or agent (such as attorney) authorized by the owner in writing. Civil Code section 5205(b).
- What costs can be passed through?

Staff Search and Copy Time

Section 5205(f) allows "the direct and actual cost of copying and mailing…" (and the association shall inform the owner, and the owner shall agree to pay, before copying [and sending] the documents." It's clear that the association may pass through the contracted (management company) cost for these actions; it's not at all clear whether the association can charge an owner for the probable cost to have association employees perform these same tasks.

Attorney Time to Redact Records

"…an amount not in excess of …$10 ... per hour, and not to exceed …$200…per written request…" (Civ. Code § 5205(g).)

- Can you require a form to be used? We recommend you DO develop a form and require use. DSCIDA does not say "yes, you can" or "no, you can't" but from a corporate housekeeping point of view, it allows for better record production and for tracking costs.
- Can you elect to email the documents? Not unless the owner consents to email (and the format must be non-alterable, e.g., pdf). (Civ. Code § 5205(h).)
- Can't meet the deadline? Send a letter or email outlining what you HAVE done, and when the owner may reasonably expect the remaining documents. If you decline to produce documents, state *why* (e.g., privileged, not on the Section 5200 list)

Duplicative/Abusive Requests

- Keep a list (or copies) of documents you have produced to the owner. While everyone loses paperwork once in a while, asking for the same documents three months in a row is probably abusive. A refusal to re-copy and send documents should probably be written (or reviewed) by counsel.

Directors' Right of Inspection

- Corporations Code section 8334 says the director "shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind …" Despite the language, "absolute" may not be so absolute. Thus, in *Chantiles v. Lake Forest II Master Association* (1995) 37 Cal.App.4th 914, the court refused to give a director access to ballots containing information on how other owners had voted. The court noted that certain public policies, such as an owner's reasonable expectation of privacy, may outweigh a director's right to view documents.

PRACTICE TIP:

Sometimes directors go rogue, and the rest of the board may worry about access to highly sensitive documents, fearing that the documents may be used against the association. While it's tempting to just declare documents "off limit", this is a sensitive area, and legal counsel should be sought before routinely denying a sitting director access to such documents. A court order may be advisable, and/or creation of a subcommittee (particularly when the director has sued or threatened to sue the association).

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Membership Lists

Both the Corporations Code and the DSCIDA require production of a membership list. Unlike other documents required to be produced, the requesting owner must state the purpose for which the list is requested, and it must be for a purpose "reasonably related to the [requester's] interests as an [owner.]" Things such as recalls and elections are clearly related to the owner's interests, while commercial purposes are not. What falls in between are things such as advising fellow owners about an issue outside the association (construction, non-association political campaigns) which is arguably of interest to many if not all associations. Check your governing documents, and consider adopting a policy to define "reasonably related" purposes. Further, if the association chooses to deny access, and the requesting owner challenges those reasons, it is up to the association to prove the requesting member would have abused access to the membership list. Civil Code section 5225.

Even though the Corporations code and the DSCIDA do not require that a membership list contain email addresses, the *Worldmark* case holds that if a corporation maintains and uses email addresses to communicate with members, those must be included on the membership list.

DSCIDA allows owners to "opt out" of the sharing of address information, BUT the association is still required to communicate in an alternative fashion. (See Civ. Code § 5220.)

Penalties for Violation

Owner

The owner may bring a court action, in small claims court or superior court, to enforce the owner's inspection/copying rights. If the owner wins, the court SHALL award the member costs, including "reasonable attorney's fees" AND a civil penalty of up to $500 "for the denial of each separate written request…"

Does that mean for each separate line item on a multiple item request? Possibly, although the decision in *Wittenberg v. Beachwalk Homeowners Association* (2013) 217 Cal.App.4th 654, (which concerned election violations) suggests that the amounts should be capped for each written request as a whole--another good reason to insist on a form.

Association

In a challenge based on production, the winning association can recover "costs" ONLY if the court finds the owner's action to be "frivolous, unreasonable or without foundation." (Civ. Code § 5235.) That's bad enough, but when you consider that the court usually defines "costs" as NOT including attorneys' fees, the association may find itself losing even when it wins.

Records to Keep

By Karyn A. Larko, Esq.

Unfortunately, there are few laws that say exactly what records a community association should keep or for how long. For this reason, much of this article is based on the author's experience and opinions, with input from experts in other legal and financial disciplines. Please note, there are undoubtedly some categories of records not addressed in this article that may be as important as those addressed below.

If you have large quantities of documents that you think you should keep, but you don't have the room, consider storing the records in computer form, either with software data files or scanned images. While this will take far less physical space than paper, you should think about how to access the documents in the future. Just as floppy disk drives have disappeared, making it difficult to pull data stored on such disks, it is important to realize that technology commonly used today may soon become obsolete. Therefore, unless you are using the most common software and hardware available now to store your records, know that it probably will not be readable in 10 to 15 years. In fact, even using the most common software and hardware available now will not ensure that you will be able to access your electronically stored records a decade or so from now. For this reason, keeping paper records may be prudent.

Member Meeting, Board Meeting and Committee Meeting Minutes

An association's minutes constitute the official record of its acts. Both incorporated and unincorporated associations must keep minutes and must allow members to inspect them (see Corp. Code § 8320 and § 8333; Civ. Code § 4950 (board meetings), § 5200 and § 5210). The original minutes should be kept forever, including minutes of membership meetings, regular board meetings and executive sessions (kept separately from regular board meeting minutes). The same applies to minutes of any committee that is empowered to exercise any board powers. If you don't have originals, keep what you do have, signed or unsigned.

Records Pertaining to Board Elections and Other Member Votes

The law provides direction on the retention of candidate registration lists, voter lists, ballots, proxies, sign-in sheets, signed voter envelopes and other election records. For Board elections and member votes to amend the governing documents, increase regular assessments, impose special assessments, and grant the exclusive use of common area, Civil Code sections 5105, 5125,5200 and 5210 require that candidate registration lists, voter lists, ballots, signed voter envelopes, proxies and sign-in sheets be stored by the inspector(s) of elections or at a location designated by the inspector(s) for one year from the date the cause of action accrues. This can be a challenging date to identify. Depending on the nature of the claim, the date of the cause of action can be prior to the date the ballots are opened

and counted, the day the ballots are opened and accounted, or a later date. Thereafter, these records must be held by the association until three fiscal years have elapsed.

