

# SOUTH COAST HOMEOWNERS ASSOCIATION

P. O. BOX 1052, GOLETA, CALIFORNIA 93116

(805) 964-7806

[www.southcoasthoa.org](http://www.southcoasthoa.org)

[gartzke@silcom.com](mailto:gartzke@silcom.com)

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Michael J. Gartzke, CPA, Editor

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## UPCOMING SOUTH COAST MEETING

### Annual Law and Legislative Update

**DATE – Wednesday, January 30, 2008**

**TIME – 7 – 9 PM**

**PLACE – Encina Royale Clubhouse, 250 Moreton Bay Lane, Goleta**

**Directions:** 101 exit Fairview Avenue North approximately 2 blocks to Encina Road (at Fairview Theatres). Turn right on Encina Road and go one block to four-way stop at Moreton Bay Lane. Turn left into Encina Royale. Clubhouse is on the right across from the flagpole. Parking is available on the street and in the adjacent parking lot.

**SPEAKERS – James H. Smith of Grokenberger & Smith and David A. Loewenthal of Loewenthal, Hillshafer & Rosen** will present our annual law and legislative update including the new agenda law as well as assessment collection procedures in a declining real estate market. Other topics are to be determined.

### 2008 MEMBERSHIP INVOICES MAILED

Your 2008 membership invoice was mailed in October. Annual dues remain at \$60 per year. Bluebooks are expected by January 1 and will be sent to all that have renewed for 2008 at that time.

## NEW CALIFORNIA LEGISLATION – BOARD MEETING AGENDAS AND ACTIONS RESTRICTED – EFFECTIVE JANUARY 1, 2008

By: Beth A. Grimm, Attorney at Law

**Editor's Note:** Beth A. Grimm is an attorney who serves homeowner associations and homeowners alike. She is a frequent contributor to our newsletter and speaker at our annual summer law forum. She also writes for similar publications in the State of California and on a national level. She posts considerable information on her web site at [www.californiacondoguru.com](http://www.californiacondoguru.com) – see sponsor information at the end of the newsletter. This new law will be discussed in depth at our January 30 law and legislative update meeting.

**SB 528 has been signed into law, effective January 1, 2008.** For some Associations, it will not make a difference because the Boards already post copies of the meeting agendas with the meeting notices, ..... or will it? Even these forward-thinking Boards may run into a hitch because the new law not only requires posting or providing an agenda with the meeting notices, it prohibits the Board from taking action on anything that is not on the agenda, ... or does it?

To be specific, first of all, it applies to board meetings, not membership meetings. The requirement for distributing the agenda is tacked on to the meeting notice requirements found in Civil Code Section 1365.05(f). That section says:

“Unless the time and place of the board meeting is fixed by the bylaws, or unless the bylaws provide for a longer period of notice, members shall be given notice of the time and place of a meeting as defined in subdivision (j), except for an emergency meeting, at least four days prior to the meeting. Notice shall be given by posting the notice in a prominent place or places within the common area and by mail to any owner who had requested notification of board meetings by mail, at the address requested by the owner. Notice may also be given by mail or delivery of the notice to each unit in the development or by newsletter or similar means of communication. The notice shall contain the agenda for the meeting.”

**KEY POINT: The distribution requirements of the agenda are the same as for Board meeting notices.**

### **QUESTIONS and ANSWERS:**

**Question:** What if the notice of meetings is in the Bylaws or Association newsletter and that comes out before the agenda is set?

**Answer:** Find a way to distribute or post the agenda at least 4 days before the meeting. That might be with the billing statements when they are mailed, in the newsletter if the timing works, or by posting in the common area. It would be a good idea to include **another** copy of the **notice** with it, even if it was already distributed. It may not be necessary, but it makes sense.

**Question:** What if the HOA does not have any common area to post in?

**Answer:** That is a little more difficult. You can mail the agenda, post it by the mailboxes if there are any clusters, put a kiosk up somewhere near a street if there are streets, a parking area if there is any, on a street lamp, or anywhere there is space available, that you can get permission. Choose the place all owners are most likely to drive by. The makers of the notice

“kiosks” and plastic encased frames are going to be busy. If you still cannot find a posting place, but you have a website, posting on the website and/or email notices **might** be found acceptable. Impossibility is a legally recognized defense that works in contract cases. And remember that any owner can ask for a mailed notice.

