

SOUTH COAST HOMEOWNERS ASSOCIATION

P. O. BOX 1052, GOLETA, CALIFORNIA 93116

(805) 964-7806

www.southcoasthoa.org

gartzke@silcom.com

Volume 26, Number 4

August 2013

Michael J. Gartzke, CPA, Editor

IN THIS ISSUE

October 21 Meeting – Financial Issues for Associations

Restricting Attendance at Board Meetings

Review of 2012 Court Decisions Impacting Community Associations

Newsletter Professional Sponsors

UPCOMING SOUTH COAST HOA MEETING—OCTOBER 21 Financial Issues for HOAs

At the May 2013 meeting and also via email after the meeting, we solicited input regarding future program topics. Five pages of notes later, we will attempt to make some of those suggestions a reality. This meeting will focus on financial considerations and concerns that associations face from the following speakers:

Gayle C. Cagianut, CPA of Newport, Washington. Gayle started her association accounting practice in Oak View, CA and is well known in Southern California as a speaker and writer on all things related to association accounting. Since ‘retiring’ to Washington several years ago, she started a practice there covering the entire state. Her presentation will be on “Top Ten” – What Board Members should know to manage financial affairs of your communities.

Les Weinberg, RS – Reserve Studies, Inc of Chatsworth, CA. Les and his company have over 20 years experience in the preparation of HOA reserve studies. His company is a South Coast member and he is a frequent meeting attendee. Topics that will be addressed include: Maintenance deficiencies seen during inspections; the impact of "zero" interest rates on reserve funding, how important is it for the board to stay within or to implement the recommendations in the reserve study and the need for even the smallest associations to have a reserve study and funding plan.

Michael J. Gartzke, CPA of Goleta, CA. Mike is a co-founder of South Coast HOA and has worked with area associations since 1982. Mike will provide an update to the financial data and trends that he has seen in local associations since he first put a database together eight years ago. Many associations have found the data useful in comparing and contrasting their financial operations with other associations in the area.

Date – Monday, October 21, 2013

Time – 7 PM

Place - Encina Royale Clubhouse - 250 Moreton Bay Lane, Goleta (Fairview exit North from 101)

Light refreshments will be served starting at 6:45

RESTRICTING ATTENDANCE AT BOARD MEETINGS

By: James H. Smith, Esq.

Editor's Note: Jim is one of South Coast HOAs co-founders. He is a frequent contributor for us, especially at the law and legislative update meeting held each year. He is part of the law firm, Grokenberger and Smith in Santa Barbara. His contact information appears at the end of the newsletter.

An often asked question is: *Does a Board have the right to restrict attendance at Board meetings to Association members only?* In a very recent case (*SB Liberty v. Isla Verde Assoc., June 2013*) the California Appellate Court, 4th District, set forth a helpful analysis to assist in answering that question. The issue often arises where tenants show up at Board meetings, or an owner authorizes a tenant, their attorney or a friend to attend a Board meeting on their behalf. In the *SB Liberty* case the issue was whether the Board acted properly when it excluded an owner's attorney from attending a Board meeting on behalf of the owner. The attorney also held a power of attorney from an owner specifically providing that the attorney could attend and participate in Board meetings on the owner's behalf.

When attempting to answer the question as to whether an individual has a right to attend a Board meeting, the first item to be reviewed is the Association's Bylaws. Often there will be a statement found which states in effect that *"members may attend any meeting of the Board except executive session meetings."* While unusual, such language may also be found in an Association's Articles of Incorporation or CC&R's. Therefore, if nothing is found in the Bylaws to address the issue, the Articles and CC&R's should next be reviewed. If nothing is stated regarding who may attend Board meetings in your Association's Governing Documents (i.e. Bylaws, Articles or CC&R's), you would then rely upon the provisions of California Civil Code section 1363.05, which states that *"any member of the association may attend meetings of the board of directors of the association, except when the board adjourns to, or meets solely in, executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters or to meet with a member, upon the members request, regarding the members payment of assessments."*

Assuming your Association's Governing Documents limit attendance at Board meetings to members, or is silent on the issue thereby being governed by the limitations set forth in California Civil Code 1363.05, which limits attendance to members, you would next turn to the definition of a member which is most often found in your Association's CC&R's. In most cases you will find the definition of a member to be the owner(s) of a unit.