Remember to note the election results in the relevant meeting minutes (see Corp. Code § 8325).

Contracts

Civil Code sections 5200 and 5210, which became effective January 1, 2014, require associations to make executed contracts that are not privileged under law available to the owners (which is the same as saying they must "retain" these records) for the current and prior two fiscal years. Having said this, an association should not destroy these documents at the end of this period.

California has a 4-year statute of limitations for lawsuits arising out of contracts or other written documents (Code Civ. Proc. § 337). Therefore, even if you signed a contract more than four years ago, you should keep the document for at least 4 years after the contractual relationship ended. For example, if you have an automatically renewing management or landscape maintenance contract, you should keep that contract for at least 4 years from the date the contract was terminated.

To keep track of contracts, you should keep a file or notebook containing all active contracts and a separate file for contracts that have expired or have otherwise been terminated.

Records Related to Taxes

Civil Code sections 5200 and 5210 also require associations to make many tax related records available to owners for the current and prior two fiscal years. (The tax-related records subject to section 5200 include, without limitation, state and federal tax returns, invoices, statements, receipts, canceled checks, approved purchase orders, reimbursement requests and credit card statements.) However, an association should not destroy these records at the end of this period.

We are informed that the IRS generally has a 3-year rule and that the California Franchise Tax Board has a 4-year rule for conducting tax audits (absent fraud). However, if a claim of loss from worthless securities is made or a deduction is taken for a bad debt, the statute of limitations (i.e., the timeframe within which the IRS can challenge the claim or deduction) is 7 years. Furthermore, there is no limit on when these agencies can pursue a claim if a tax return wasn't filed. We have had clients whose corporate status was suspended for allegedly not filing a tax return more than fifteen years before. If the IRS has no record of a tax return or the tax payments, it will be impossible to show that you filed or paid the taxes without the return and the canceled checks. Using this knowledge, it would be wise to keep all original financial documents for at least 4 years after filing the tax return (7 years if the return included a bad debt deduction or claim of loss) and to keep the tax returns and any tax payment checks forever.

If the Franchise Tax Board has no record that you filed or paid taxes and you do not have the records to prove otherwise, your corporation can be suspended. The state will not revive the corporation or allow you to terminate the existing corporation unless and until the Franchise Tax Board acknowledges that all returns have been filed and taxes paid.

A few publications from the IRS provide additional guidance on the retention of tax related records. Publication 17 (2014) "Your Federal Income Tax" and Publication 583, "Starting a Business and Keeping Records," are both available on request or can be accessed and printed from the Internet at http://www.IRS.gov. Also, an article in Smart Money Magazine[3], citing an H&R Block tax specialist, gives suggestions for individuals. The specialist suggests keeping all tax-related items for seven years. It should be noted that the suggestions for what not to keep seem more applicable to individuals than businesses.

Employee Related Records

For associations with employees, retaining payroll and employment records is more difficult to address. There are different statutes of limitations for state and federal wage claims, age and sex discrimination claims, etc. Some run from the date of the first breach and others from the date of the last violation. Depending on the claim raised, you may need time cards, hourly rates and annual salary data paid to different employees, evaluations and other personnel file records, and employee manuals and amendments. You should probably retain the records on an employee for at least five years after the employee's employment with the association ends. Certainly, you should retain all records for current employees for at least five years and you should retain all personnel file information for at least five years after the employer/employee relationship is terminated.

Unfortunately, it is far more difficult to say how long you should keep these records to defend against claims that current employees might raise in the future.

When you discard employee records, be sure to shred them to prevent both identity theft and the access of personal and confidential information by unauthorized persons.

Association Records Subject to Owner Inspection Pursuant to California Law

Civil Code section 5200 specifically identifies a number of other association records that must be made available to owners for inspection (and therefore, must be retained) for the current and prior 2 fiscal years. Excluding minutes, contracts and tax related documents, which we addressed separately, these records include: (1) all governing documents; (2) documents required pursuant to Civil Code sections 4525, 5300, 5305, 5310 and 5565; (3) interim financial statements which include a balance sheet, income and expense statement, budget comparison or a general ledger; (4) written board approval of contracts or vendor bills; (5) reserve account records and records of payments made from

[3] April 2000 edition, page 88.

reserve accounts; (6) the agendas for membership meetings, board meetings and meetings of committees established by the board pursuant to Corporations Code section 7212; (7) membership lists; and, (8) check registers.

The retention period required by Civil Code section 5200 is the minimum retention period. These records should be kept longer if another rule or category applies that mandates a longer retention period.

Legal Documents

Legal documents, especially those that are not recorded in the official records of the county the association is located in, including settlement and mediation agreements, releases and maintenance agreements should be retained indefinitely – or at least until the association's legal counsel confirms that it is safe to destroy them.

Other Association Records

There are records not addressed above that you probably want to keep indefinitely or at least for a substantial period of time.

Annual audits or reviews are among the most important association financial records. These documents, which typically come in a small booklet, summarize an entire fiscal year. It seems reasonable to keep them indefinitely.

You should maintain an inventory list, at least for items having a significant value. This list should include a description of each item purchased, the purchase date, the amount paid and the check number. If you have a casualty loss, you will need to provide the association's insurance carrier with a copy of the applicable purchase invoice(s) or canceled check(s). Accordingly, you should keep these documents for as long as you own the property.

If you have an uncollected judgment, it is good for an initial 10 year period and can be renewed for an additional 10 year period. Judgments and recorded abstracts of judgment can pop up years later, usually when a former owner wants to pay off the judgment to obtain new credit. While a copy of these documents may be available in court files or attorney records, they may have been archived or even destroyed. Even if they can be obtained, it may take some time to obtain them from storage. Therefore, it is wise to keep these records while the judgment is valid.

Liability claims and certain property casualty claims can arise years after the incident(s) leading to such claims occurred and the association may have changed carriers one or more times in in the interim. The association will need to find the applicable insurance carrier to obtain insurance defense. A file should be kept for each insurance carrier and its policy(ies). Each year's declarations page, as well as

any changes and endorsements that take effect during the life of the policy, should be added to the file.

Most associations keep a file for each owner's property containing all correspondence and other records relating to that property or its owners. If an owner changes, routine correspondence can be archived and probably discarded following the general guidelines at the end of this article. However, for the reasons described below, you should probably retain indefinitely those documents relating to the property itself, such as architectural applications and recorded maintenance and indemnity agreements.