**Key Point: If posting the agenda is difficult to impossible, good faith could become a key element of the choice you make to find a way to let owners know how to view the agenda.**

Now, as to the point that no action can be taken on any item not on the agenda - what are the exceptions? There are many:

**The law applies to “non emergency” meetings only.** So, if the Board is meeting in an emergency meeting, the agenda requirements do not apply.

**The law does not prevent the Board or its staff or agents from talking to the members about something not on the agenda. It is not muzzled by this law.** The statute says that management, the staff or the board of directors, may “briefly” respond to statements made or questions posed by a person speaking at the meeting, or ask a question for clarification, make a “brief” announcement, or make a “brief” report on the activities of a board member, management or staff, whether in response to questions posed by a member of the association or based upon his or her own initiative. What do you suppose that overuse of the word “brief” means? It could mean that the legislators have sympathy for HOA board members, and want meetings to be brief (hardly!), but more likely its a warning that if subjects come up that are not on the agenda, boards are supposed to avoid full discussions of the items and defer business until the owners can get fair notice of it.

**The law allows Boards to communicate instructions to its management and staff.** The limitation on action does not prevent the Board from

- (1) providing information to its managing agent or other agents or staff,
- (2) requesting the manager or staff to report back to the Board at a subsequent meeting concerning any matter,
- (3) directing the manager or staff to place a matter of business on a future agenda, or
- (4) from directing the manager or staff to perform administrative tasks that are necessary to satisfy its obligations under this law.

**The new law allows action on items that come up before/at the meeting that are not on the agenda if certain findings are made.** The Board may take action on an item on the agenda if **any** of the following conditions occurs:

**A majority of the board members present at the meeting determine that an emergency situation exists.** [An emergency situation exists if there are circumstances that could not have been reasonably foreseen by the board, that require immediate attention and possible action by the board, and that, of necessity, make it impracticable to provide notice.]

**If the Board determines, by a vote of 2/3 of the members present at the meeting, or, if less than 2/3 of the total membership of the Board is present at the meeting, by a**

**unanimous vote of the members present, that there is a need to take immediate action.** The Board must also find that the "need to take action" arose after the agenda was prepared and posted or distributed, **OR**

**The item was on an agenda for a prior board meeting and did not get put on the agenda for the current meeting.** The statute says on an agenda for a prior meeting that took place "not more than 30 days before", and that the item "was continued to this subsequent meeting." This language is confusing and undermines the point. If the prior meeting was 31 days prior, and/or the minutes from that meeting do not say that the matter was continued, does this apply? One could argue it practically does apply, given the apparent intent to tie two meetings together, without the understanding that they can easily occur 30-35 days or so apart, even when held monthly. It does not appear that Boards that meet quarterly can stretch things to tie in a prior meeting held the prior quarter.

There are other questions that have already been asked, like:

**Question:** What does # (2) above mean, is it the members or the board?

**Answer:** #(2) is confusing in its wording. I believe it was intended to relate to members. However, there may be a debate over what (2) actually means.

**Question:** Is it sufficient to list 'Old Business' or 'New Business' as categories to cover any topics that might come up; or does this new law require that every subject be listed separately?

**Answer:** General categories are not a sufficient "catchall" for any item that may fit within one of them.

**Question:** If something comes up before a scheduled board meeting that needs attention, and it is not on the agenda, can we simply call a separate emergency meeting, maybe even the hour before the scheduled meeting?

**Answer:** It would seem so, if the Board members are willing to show up an hour earlier. The new law does not prevent this. The question is, given the facts and circumstances, **does it make more sense to do that**, all things considered, or simply count on one of the exceptions for handling the matter at the already scheduled meeting? Only you can answer that. It's not a legal question.

**Question:** What can happen if the Board simply takes action on an item that is not on the agenda without making any findings?

**Answer:** It is risking court invalidation of its decision if challenged, and maybe even a cause of action under Civil Code Section 1363.09(b) which provides for recovery of attorneys fees in any lawsuit over the violation, and/or a \$500 fine for each violation.

***It's better to plan a.h..e...a....d..... don't wait until January 1 when the law becomes effective to practice the new procedures with the agendas.***

## CORPORATION FILINGS WITH THE CALIFORNIA SECRETARY OF STATE

By: Michael J. Gartzke, CPA

**Editor's Note:** These seemingly simple forms can cause your homeowners association a lot of grief if not sent in on time or filled out correctly. Information follows as to what these forms are, how to complete them and why they are so important.