Where, based on the provision of an Association's Governing Documents, or Civil Code 1363.05, only members may attend Board meetings, the *SB Liberty* case concludes that the

Board may prohibit all other individuals from attending Board meetings. This conclusion is premised upon the fact that a Board has authority under California Corporations Code section 7210 to determine how to conduct its meetings. The *SB Liberty* case also noted that unless allowed by an Association's Governing Documents, California Corporations code 7320 prohibits a member from transferring any right arising from their membership. This would include transferring the right to attend a Board meeting.

The Association's Bylaws in the *SB Liberty* case, only granted members an entitlement to attend Board meetings. Additionally, the only membership right that the Bylaws allowed to be transferred in the *SB Liberty* case was the right to vote by proxy. Therefore, the Board in the *SB Liberty* case had the power to exclude all other individuals including the owner's attorney as well as anyone holding a power of attorney from the owner specifically allowing him or her to attend Board meetings on behalf of the owner. The Court's analysis was quite simple and straightforward. Members can attend Board meetings. An owner's attorney is not a member. Nor is an individual who happens to hold a power of attorney from an owner a member.

Based upon the circumstances set forth above (i.e. Bylaws only allow members to attend Board meetings, or are silent, and members are defined as owners), several conclusions can be drawn.

1. Where a Unit is individually owned, those individuals named in the deed would be the members and have an entitlement to attend Board meetings.
2. Where a unit is owned by an LLC (Limited Liability Company), as was the case in *SB Liberty*, management of an LLC is vested in its members or managing partner. Therefore, any member of the LLC or the managing partner may attend Board meetings.
3. Where a unit is owned by a trust, management of the trust is vested in the Trustee. Therefore, the Trustee may attend Board meetings.
4. Where a unit is owned by a Corporation, management of a Corporation is vested in the Board of Directors. Therefore, any Board member may attend a Board meeting of the Association.

In 99% of Homeowner Associations, the Governing Documents only entitle Members to attend Board meetings, or are silent on the issue. Equally true is that in most Associations, members are defined as owners. While your Association's Governing Documents should be reviewed before taking a position as to who may be excluded from Board meetings, there is a high probability that they will be consistent with that which existed in the *SB Liberty* case. Therefore, except in those unusual situations where the Governing Documents state otherwise, in most Associations only "members" may attend Board meetings which would exclude an owner's attorney, those holding a power of attorney, an owner's tenants as well as any other individual who does not fall within the narrow definition of a "member."

Certainly, where a Board has no objection to individuals other than members attending a Board meeting, there is nothing wrong with allowing non-members to attend. However, there are situations where limiting attendance to members, or excluding a particular non-member, is preferable.

REVIEW OF COURT DECISIONS IMPACTING COMMUNITY ASSOCIATIONS IN 2012

By: David A. Loewenthal, Esq.
Robert D. Hillshafer, Esq.

Editor's Note: The authors are principals in the law firm, Loewenthal, Hillshafer & Carter based in Sherman Oaks, CA. The firm has provided much content for the newsletter over the years and Mr. Loewenthal is a frequent speaker at our meetings. Contact information appears at the end of the newsletter.

Pinnacle Museum Tower Association v. Pinnacle Market Development (2012) 55 Cal. 4th 223

Facts:

The developer of a condo project included in the recorded CCRs a provision which required that all construction defect claims by the Association against the developer be resolved through binding arbitration rather than through a Superior Court jury trial. The CCRs made specific reference to the Federal Arbitration Act. The Association filed a construction defect lawsuit and the developer filed a motion to compel arbitration pursuant to the CCR provision, contending that the Association was bound to the provisions of the recorded CCRs. Association opposed the motion based on the fact that the CCRs were put in place before the corporation (Association) was even in place and no negotiation of terms was possible and that it fundamentally deprived the Association of its constitutional right to a jury trial. The trial court and the Court of Appeal held that the arbitration provision was unenforceable, following the rationale in several prior appellate decisions, because the Association had not consented to limit its constitutional rights.