We know of one older association that hired a professional "efficiency expert" to cull its records. Unfortunately the professional knew nothing about community associations and discarded old owner architectural applications and approvals. As a result, it became impossible for the association to confirm which lot alterations had been approved. It also become impossible to confirm which improvements had been owner rather than developer constructed.

There is another benefit to retaining architectural decisions. Prior architectural decisions can provide guidance to architectural committees and boards by providing a record of what alterations did and did not work in the past and why. These records can also assist an association in the event an owner challenges its approval for denial of a proposed alteration. (Courts have allowed associations to change their minds based on the lessons of experience.)

Civil Code section 4765 requires architectural decisions to be in writing, and if a proposed change is disapproved, the written decision must explain why. Although you may keep the originals in separate files for each separate interest, you may find it more helpful to have at least a summary of each decision well-indexed in one or more files or notebooks. The summary should identify the improvements proposed and the reasons why they were or were not approved. This summary should also identify any regrets or complaints that followed an approval.

Records seem to disappear over the years. Thus, it is a good idea to consider using either a professional document storage company or a commercial self-storage unit just for your association's records. You should also develop a numbering system for the boxes and keep an index of what is in each box so that you can readily find documents many years later.

Records that you plan to keep forever should probably be kept with like documents in date order to make locating them easier (e.g., tax returns). It also makes sense to keep all records in the association's active files that are to be kept forever in a separate drawer or banker's box marked "KEEP FOREVER" to reduce the risk of them being inadvertently discarded. If you do not separate out these records at the time of their creation or receipt, they will become commingled with other records that may later be discarded. Waiting until you are ready to discard records to separate out those that should be kept will likely be significantly more difficult and time consuming than filing them separately in the first place.

A general rule would be to say that, apart from the discussion above, most records can be discarded after five years. However, even a five-year guideline cannot be applied categorically, and once a unique document is discarded, it is gone forever. If you are in doubt, you probably should err on the side of keeping the document, or at least get specific advice from someone with special expertise in the area that may be affected by the disposal.

Architectural Decisions: When An Owner Fails To Submit An Application

By David A. Kline, Esq.

In 1979, Bernard and Perlee Solomon purchased a home in the Ironwood Country Club. Four years later, they planted eight date palm trees without first seeking or obtaining approval from their association's architectural control committee, in violation of the CC&Rs.

The association sued the Solomons and sought a mandatory injunction compelling the removal of the palm trees. The association obtained the injunction by summary judgment (i.e., without a trial), but the Solomons appealed. They argued that the association was not entitled to have the trees removed, because it did not show that it followed its own standards and procedures before pursuing that remedy. In fact, the association had not submitted any evidence to the trial court showing that the trees were disapproved, who disapproved them, or why they were disapproved. In 1986, the Court of Appeal reversed the trial court's judgment on that basis. (*Ironwood Owners Association IX v. Solomon* (1986) 178 Cal.App.3d 766 ("*Ironwood IX*").)

Since 1986, the Davis-Stirling Act was written and rewritten. Civil Code section 4765 (formerly section 1378) requires associations to adopt and follow architectural review procedures.

Of course, these procedures typically describe how applications for architectural or landscaping changes will be reviewed. It is very common for CC&Rs to describe the criteria that the committee or board should consider when evaluating these applications. However, governing documents rarely address the obvious question raised by *Ironwood IX*. How can an association follow its own procedures to review an application that was never submitted?

In general, associations should consider two separate issues. First, associations should address the failure to submit architectural or landscaping plans like all other violations. This may include a demand to correct the violation by submitting plans, fining the homeowner after notice and a hearing, submitting the matter to IDR or ADR, and/or filing a lawsuit to compel the owner to submit plans.

Separately, whether or not the owner submits plans, before seeking an injunction to compel the owner to return the property to its original condition, the board or architectural committee should consider whether it would have approved the changes if the owner had submitted an application. In other words, it should evaluate those changes based on the criteria for approval or disapproval described in the governing documents. Essentially, the board or committee should ignore the fact that the owner failed to submit plans and consider only the physical changes to the property. Seek legal advice to determine what particular procedure should be followed in each case.

Associations may want to follow the spirit of their architectural review procedures even when the letter of those procedures may not apply to situations in which an owner fails to submit plans. For example, if an architectural committee disapproves the changes, the association might notify the owner of that

decision and give the owner the option to appeal that decision to the board of directors even if the architectural review procedures only provide a right of appeal to owners who submit plans. Likewise, if the application process requires an owner to notify his neighbors who may be affected by the proposed change, the association might notify those neighboring owners and invite them to the meeting at which the changes will be considered for approval or disapproval.

Taking these additional steps accomplishes several goals. First, it ensures that the decision to sue an owner to compel him to return the property to its original condition is based on the association's best interest, rather than the offense of having been snubbed by the failure to submit an application. It may even avoid an unnecessary trial if the board realizes that it can live with the unapproved architectural change. Second, it establishes a paper-trail to show that the association did not act arbitrarily, capriciously, or for discriminatory reasons. Third, it may allow the court to defer to the committee's or board's discretion on matters of aesthetics that are within their decision-making authority under the governing documents.

Finally, it allows the association to go to court with clean hands. In other words, if the association can show that it gave the owner every opportunity to comply with its reasonable requests before deciding to go to court, the judge is more likely to view the association's actions favorably. Then, when the association achieves its litigation objectives and seeks its reasonable attorneys' fees and costs, the court is less likely to reduce that fee award.

CHECKLIST

Annual Disclosures, Mandatory

1. **Annual Notice of Owner Information**.
At least 30 days prior to the association mailing its required annual budget report and annual policy statement, an association must update certain owner information in its records. (Civ. Code § 4041(b).) To obtain this updated information, an association must solicit the following information from the owners: (1) the address(es) to which association notice are to be delivered; (2) an alternate or secondary address to which association notices are to be delivered; (3) the name and address of the owner's legal representative, if any, including any person with the owner's power of attorney or other person who can be contacted in the event of the owner's extended absence from the separate interest; and (4) whether the separate interest is owner-occupied, rented out, if the parcel is developed but vacant, or if the parcel is undeveloped land. (Civ. Code § 4041(a).) If an owner fails to provide their primary and alternate secondary address, if applicable, the last property address provided in writing by the owner, or if none, the property address within the association community shall be deemed to be the address to which association notices are to be delivered. (Civ. Code § 4041(c).)