When a homeowners association is formed as a corporation (in my practice, 97% of HOAs are corporations), articles of incorporation are filed with the California Secretary of State. A corporation number is assigned and the Secretary of State maintains public information on the corporation. Some of this information can change frequently and so a periodic filing is required by each corporation to the Secretary of State's office every two years. The due date for filing these forms varies depending upon the month and year that the corporation was formed. The filing date is not tied to the association's fiscal year or income tax year filings. For example, a corporation formed in April 1984 with a calendar year end for income tax returns filings will file a Statement of Information (SI-100) with the California Secretary of State in **April** of every even-numbered year (2006, 2008, etc.) since it was formed in an even-numbered year. A corporation formed in May 1993 with a June 30 fiscal year will file the Statement of Information in **May** of each odd-numbered year (2005, 2007 etc.). Statements of Information that are filed late are subject to a \$50 penalty that is assessed through the Franchise Tax Board even though it is a Secretary of State penalty. Not filing the form at all can result in the suspension of the corporation's powers by the Secretary of State. See separate article following.


It is important to note that these are not tax forms. Your CPA or income tax preparer will not prepare these forms as part of the annual income tax preparation process. Two Forms are required: 1) Statement of Information, and 2) Statement of Community Interest Development. Each form should only require about 10-15 minutes of your time.

A completed, sample Statement of Information follows. Comments follow where I have seen problems in the past.

### STATEMENT OF INFORMATION

#### **Line 2 – Principal Office Address**

The instructions indicate that nothing has to be entered here. If you enter information here, that is the address that the Secretary of State uses to mail these forms for completion every two years. If you have a property manager, their address usually goes on Line 2. If your property manager or office address listed on line 2 changes during the two-year period, your association will not receive the forms and you could be on your way to penalties or corporate suspension. You can submit an amended Statement of Information at any time prior to five months before its normal due date and not pay the \$20 filing fee with the amended statement. The \$20 filing fee is for original biennial filings only. Consider amending the Statement of Information after your annual meeting if your officers change or if there is a change in your property manager. The Secretary of State does not get address information

	<h2 style="margin: 0;">State of California</h2> <h3 style="margin: 0;">Secretary of State</h3> <p style="margin: 0;"><b>STATEMENT OF INFORMATION</b> (Domestic Nonprofit Corporation)</p>	N
Filing Fee \$20.00. If amendment, see instructions.		
IMPORTANT — READ INSTRUCTIONS BEFORE COMPLETING THIS FORM		
<p>1. <b>CORPORATE NAME</b> (Please do not alter if name is preprinted.)</p> <p style="margin-left: 40px;">SOUTH COAST HOMEOWNERS ASSOCIATION</p>		
This Space For Filing Use Only		
<b>DUE DATE:</b>		
<b>COMPLETE PRINCIPAL OFFICE ADDRESS</b> (Do not abbreviate the name of the city. Item 2 cannot be a P.O. Box.)		
2. STREET ADDRESS OF PRINCIPAL OFFICE IN CALIFORNIA, IF ANY.	CITY	STATE ZIP CODE
1499 State Street	Santa Barbara	CA 93101
<b>NAMES AND COMPLETE ADDRESSES OF THE FOLLOWING OFFICERS</b> (The corporation must have these three officers. A comparable title for the specific officer may be added; however, the preprinted titles on this form must not be altered.)		
3. CHIEF EXECUTIVE OFFICER/	ADDRESS	CITY AND STATE ZIP CODE
Robert R. Jones	3034 Anacapa Street	Santa Barbara, CA 93105
4. SECRETARY/	ADDRESS	CITY AND STATE ZIP CODE
Charles Robertson	3038 Anacapa Street	Santa Barbara, CA 93105
5. CHIEF FINANCIAL OFFICER/	ADDRESS	CITY AND STATE ZIP CODE
Matthew Janovich	3002 Anacapa Street	Santa Barbara, CA 93105
<b>AGENT FOR SERVICE OF PROCESS</b> (If the agent is an individual, the agent must reside in California and Item 7 must be completed with a California address. If the agent is another corporation, the agent must have on file with the California Secretary of State a certificate pursuant to Corporations Code section 1505 and Item 7 must be left blank.)		
6. NAME OF AGENT FOR SERVICE OF PROCESS		
Robert R. Jones		
7. ADDRESS OF AGENT FOR SERVICE OF PROCESS IN CALIFORNIA, IF AN INDIVIDUAL	CITY	STATE ZIP CODE
3034 Anacapa Street	Santa Barbara	CA 93105
<b>DAVIS-STIRLING COMMON INTEREST DEVELOPMENT ACT</b> (California Civil Code section 1350, et seq.)		
8. <input checked="" type="checkbox"/> Check here if the corporation is an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act and proceed to Items 9, 10 and 11.		
<b>NOTE:</b> Corporations formed to manage a common interest development must also file a Statement by Common Interest Development Association (Form SI-CID) as required by California Civil Code section 1363.6. Please see instructions on the reverse side of this form.		
9. ADDRESS OF BUSINESS OR CORPORATE OFFICE OF THE ASSOCIATION, IF ANY	CITY	STATE ZIP CODE
1499 State Street	Santa Barbara	CA 93101
10. FRONT STREET AND NEAREST CROSS STREET FOR THE PHYSICAL LOCATION OF THE COMMON INTEREST DEVELOPMENT (Complete if the business or corporate office is not on the site of the common interest development.)		9-DIGIT ZIP CODE
Anacapa Street & Alamar Avenue		93105-1234
11. NAME AND ADDRESS OF ASSOCIATION'S MANAGING AGENT, IF ANY	CITY	STATE ZIP CODE
Catherine Martinez 1499 State Street	Santa Barbara	CA 93101
12. THE INFORMATION CONTAINED HEREIN IS TRUE AND CORRECT.		
TYPE OR PRINT NAME OF PERSON COMPLETING THE FORM	SIGNATURE	TITLE DATE
		APPROVED BY SECRETARY OF STATE