Decision by the Supreme Court:

The Supreme Court reversed the decision and determined that the mandatory arbitration provision was binding on the Association. The basis for this decision was fundamentally based on the wording of the provision in the CCRs with its specific reference to the Federal Arbitration Act, which preempts California law and policies favoring preservation of the right to a jury trial without the express consent of all parties to an agreement. The several prior decisions which voided the mandatory arbitration provisions did not involve provisions specifically invoking the FAA.

However, in an attempt to rationalize its application of the preemption doctrine in this context, the Supreme Court backed in to an analysis that concluded that the Association's "consent" to arbitration was implied through its member's agreeing to purchase subject to the recorded CCRs. The Court basically ignored the fact that the Association is a legal entity separate and apart from its members that has legal rights and obligations, including the right to sue on its own behalf and to have a jury trial and determined that the combination of the recorded CCRs, the fact that arbitration was not inherently unconscionable to the Association and was not inconsistent with the Davis Stirling Act, was sufficient to justify enforcing a contractual provision that the Association never consented to.

Why this is significant:

Developers will now include the "magic words" Federal Arbitration Act in the context of construction defect dispute resolution in CCRs, thereby removing a fundamentally powerful tool of Association's legal counsel to settle such cases for their clients. Attorneys who represent Associations as plaintiffs in these cases universally prefer the option of a level playing field created by a trial by a jury of ordinary citizens over the arbitration procedure where a single person (generally a retired judge) decides all the issues, and is paid hourly by both sides to do so. Developers put these provisions in CCRs because they believe it substantially benefits their position because it forces Association's to spend more money and because arbitrators (who the developer has to consent to) are inherently more conservative in awards than juries.

It is also a significant decision because it will probably embolden developers to seek to compel arbitration even when the provision does 't mention the FAA, in reliance on the Court's analysis that the corporation's consent can be implied through its member's constructive knowledge of the terms of the CCRs through recording . This will necessarily slow down the process and increase the costs to the Association to prosecute a claim, both of which benefit developers.

Glen Oaks Estates Homeowners Association v. Re Max Premier Properties, Inc. (2012)
203 Cal. App. 4th 913

Facts:

Association filed a lawsuit for damages caused by a slope failure on Association common area against the real estate brokers for the developers of the project. The suit was based on allegations that the brokers were privy to soils reports and information regarding same that the reports were unreliable, and withheld such reports from the Association and its members. The Association claimed that its members would not have purchased in the project had they been provided the information and hence would not have been responsible for the costs of repairing the damage. The Brokers challenged the Association's standing to assert such claims because the Association had no contractual privity with the Brokers and did not owe any duty to the Association. The trial court agreed with the Brokers and the Association appealed.

Decision by the Appeals Court:

The Court of Appeals reversed the decision based on its interpretation of Civil Code Section 1368.3, which provides Associations with legal standing to assert claims and file lawsuits in certain types of matters. Prior to this decision, Civil Code Section 1368.3 had not been the basis for suits in the construction defect context against parties other than the developer, general contractor and subcontractors that built the project. The Court interpreted this statute as not having limits as to "whom" was being sued, but rather just limited the types of matters which the Association could pursue independently. The Court held that because the matter sued over involved damage to the common areas which is specifically identified in the statute, that provided standing to the Association against any party even absent contractual privity.

Why is this significant?

Although it does not expand the duty of care of brokers, the decision does eliminate one technical challenge to an Association's attempt to broaden the scope of responsibility for construction defects beyond the conventionally responsible parties such as builders and contractors pursuant to Civil Code Section 1368.3.