   If the association includes time-share units, as part of a mixed-use project, the association may comply with Section 4041 by obtaining a complete list of the names and addresses of the time-share owners, and entering that data into its books and records. (Civ. Code § 4041(d) (effective Jan. 1, 2019).)

2. **Annual Budget Report**.
Between 30 and 90 days before the new fiscal year begins, an association must prepare an annual budget report ("Report") and distribute it to the owners. (Civ. Code §5300(a).) *[As an alternative to distributing the full Annual Budget Report under Civil Code section 5300 or the Annual Policy Statement under Civil Code section 5310, the association may distribute only a summary of the items required by Civ. Code section 5300 or Civ. Code section 5310 (Civ. Code § 5320.) However, the members must be given a notice, in at least 10-point boldface type on the front page of each summary with instructions for how a member can request a complete copy of either report at no cost to the member. If a member requests a copy of the full report required by Civil Code section 5320, the association must mail a copy to the member presumably as provided for "individual delivery" under Civil Code section 4040.]* Compliance with this requirement, except for the summary of the reserve funding plan required by Civil Code section 5300(b)(3) is necessary for associations to utilize the 20%/5% assessment increase provisions described, paragraph (a), below. (Civ. Code § 5300(b)(1).) This Report must contain the information below. See the respective statutes for details.

   ☐ Annual Budget. The Report must include an annual budget prepared on an accrual basis. (Civ. Code § 5300(b)(1).)

☐ Reserve Summary. The Report must include a summary of the association's reserves in boldface type and include the many details described in the statute (Civ. Code §§ 5300(b)(3) & 5565) and must disclose reserve study information in a specified format. (Civ. Code §§ 5300(e) & 5570.) Where a community service organization (CSO) maintains major components of the association, the CSO must provide the association with information to do the reserve study. (Civ. Code § 5580.) Reserves include any funds received and not yet expended from a settlement or damage award arising out of any claim for construction or design defects. (Civ. Code § 4177.) Each association must report, as separate line items, either in the reserve study or in the annual review or audit, the amount of any such defect funds that have not yet been expended, and the expenditure or disposition of such funds, including any amounts expended for the direct or indirect costs for repairing construction or design defects. (Civ. Code § 5565(b)(3).)

☐ Reserve Funding Plan Summary and Full Reserve Study. The Report must include a summary of the reserve funding plan adopted by the Board (Civ. Code § 5550(b)(5)) and include notice to members that the full reserve study, including the reserve funding plan, is available to members and that the association must provide it upon request. (Civ. Code § 5565(b)(3).)

☐ Statement of Decision(s) to Defer Repairs. The Report must include a statement of whether the board has determined to defer or not undertake repairs or replacement of any major component with a remaining life of 30 years of less, including a justification for the decision. (Civ. Code §5300(b)(4).)

☐ Statement of Possible Levy of Special Assessments. The Report must include a statement of whether the board has determined or anticipates the need to levy one or more special assessments to repair, replace, or restore any major component or to provide adequate reserves for doing so. (Civ. Code § 5300(b)(5).)

☐ Statement of Method(s) for Funding Reserves. The Report must include a statement of the mechanism(s) by which the board will fund reserves. (Civ. Code § 5300(b)(6).)

☐ Statement of Procedures Used to Calculate and Establish Reserves. The Report must include a statement addressing procedures used for calculation and establishment of reserves. The statement shall include reserve calculations made using the formula described in paragraph (4) of subdivision (b) of Civil Code section 5570, and may not assume a rate of return on cash reserves in excess of two percent above the discount rate published by the Federal Reserve Bank of San Francisco at the time the calculation was made. (Civ. Code § 5300(b)(7).)

☐ Statement of any Outstanding Loans. The Report must include a statement of whether the association has any outstanding loans with an original term of more than one year. See statute for details. (Civ. Code §5300(b)(8).)

- ☐ Summary of Insurance Policies. The Report must include a summary of the association's (1) property, (2) general liability, (3) earthquake, (4) flood insurance and (5) fidelity policies, listing the carrier's name, type of insurance, policy limits for each type and the deductibles. If the policy declaration page includes the required information, the association may use the declaration page. The Report must also include verbatim disclaimer language specified by the statute in at least 10-point bold type. (Civ. Code § 5300(b)(9).) It may be worth adding to the insurance disclosures that the association policy (usually) does not cover alternate housing, moving and storage expenses, nor loss of owner's personal property from fire and other losses, nor cover the owner's liability for injuries on or in the owner's separate interest.

- ☐ Statement of FHA Certification Status by Condominiums. If the HOA is a condominium, the Report must contain a verbatim statement about whether the development is a condominium project and whether it is FHA certified. (Civ. Code § 5300(b)(10).)

- ☐ Statement of VA Certification Status by Condominiums. If the HOA is a condominium, the Report must contain a verbatim statement about whether the development is a condominium project and whether it is VA certified. (Civ. Code § 5300(b)(11).)

- ☐ A Copy of Completed Charges for Documents Provided Disclosure. The Report must include a completed "Charges for Documents Provided" disclosure as described in Civil Code section 4528. For purposes of the Report a "completed" "Charges For Documents Provided" disclosure means that the "Fee for Document" section of the form individually identifies the costs associated with providing each document listed on the form. (Civ. Code § 5300(b)(12).)

3. Issues Related to the Annual Budget Report

- ☐ Assessment Limits. Without obtaining the approval of a majority of a quorum of members, pursuant to Civil Code section 4070, at member meeting or election, associations may not increase in regular assessments 20% above the regular assessment for the prior fiscal year and total special assessments at a rate of more than 5% of the association's budgeted gross expenses during a given fiscal year. (Civ. Code § 5605.) Unless the association levied assessments based on taxable value in accordance with its governing documents before December 31, 2009, it may not do so thereafter, except where the association pays taxes on the separate interests and then only with respect to the taxes levied. (Civ. Code § 5625.)

- ☐ Increase in Assessments Disclosure. Associations must send notice of any increase in regular or special assessments, by individual notice, 30 to 60 days before the due date for the increase (Civ. Code § 5615) and notify prospective purchasers of increases that have been approved but are not yet due. (Civ. Code § 4525(a)(8).)