from the income tax returns you file with the Franchise Tax Board so you need to tell the Secretary of State of address changes.

Many associations and their managers use a post office box for mailing purposes. Line 2 cannot be a P.O. Box. This was a recent change by the Secretary of State and it has caused numerous problems because officers do change and mail would go to old officers, members who had moved, or be returned to the Secretary of State as undeliverable. Forms filed after December 2007 are supposed to allow the association to specify a P. O. Box as the mailing address and specify a street address for the principal office address.

If no address is specified on Line 2, then the forms will be mailed to the President of the Association as shown on Line 3. Street addresses must be used for the three officers.

### **Line 6 – Agent for Service of Process**

Should the association need to be served with legal papers, the agent for service of process would be the recipient of these documents. This person could be any one of the officers, the manager, your attorney, etc. No P.O. boxes are allowed on Line 7.

### **Line 8 – Davis-Stirling Act**

Your association is subject to the Davis-Stirling Act so you need to check the box on Line 8. In many cases, the Association office address (Line 9) is not on the association's premises. So you will need to complete Line 10 to identify the specific location of your association. A "front street" and nearest "cross street" must be listed **and** a 9-digit zip code in your development. Any 9-digit zip code within your association will work. You can find the 9-digit zip on some of your own mail if you live in the association or go to [www.usps.com](http://www.usps.com) and click on "Find a Zip Code" and type in an address of one of the units. A 9-digit zip code will be returned to you online. Line 11 is completed only if the association has a managing agent.


Don't forget to sign the form and include the \$20 filing fee when mailing the statement in. Additional information is included in the instructions mailed with the form, [www.sos.ca.gov](http://www.sos.ca.gov), (916) 657-5448 or 1500 11<sup>th</sup> St., 3<sup>rd</sup> Floor, Sacramento, CA 95814.

## **STATEMENT OF COMMON INTEREST DEVELOPMENT**

Several years ago, the California Legislature imposed a second form for associations to file with the Statement of Information called the Statement of Common Interest Development Association (SI-CID). This form is to be filed at the same time as the Statement of Information and carries a \$15 filing fee. Some of the information on the SI-CID is the same as the Statement of Information. Some of it is new. The idea behind this form would be to determine how many associations there are in California and their size and to provide specific information to associations.

### **Line 3 – Incorporated or Unincorporated**

If your association is unincorporated, you do not complete a Statement of Information. However, you do complete a Statement of Common Interest Development. It is due in July of each odd-numbered year (2007, 2009, etc).