Girardi v. San Rafael Homeowners Association (2012) Cal. Unpub. Lexis 1421

Facts:

Association was sued by a member whose home had been burglarized several times resulting in a claimed loss of over \$1,000,000.00 in jewelry and a watch. The suit alleged that the Association was negligent in providing security to the development because of its failure to hire a security guard, install security gates, security cameras, and replace broken street lights. Association filed a motion for summary judgment based partially on the lack of evidence as to whether the unidentified burglars were authorized to enter onto Association property. The Association's argument was that if the criminals were authorized to enter into the development, no amount of security to keep criminals out would have prevented the burglary and theft. The Association also argued that it owed the Association no duty to protect Girardi's property from criminal acts of third parties. The only evidence presented by Girardi was an expert opinion by a security expert who opined that had there been appropriate security, the burglaries would not have occurred. The trial court granted the Association's motion for summary judgment.

Decision by the Appeals Court:

The Court affirmed the granting of the Association's motion for summary judgment because Girardi had failed to raise a triable issue of fact as to causation. It was Girardi's burden to establish that the negligence of the Association in failing to provide a certain level of security was a legal cause of the injury to the Girardi's. The Court found that the expert opinion was insufficient to attribute the cause of the loss to the Association's failure to provide a certain level of security measures. If Girardi was unable to determine who the criminals were or when the crimes were committed, there is no factual basis for an opinion that any failure of the Association caused or contributed to the injury caused by the burglaries.

Why is this significant?

Association members who have been injured are always looking for a way to blame the Association for their misfortune and over the years, claims for lack of security have increased substantially against Associations. There have been some cases in which Association's have been held responsible for not taking reasonable steps to protect members in light of potentially serious threats of harm and as such, Boards and managers must take reasonable steps to address security issues, including communications with members concerning the Association's limited resources for security and the need for individual diligence.

Quail Lakes Owners Association v. Kozina (2012) 204 Cal. App. 4th 1132

Facts:

Association filed a petition seeking approval of a CCR amendment by the Superior Court under Civil Code Section 1356 that was not approved by the requisite percentage of homeowners. A member of the Association opposed the petition on the ground that the Association had denied him due process because it had not provided the requisite 15 days notice to the members such that other owners were not given adequate time to file opposition to the petition. The Association argued that the objecting member's due process rights were not violated because he timely filed opposition and because a member does not have standing to assert due process rights of other members. The trial court granted the petition and the member appealed.

Decision by the Appeals Court:

The Court affirmed the trial court's granting of the Association's petition. The Court found that Kozina's due process rights were not violated because he did file an opposition. The Court further found that the Association is the *de facto* representative of its members, and other members could have achieved standing for themselves by moving to vacate the order granting the petition. The Court ruled that due process rights must be asserted by an individual and that one member cannot assert a violation on behalf of other members.

Why is this significant?

While in certain instances one member can assert "claims" against the Association on behalf of other members, violations of due process are not included.

Dinh Ton That v. Alders Maintenance Association (2012) 206 Cal. App. 4th 1419

Facts:

Association was sued by a member who was challenging an election. In addition, the lawsuit alleged that the Association was a "business establishment" that was subject to the Unfair Competition Law set forth in the Business and Professions Code (Section 17200 et. seq.). This set of laws allows civil penalties to be imposed against violating businesses. The Association sought to have the case dismissed because it was brought beyond the one year statute of limitations and because the Association was not a "business" for purposes of the Unfair Competition Law. The trial court agreed with the Association and dismissed the action. The member appealed.

Decision by the Appeals Court:

The Court affirmed the decision on both grounds asserted by the Association, finding that the statute of limitations had expired and that the Association did not qualify as a business under the Unfair Competition Law because the activity (election) in dispute was not commercial and the Association did participate as a business in the commercial market. The Court ruled that the one year statute of limitations regarding elections starts to run on the date that the disputed election occurred.

Why is this important?

Because it clearly eliminates an unfair business practice claim against Associations, which is probably not covered under the Association's master insurance policy or Directors and Officers policy.