- ☐ Detailed Reserve Study. At least every three years, conduct a reasonably detailed and competent visual inspection of the accessible components the association must maintain, repair, replace, or restore as part of a study of the association's reserve account

requirements (if the replacement cost of the components the association must maintain is at least one-half of the association's fiscal budget for the last three-year period, excluding reserves). Consult the statute for many detailed requirements. (Civ. Code § 5550.)

☐ Annual Reserve Study Adjustments. At least annually, review the reserve study and make any necessary adjustments. (Civ. Code § 5550.)

☐ Reserve Procedures. In reserve studies, associations may not assume a rate of return in excess of 2% higher than the discount rate from the Federal Reserve Bank of San Francisco. (Civ. Code §§ 5300(b)(7) & 5570.)

☐ Reserves Used for Litigation Expenses. At least quarterly, if the board uses any reserve funds to pay expenses for any litigation, make an accounting of all litigation expenses and make it available for inspection at the association's office. Give the members written notice of (1) any decision to use reserves to pay for such litigation expenses and (2) the location of the accounting that is available for their inspection. (Civ. Code § 5520; Corp. Code § 5016.)

☐ Directors and Officers (D&O) Insurance. To obtain exemption from personal liability for volunteer directors, purchase both general liability and director's and officer's liability insurance. The amount must be at least $500,000 for associations consisting of up to 100 separate interests and $1,000,000 for those associations consisting of more than 100 separate interests. (Civ. Code § 5800.)

☐ Commercial General Liability (CGL) Insurance. If the association contains any property owned in common by the owners, then to prevent suit and joint and several liabilities against individual owners, the association must purchase general liability coverage of $2,000,000 for associations consisting of 100 separate interests or fewer and $3,000,000 for those with more than 100 separate interests. (Civ. Code § 5805.)

☐ Fidelity Bond Coverage. Unless an association's governing documents require *greater* coverage amounts, associations must maintain fidelity bond coverage for its directors, officers, and employees in an amount equal to or more than the combined amount of the reserves of the association and total assessments for three months. The association's fidelity bond must also include computer fraud and funds transfer fraud. If the association uses a managing agent or management company, the association's fidelity bond coverage must also include dishonest acts by that person or entity and its employees. (Civ. Code § 5806 (effective Jan. 1, 2019).)

☐ Notice to Members of Insurance Lapse, Non-renewal or Cancellation. Associations must also give "individual notice" to all members under Civil Code section 4040 of any lapse, non-renewal, or cancellation of coverage, or if there is a significant change in coverage, such as a reduction in coverage or limits or an increase in deductibles. If an association receives a nonrenewal notice for an insurance policy described in the annual budget report, then such

association must immediately notify the membership if replacement coverage will not be in effect by the date the existing coverage lapses. (Civ. Code § 5810.) Carriers must provide a reason for any non-renewal of a policy. (Ins. Code § 678.)

☐ Workers Compensation Insurance. Be sure that you have worker's compensation insurance for employees and pay taxes withheld from employees pay when due.

4. Annual Policy Statement.

Between 30 and 90 days before the new fiscal year begins, an association must distribute an annual policy statement to provide information to members about association policies. (Civ. Code § 5310(a).) This report must contain the information below. See the respective statutes for details.

☐ Official Communications to Association. The name and address of the person designated to receive official communications to the association as provided in Civil Code section 4035. (Civ. Code § 5310(a)(1).)

☐ Second Member Address. A statement explaining that a member may submit a request to have notices sent to up to two different specified addresses under Civil Code section 4040(b). (Civ. Code § 5310(a)(2).)

☐ Place for Posting a General Notice. The location, if any, designated for posting of a general notice under Civil Code section 4045(a)(3). (Civ. Code § 5310(a)(3).)

☐ Option to Receive Member Notices by Individual Delivery. Notice of a member's right to receive general notices by individual delivery as provided in Civil Code section 4045(b). (Civ. Code § 5310(a)(4).)

☐ Right to Receive Meeting Minutes. Notice of a member's right to receive copies of meeting minutes as provided in Civil Code section 4950(b). (Civ. Code § 5310(a)(5).)

☐ Assessment Collection Policies. The statement of assessment collection policies required by Civil Code section 5730. (Civ. Code § 5310(a)(6).) This is the lengthy verbatim statement set forth in Civil Code section 5730 describing an association's collection rights that must be printed in at least 12-point type. (Civ. Code § 5730.)

☐ Policies for Enforcing Lien Rights. A statement describing the association's policies and practices in enforcing lien rights or other legal remedies for default in the payment of assessments, in other words, its own "Collection Policy." (Civ. Code § 5310(a)(7).) The board must also notify the owners of the standards for payment plans, if any exist. (Civ. Code § 5665(a).)

☐ Association Discipline Policy. A statement describing the association's discipline policy, if any, including any schedule of penalties for violations of the governing documents as provided in Civil Code section 5850. (Civ. Code § 5310(a)(8).)

☐ Summary of Dispute Resolution Procedures. A summary of dispute resolution procedures as required by Civil Code sections 5920 (IDR) and 5965 (ADR). (Civ. Code § 5310(a)(9).)

☐ Requirements for Architectural Approvals. A summary of any requirements for association approval of a physical change to property as provided in Civil Code section 4765, including the types of changes that require association approval and a copy of the procedure used to review and approve or disapprove a proposed change. (Civ. Code §§ 4765 and §5310(a)(10).) If the governing documents require association approval of architectural changes, the association must provide a fair, reasonable and expeditious process for making architectural decisions. Associations may not impose fines or assessments against members for reducing or eliminating the watering of vegetation or lawns during any period for which the Governor or a local government has declared a state of emergency due to drought conditions. Governing document architectural requirements may not conflict with the water conservation requirements in Civil Code section 4735. They may no longer prohibit, or have the effect of prohibiting, artificial turf or other artificial surfaces resembling grass. (Civ. Code § 4735.) Owners may use a "clothesline" or "drying rack", as defined in the law, for drying clothes in the owner's "backyard" (not defined). (Civ. Code § 4750.01.) Associations can no longer establish a general policy prohibiting the installation or use of a rooftop solar energy system for household purposes on the roof of the building in which an owner resides or a garage or carport adjacent to the building that has been assigned to an owner for his/her exclusive use. (Civ. Code § 4746.)

☐ Mailing Address for Overnight Payment. The mailing address for overnight payment of assessments as provided in Civil Code section 5655. (Civ. Code § 5310(a)(11).)

☐ Other Required or Optional Information. Any other information that is required by law or the governing documents. For items that require disclosure and that you may wish to include at the end of the Annual Policy Statement, see the paragraph, below, entitled "Other Mandatory Disclosure the Board May Wish to Disclose with the Annual Budget Report and Annual Policy Statement." Some of these may require disclosure in a place other than the Annual Policy Statement. For optional items you may consider important to disclose to members but that may not be mandatory, also see the paragraph, below, entitled "Optional Disclosures the Board May Wish to Make with the Annual Budget Report and Annual Policy Statement." (Civ. Code § 5310(a)(12).)

5. Issues Related to the Annual Policy Statement

☐ Document Delivery Methods. The Board may deliver documents in any manner provided in Civil Code sections 4040 & 4045. (Civ. Code §§ 4040 & 4045.)

☐ Right to Annual Financial Report. The board must notify members (of incorporated associations) annually of their right to obtain an annual financial report upon written request. This report is similar to the audit or review required by Civil Code section 5300(b)(3), but it applies to corporations that have as little as $10,000 in gross annual receipts. (Corp. Code § 8321). Presumably the requirements of Civil Code section 5300(b)(3) are more extensive and control over Corporations Code section 8321.

☐ Monetary Penalty or Fine Disclosures. The board must distribute to all members any schedule of the monetary penalties adopted by the board to discipline members, whether committed by the owner, or the owner's guests or invitees. The board must distribute it by individual delivery as provided in Civil Code section 4040. The board needs to do this only once per year pursuant to Civil Code section 5310(a)(8), although it must redistributed, if there are any changes. (Civ. Code § 5850.)

☐ IDR and ADR Disclosures. Associations must have some procedure for informal, internal attempts to resolve disputes between the association and an owner. (Civ. Code §§ 5900-5920.) The board must also disclose its IDR (Internal Dispute Resolution) procedures in the annual policy statement. (Civ. Code § 5920.) If the board does not adopt its own IDR procedures, the statute contains default procedures in Civil Code section 5915 that will apply. Attorneys may assist either an association or a member at both ADR and IDR proceedings. (Civ. Code §§ 5910 & 5915.) Associations must also include in the Annual Policy Statement at least a summary of the ADR (Alternative Dispute Resolution) procedures used under Civil Code sections 5925-5965. It must contain the verbatim language found in Civil Code section 5965(a). This summary must also be disclosed in the annual policy statement. (Civ. Code § 5965.)

6. Other Mandatory Disclosures the Board May Wish to Disclose with the Annual Budget Report and Annual Policy Statement

☐ Preparation of an Annual Audit or Review. This statement or disclosure is not required, but it should help to alert the board of the need to get this task done within 120 days after the end of the fiscal year. An association must prepare at least a "review," or possibly an "audit" if required by the governing documents, if its gross income for the year is $75,000 or more. (Civ. Code § 5305.) The review or audit must be distributed to members by individual delivery within 120 days after the close of the fiscal year. If an incorporated association has at least $10,000 in income for the year, it must provide at least the information required by Corporations Code section 8321 within 120 days after the end of the fiscal year. Also, if there are any disclosures required by Corporations Code section 8322 (such as information about material financial interests, loans, guarantees, indemnifications, etc.) involving officers and directors as required by Corporations Code section 8322, that must be disclosed annually as well.

☐ Asbestos Disclosures. Under Health & Safety (Health & Saf.) Code section 25915.2, associations must give or post notice about any asbestos known to exist in the project. See

footnote 16 in Civil Code section 4525. (Health & Saf. Code § 25915.2.) Annual written notice and/or signs on the premises may be required to be posted. You should consult with legal counsel for assistance in preparing this disclosure for compliance with the requirements of the Health & Safety Code.

☐ Disclosure and Accounting of Reserves Borrowed for Litigation. When the Board temporarily borrows reserve funds to pay for litigation under Civil Code section 5510(b), the association must make an accounting of expenses related to the litigation on at least a quarterly basis. The accounting must be made available for inspection by members of the association at the association's office. (Civ. Code § 5520.) A statement to this effect is not required, but if an association discloses this, it is more likely to do the accounting each quarter.

☐ Rental/Lease Restriction Disclosures. If an association's governing documents prohibit the rental or leasing of any separate interest to a renter, lessee or tenant (Civ. Code § 4740.), an owner is required to disclose this to prospective purchasers (Civ. Code § 4525(a)(9)), but the association is required to provide that information to the owner on request to provide to the prospective purchaser. (Civ. Code § 4528.) If the information is disclosed with the annual disclosures, the annual disclosures and budget documents are part of the documents that a prospective purchaser is required to be given.

☐ Disclosure of Senior Community (55+) Status. This option is required by Civil Code section 4525(a)(2) only if there are differences between the CC&Rs requirements and the requirements of Civil Code section 51.3. While not specifically required for the annual policy statement, this disclosure is required if a prospective purchaser requests documents and disclosures for escrow as required by Civil Code section 4525(a)(2), AND if there is any difference between the CC&Rs provision on senior housing and the senior housing requirements in Civil Code section 51.3. There may also be some differences if an association is a mobile home community (that is subject to the Federal Fair Housing Act) or an association in Riverside County (that is subject to Civil Code section 51.11). Obviously the association must be a senior (55+) community in the first place. By including the disclosure in escrow packages as part of the annual budget disclosures, it helps to ensure that this disclosure will be distributed to the prospective purchaser under Civil Code section 5300 as required by Civil Code section 4525(a)(3). It is probably helpful to have a disclosure that the association is a senior community as part of the annual budget package that would go to a prospective purchaser who requests the documents, including the annual disclosures, under Civil Code section 4525.

☐ Community Service Association Disclosure. Include this section only if there is a community service organization whose funding comes from the association, and it exceeds 10% of the association's annual budget. (Civ. Code § 5580.) It is likely to apply to few associations. The association can disclose that it is subject to the disclosure requirements of the law, but

it also needs to prepare and provide the accounting described in Civil Code section 5580 when it is required.