Silk v. Feldman (2012) 208 Cal. App. 4th 547

Facts:

An incumbent director of an Association running for reelection sent a letter to all Association members which accused another candidate (a former director) of engaging in self-dealing while on the Board relative to obtaining parking spaces for her personal use. Specifically the letter alleged that the former director "cut secret deals" to purchase parking spaces without the knowledge of the Association's attorney and other board members. The former director sued the incumbent director for defamation.

The incumbent director claimed that the statements in his letter were protected free speech in relation to an issue of public interest and moved to dismiss the lawsuit as a strategic lawsuit against public participation ("SLAPP"). California has a statute, known as the Anti-SLAPP statute which is designed to protect persons from being sued for activities which are in furtherance of the person's right of petition or free speech under federal or state Constitutions in connection with a public issue, unless the court determines that the party suing has a probability of prevailing on the claim.

Decision by the Appeals Court:

Generally the Court held that the statements in the letter against the former director may qualify for protection as free speech within the meaning of the Anti-SLAPP statute, the court denied the motion to dismiss because the former director introduced compelling evidence that the allegations were false and as such stood a probability of prevailing on the claim on its merits. The former director (who was an attorney) submitted evidence which completely disproved the allegations against her.

Why is this important?

Because it is not uncommon for Association members to make unfounded allegations against each other or against sitting directors, often accusing them of criminal activities such as embezzlement or fraud, it is important for Boards and managers to be proactive in attempting to prevent this from occurring and to avoid "re-publication" of defamatory material so as to avoid potential financial liabilities for defamatory statements. For example, if the Association's election process allows each candidate to submit a "candidate statement" for distribution by the Association to all members, if the candidate statement submitted by the candidate contains defamatory material and the Association distributes it to the membership, the Association could be found liable as a "republisher" of defamatory material. Although Civil Code Section 1363.03 prohibits censorship of election material by the Association, this does not mean that the Association is obligated to "re-publish" potentially defamatory accusations submitted by one candidate. If such a situation were to arise, the Association should decline to disseminate any candidate materials to its members and require that candidates do that on their own.

BRIEF SURVEY RESULTS

At our May 2013 meeting a brief questionnaire was distributed to the attendees. Soon after, an email version was sent. Here is a brief summary of the 43 responses:

Board Member – Yes – 32 of 43 – 74%

I attend South Coast Meetings:

Most – 51%

Occasionally/Frequently – 28%

First time – 21%

Would attend an all day training seminar–72%. (we will look to see about putting one together in 2014). Check with Channel Islands CAI for their schedule of classes 805-658-1438.

Have you ever looked at the South Coast HOA website – 78%. This is more than your editor expected. The website is currently being redone. Watch for it!

The questions regarding seminar topics and newsletter articles generated a large number of responses. It looks like our work is cut out for us! Thanks to all who participated in the survey process.

COMING SOON – A REDESIGNED WWW.SOUTHCOASTHOA.ORG WEBSITE!

Plans are underway to set up an entirely new site with archived newsletters and materials from previous meetings and seminars. Also, we will post our upcoming meeting notices and links to other sites containing valuable guidance and information for you. Watch for the announcement!

MARK YOUR CALENDARS

Just Scheduled – Mr. Adrian Adams of Adams Kessler, PLC in Los Angeles will make a presentation on the totally rewritten Davis-Stirling Act that was passed by the legislature in 2012 but is coming effective January 1, 2014. This act is the primary law governing homeowner association operations in California. The law has been reorganized and renumbered and in some cases, substantial changes have been made in the law.