☐ Emergency Preparedness and/or Evacuation Plans. Mobile home communities (Health & Saf. Code §§ 18603 & 18871.8) and high rise buildings (Health & Saf. Code §§ 13210-13234) are required to have emergency preparedness and/or evacuation plans. Such associations may also wish to include them in their annual policy statements. However, there are other requirements, such as posting these in conspicuous common areas or conspicuous areas of a high rise, as required by the applicable statutes.

☐ Any Other Disclosures that May be Required by Law or the Governing Documents. An association may include any other disclosure in its annual policy statement that is required by law or the governing documents.

7. Optional Disclosures the Board May Wish to Make with the Annual Budget Report and Annual Policy Statement.

☐ Architectural Modifications or Other Accommodations Made for Persons with Disabilities. This is an optional disclosure, but it is helpful for some associations. Such a disclosure would inform owners that they may observe some architectural changes or some other apparent violation of the association's governing documents, but the changes or other apparent "violations" are actually "accommodations" that were permitted to enable the association to comply with state and/or federal fair housing laws requiring accommodations to be made for persons with disabilities. This disclosure can point out that these may be needed to give disabled residents an equal opportunity to use and enjoy the premises. This disclosure also can point out the many different types of disabilities may require many different types of accommodations. However, owners should recognize that this does not mean the association is lax about enforcing community standards and rules. Rather it is mindful of its legal duty to comply with disability protection laws.

☐ Distribution of Mailing List to Owners. An association is required by Civil Code section 5200(a)(9), under the circumstances covered by the statute, to provide members with the name, property address, and mailing address of all members. However, association members may opt out of sharing their contact information by notifying the association that the member prefers to be contacted via the alternative process described in Corporations Code section 8330(c). Civil Code section 5200(a) does not require this disclosure, but it may be useful for owners who wish to opt out of providing their name and other contact information to an owner who requests and is entitled to the information on the membership list. This disclosure would inform owners of their right to opt out, but if some do opt out, it will not exempt them from receiving the materials. It probably requires the association to disclose to the requesting party that X owners opted out, and if the requesting party wants to distribute information to them, the requesting owner will need to provide sealed and stamped envelopes with the return address of the sender, and the

association will have to add mailing labels to mail out that information to those specific owners.

☐ Security Disclaimer by Gated Communities and Associations with Locked Entry Doors or Patrols. Associations may wish to consider a disclaimer to state explicitly that owners are ultimately responsible for their own security, and the fact that there may be gated entries, staffed entry gates, periodic patrols, the use of security cameras, etc., does not provide a guarantee of security on which any residents may rely.

☐ Requirements for Owners to have Smoke and Carbon Monoxide Detectors in their Units. These are not mandatory disclosures, but they are important to remind owners about smoke detectors and carbon monoxide detector requirements, and some HOA insurance companies are also requiring the associations they insure to provide written notice to owners about these obligations. Owners are required by law to have operational smoke detectors and carbon monoxide detectors. Carbon monoxide detectors were required by July 1, 2011, in most single-family dwelling units with a fossil fuel-burning heater or fireplace. The deadline was January 1, 2013, for all other dwelling units intended for human occupancy. (Health & Saf. Code §§ 17926-17926.2) Also, smoke alarms have been required as far back as January 1, 1986. (Health & Saf. Code § 13113.8).) Associations may wish to remind owners that it is common for many detectors to last no longer than 10 years, to test their detectors regularly, to follow the manufacturer's instructions about replacement and to replace them when their useful life ends.

☐ Water Shutoffs. It may be helpful to identify the location of all water main shutoffs in association buildings to be sure everyone knows where they are. This information is critical to find a shutoff to stop a major pipe leak or a fire sprinkler that is accidentally damaged or fails. This is important even if all residents are one floor and even more so if the association has a building that is two or more stories high.

☐ Any Other Disclosures that an Association May Wish to Add. An association may add any other information in this section that it believes is appropriate.

SAMPLE RULES OF MEETING PROCEDURES

Standing Rules of Procedure

The Board of Directors believes that owner attendance and participation at meetings is important and should be encouraged so that more owners will become interested in and begin to participate in Association activities. The Board also recognizes that owners will not always agree with the actions taken by the Board, that debate is fundamental to our concepts of representative democracy and that differences in ideas will improve the chances for a better long-term result.

On the other hand, as the elected representatives of the Association, the Board must be permitted to conduct its business without unreasonable interference. Thus, owner participation must remain orderly and be limited to the portions of meetings specifically set aside for such participation. Owners who resort to name-calling or the use of profanity or obscene language will be asked to stop and even to leave the meeting if they persist with such conduct.

The California Legislature has enacted laws to prevent disturbances (1) in meetings of the Legislature and other state and local governmental bodies (Gov. Code §§ 9050, 9051, 11126.5 and 54957.9), (2) in religious worship services (Pen. Code § 302) and (3) in other public meetings (Pen. Code § 403). For those few owners who may not be willing to avoid disrupting meetings of the Association, they should be aware that California Penal Code section 403 states, in part, as follows:

> "Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting, not unlawful in its character ... is guilty of a misdemeanor."

To address any problems which might arise from unwarranted interruptions at meetings, the Board enacts the following rules to be applicable at all Board, committee and membership meetings.

Only owners may attend Board meetings. Outside guests, tenants of owners or the media may attend only if specifically invited by the Board.

Board meetings are established to enable the Board to conduct essential business of the Association; they are not social events. To provide an atmosphere conducive for conducting business, for preserving decorum, and for facilitating business efficiently, alcoholic beverages should not be consumed at Board meetings.

Owners may participate in Board meetings only during that portion of the meeting specifically set aside for owner input. The rules governing the homeowner forum are addressed below. The Board respectfully requests that owners not ask questions or otherwise interrupt the portion of the meeting set aside for Board business.

If it appears to the Board that special concerns of the owners warrant further time for input or discussion, the Board may set a special Board or membership meeting solely to discuss those issues.

At membership meetings, no substantive matter may properly be presented for a vote of the members, either by the Board or by any member, unless the notice of the meeting has stated the general nature of each issue on which a vote will be taken at the membership meeting. Without limiting the generality of the foregoing statement, notices of any meeting must contain notice that a vote will be taken to elect Board members, to approve amendments to the governing documents, and to increase or impose assessments which require a vote of the membership. It shall be proper, however, for votes to be taken on matters concerning meeting procedures, such as closing or limiting debate, amending motions, nominating candidates not previously nominated, adjournment, and other procedural matters.

If an owner appears at a meeting with his or her attorney, the Board will refer the owner's attorney to the Association's attorney and request that the owner's attorney discuss the matter directly with the Association's attorney. Attorneys are not permitted at Board meetings without prior permission.

Rules Pertaining to Interruptions at Meetings

If any person interrupts a meeting, the chair will first admonish those present that any person who persists in interrupting the meeting will be given two specific warnings after which the disruptive person will be ordered to leave the meeting. The secretary should note in the minutes that the chair gave this general warning.

If any person again interrupts the meeting, the chair will give a specific warning to the person or persons doing so. The chair should indicate that the person is being warned, and the secretary should note the name of the person warned in the minutes, and whether it is a first or second warning.

Upon a third offense, the chair shall order the interrupting person or persons to leave the room, unless the Board votes to suspend the rules to permit the person to stay or upon such other conditions as the Board collectively imposes.

If an owner is ordered to leave a meeting and refuses to do so, the chair may ask the police to be summoned. The chair may also ask for the assistance of those present to encourage that person to leave. The chair will state that, if those present cannot get the disruptive person to leave voluntarily, there will be no option but to clear the entire room, or to adjourn the meeting to another location where the meeting can continue, whatever is feasible. If those persons attending are uncooperative or unable to get the disruptive person to leave voluntarily, the chair may ask for a vote to close the meeting to permit the business of the meeting to continue in private.

Depending on what is feasible, the meeting can be closed, or adjourned to another location or another time. If practical, the persons who have not been disruptive may also be invited to attend. If a meeting is closed, the Board will still publish minutes for the meeting as if it were held as an open session.

Closing a meeting under such circumstances shall not be deemed a violation of the general rule calling for open meetings. (See e.g., Gov. Code §§ 11126.5 and 54957.9.) However, nothing shall prohibit the Board from establishing a procedure for readmitting an individual or individuals not responsible for willfully disturbing the orderly conduct of the meeting, if feasible to do so. The Board members, either individually or on behalf of the Association, may also seek to obtain a restraining order prohibiting harassment pursuant to Code of Civil Procedure section 327.6 against any individual or individuals who willfully disturb any meeting of the Association's Board, committees or members.

Homeowner Forum

At the beginning of the meeting, the Board will ask owners who wish to speak to sign in. Speakers must sign in on the sheet provided by the Board, listing their respective addresses/units and identify the agenda item they wish to address before the Board discusses the matter.

By signing in and requesting to speak, the Speaker is agreeing to adhere to and abide by these rules.

Each owner participation period will be limited to a maximum of three minutes. During the homeowner forum, the Board will recognize each speaker in the order in which each signed in.

Owners should recognize that the Board must limit the length of owner participation periods, because the Board has business that it must conduct each month to carry out the Association's business. Board members are volunteers who have families and other commitments who set aside a particular date each month to meet together to transact necessary business of the Association. If the Board cannot complete the business on the date of the meeting, it is not always easy to schedule a time for the Board to meet again to complete the agenda items. If the Board is unable to get to every speaker, the Board appreciates your understanding and encourages you to address your comments to the Board in writing through our management company. The Board does receive copies of all such correspondence. If there is a particular issue that may require additional time for owner input, the Board will attempt to schedule a meeting for all owners to attend to comment on that particular issue.

Participation periods are intended to allow owners to bring their issues and concerns to the Board. However, the Board considers this to be a time for owner input. The Board will not engage in debates with any speakers, and the Board will not render decisions on any item during owner participation periods. As such, speakers should address their input, comments and/or criticism to the Board, but speakers should not direct questions to members of the Board, and the Board will not reply to direct questions from speakers. The Board recognizes that some speakers will be or have a right to be critical of actions taken by the Board. However, everyone should also recognize that the Board cannot please everyone all the time. The Board urges everyone to await their turns to speak so that each speaker can speak uninterrupted. The Board also encourages speakers to express their criticism in a civil and constructive manner, for when someone engages in personal attacks rather than in addressing issues, civility tends to disappear, and effective communication ceases to take place.

If owners wish to have items placed on the agenda, they should submit their request to the Board in writing. The request should include the name, address and signature of the Owner, the subject and the reasons for the request. The Board will consider the request and include the item on a future agenda, if the Board believes it is appropriate for the Board to address it at a meeting. If the Board does not believe it is appropriate to address at a meeting, the Board will send a response to the owner about it.

SAMPLE ANNUAL REQUEST FOR OWNER'S ADDRESS

[ASSOCIATION]

ANNUAL REQUEST FOR OWNER'S ADDRESS FOR ASSOCIATION COMMUNICATIONS

Dear Homeowner,

Please note that new Civil Code section 4041 requires owners to provide the below information to the Association annually. Please complete this form and return it to the Association no later than _____, 20__. You may **ALT #1** return this form in the enclosed stamped envelope or **ALT #2 return this form by sending it to _____.**

(1) Names and Address of Owner(s) _____
_____

(2) Address of Lot/Unit within Association
_____

(3) The address or addresses to which notices from the Association are to be delivered.
_____
_____

(4) An alternate or secondary address to which notices from the Association are to be delivered. (**ALT** This may be an e-mail address if you complete an Electronic Communication Consent/Change Form, a copy is enclosed; or already have this form on file with the Association.)
_____
_____

(5) The name and address of the owner's legal representative, if any, including any person with power of attorney or other person who can be contacted in the event of the owner's extended absence from the separate interest.
Attorney: _____
Person with Power of Attorney _____ (A copy of the power of attorney must be provided.)
Other Contact in the Event of Prolonged Absence _____

(6) Please mark answers to the questions below:
Owner-occupied? ____ Yes ____No Rented or Leased? _____Yes ____ No
If yes, names of tenants _____
Vacant? _____
Undeveloped Land? ___ Yes ____ No

Please note that pursuant to Civil Code section 4041, if you fail to provide the notices set forth in paragraphs (1) and (2), the property address will be used for delivery of all Association communications.

[Association] Board of Directors

SAN DIEGO
858.527.0111 | fax 858.527.1531
10200 Willow Creek Rd., Ste. 100
San Diego, CA 92131

COACHELLA VALLEY
760.836.1036 | fax 760.836.1040
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951.461.1181 | fax 858.527.1531
43460 Ridge Park Dr., Ste. 200
Temecula, CA 92590

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