Date – Monday, November 18, 2013

Time – 7 PM

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

SOUTH COAST NEWSLETTER SPONSORS

ACCOUNTANTS

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

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

Jimenez & Company, CPAs
Joyce Jimenez, CPA
P. O. Box 756
Camarillo, CA 93011
805-491-2126

Walpole and Co., LLP
Mary Widener, CPA
70 Santa Felicia Dr
Goleta, CA 93117
805-569-9864

BOOKKEEPING SERVICES

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

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

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

ATTORNEYS

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

James H. Smith
Grokenberger & Smith
1100 Santa Barbara St.
#202
Santa Barbara, CA 93101
805-965-7746

David A. Loewenthal
Loewenthal, Hillshafer &
Carter, LLP
15260 Ventura Blvd #1400
Sherman Oaks, CA 91403
866-474-5529

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

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

Eddren Boyer
Domine Adams LLP
26500 W. Agoura Rd,
Suite 212
Calabasas, CA 91302
818-880-9214

FINANCIAL SERVICES

First Bank Association
Services
Judy Remley
2797 Agoura Rd
Westlake Village, CA 91361
888-539-9616

Mutual of Omaha Bank
Lisa Ann Rea
1534 N. Moorpark Rd #306
Thousand Oaks, CA 91360
866-800-4656

ASSOCIATION MANAGEMENT

Coast Community Property Management

Sandra G. Foehl, CCAM

P. O. Box 8152
Goleta, CA 93118
805-968-3435

St. John & Associates

Kristin St. John CCAM

3887 State Street #24
Santa Barbara, CA 93105
805-683-1793

Team HOA

Geoff McFarland

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

Crowley Management Company

Bill Crowley

P. O. Box 286
Summerland, CA 93067
805-684-0989

Spectrum Property Services

Cheri Conti

1259 Callens Rd #A
Ventura, CA 93003
805-642-6160

Professional Association Management

Paula Scott

P. O. Box 7934
Santa Maria, CA 93456
805-714-3823

P Walters & Co

Patti Walters

P. O. Box 838
Carpinteria, CA 93014
805-689-8485

River Road Properties & Management

Mark Corliss

3993 Foothill Road
Santa Barbara, CA 93110
805-452-4497

RESERVE STUDIES

Stone Mountain Corporation

Chris Andrews

P. O. Box 1369
Goleta, CA 93116
805-681-1575
www.stonemountaincorp.com

Reserve Studies, Inc.

Les Weinberg

9420 Topanga Canyon Blvd.
#201
Chatsworth, CA 91311
800-485-8056
www.reservestudiesinc.com

INSURANCE

Timothy Cline Insurance Agency

Tim Cline, CIRMS

725 Arizona Ave #100
Santa Monica, CA 90401
805-299-0899

Bill Terry Insurance Agency

Barbara Terry

3887 State Street #201
Santa Barbara, CA 93105
805-563-0400

Baxter Insurance Services

Dan Baxter

225 East Carrillo #201
Santa Barbara, CA 93101
805-963-4048

CONTRACTORS

All Seasons Restorations & Construction

Kirk Prouse
1830 Lockwood St #107
Oxnard, CA 93036
805-988-1040

Blake Fuentes Painting, Inc.

79 S. Kellogg Avenue
Goleta, CA 93117
805-962-6101

Acme Detection

Gary Fuller
1081 E. Mountain Drive
Santa Barbara, CA 93108
805-565-LEAK (5325)

General Pavement Management

Casey Forster
240 Quail Court
Santa Paula, CA 93060
805-856-8163

United Paving

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

LANDSCAPE CONTRACTORS

Kitson Landscape Management, Inc.

Sarah Kitson & Mike Waggoner
5787 Thornwood Drive
Goleta, CA 93117
805-681-7010

Better Earth Landscape

Bill Kehoe
1448 Lou Dillon Lane #B
Santa Barbara, CA 93103
805-965-5678

TriValley Landscapes

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

Plowboy Landscapes, Inc.

Doug Wasson
2190 N. Ventura Ave
Ventura, CA 93001
805-643-4966 ext 13

ORGANIZATIONS

Community Associations Institute (CAI) Channel Islands Chapter

P. O. Box 3575
Ventura, CA 93006
805-658-1438
www.cai-channelislands.org

Executive Council of Homeowners - ECHO

1602 The Alameda #101
San Jose, CA 95126
408-297-3246
www.echo-ca.org