 <p style="margin: 0;"><b>State of California</b> <b>Secretary of State</b></p> <p style="margin: 0;"><b>STATEMENT BY COMMON INTEREST DEVELOPMENT ASSOCIATION</b></p>												
<p><b>Filing Fee \$15.00. If amendment, see instructions.</b></p>												
<p><b>IMPORTANT — READ INSTRUCTIONS BEFORE COMPLETING THIS FORM</b></p>												
<p>1. NAME OF ASSOCIATION</p> <p style="margin-left: 40px;">SOUTH COAST HOMEOWNERS ASSOCIATION</p>												
<p>This Space For Filing Use Only</p>												
<p>2. The above named association is formed to manage a common interest development under the Davis-Stirling Common Interest Development Act. (This statement is required by Civil Code section 1363.6(a)(1) and must not be altered.)</p>												
<p>3. THIS ASSOCIATION IS:    <input checked="" type="checkbox"/> INCORPORATED    <input type="checkbox"/> UNINCORPORATED</p>												
<p><b>STREET ADDRESS OF ASSOCIATION'S ONSITE OFFICE OR, IF NONE, THE ADDRESS OF THE ASSOCIATION'S RESPONSIBLE OFFICER OR MANAGING AGENT</b> (Please do not abbreviate the name of the city. Item 4 cannot be a P.O. Box.)</p>												
<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;">4. STREET ADDRESS</td> <td style="width: 20%;">CITY</td> <td style="width: 10%;">STATE</td> <td style="width: 10%;">ZIP CODE</td> </tr> <tr> <td>1499 State Street</td> <td>Santa Barbara</td> <td>CA</td> <td>93101</td> </tr> </table>	4. STREET ADDRESS	CITY	STATE	ZIP CODE	1499 State Street	Santa Barbara	CA	93101				
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1499 State Street	Santa Barbara	CA	93101									
<p><b>NAME, ADDRESS AND EITHER THE DAYTIME TELEPHONE NUMBER OR E-MAIL ADDRESS OF THE PRESIDENT OF THE ASSOCIATION</b> (The address and telephone number <b>must be different</b> from the address and telephone number of the association's onsite office or managing agent. Please do not abbreviate the name of the city.)</p>												
<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;">5. NAME</td> <td style="width: 40%;">PHONE NUMBER OR E-MAIL ADDRESS</td> </tr> <tr> <td>Robert R. Jones</td> <td>805-555-1212</td> </tr> <tr> <td>ADDRESS</td> <td>CITY</td> <td>STATE</td> <td>ZIP CODE</td> </tr> <tr> <td>3034 Anacapa Street</td> <td>Santa Barbara</td> <td>CA</td> <td>93105</td> </tr> </table>	5. NAME	PHONE NUMBER OR E-MAIL ADDRESS	Robert R. Jones	805-555-1212	ADDRESS	CITY	STATE	ZIP CODE	3034 Anacapa Street	Santa Barbara	CA	93105
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1499 State Street	Santa Barbara	CA	93101									
<p><b>PHYSICAL LOCATION OF THE DEVELOPMENT</b></p>												
<p>7A. COUNTY OR COUNTIES</p> <p style="margin-left: 40px;">Santa Barbara</p>												
<p>7B. CITY (If in an unincorporated area, enter the city closest in proximity.)</p> <p style="margin-left: 40px;">Santa Barbara</p>												
<table style="width: 100%; border: none;"> <tr> <td style="width: 33%;">8A. FRONT STREET</td> <td style="width: 33%;">8B. NEAREST CROSS STREET</td> <td style="width: 34%;">8C. NINE-DIGIT ZIP CODE</td> </tr> <tr> <td>Anacapa Street</td> <td>Alamar Avenue</td> <td>93105-1234</td> </tr> </table>	8A. FRONT STREET	8B. NEAREST CROSS STREET	8C. NINE-DIGIT ZIP CODE	Anacapa Street	Alamar Avenue	93105-1234						
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Anacapa Street	Alamar Avenue	93105-1234										
<p><b>TYPE OF COMMON INTEREST DEVELOPMENT MANAGED BY THE ASSOCIATION</b> (At least one of the types listed must be checked. Refer to Civil Code section 1351 for definitions.)</p>												
<p>9. CHECK THE APPLICABLE BOX:</p> <p><input type="checkbox"/> A COMMUNITY APARTMENT PROJECT</p> <p><input type="checkbox"/> A CONDOMINIUM PROJECT</p> <p><input checked="" type="checkbox"/> A PLANNED DEVELOPMENT</p> <p><input type="checkbox"/> A STOCK COOPERATIVE</p>												
<p><b>SEPARATE INTERESTS</b> (Please note, "Zero" or "none" is not acceptable.)</p>												
<p>10. THE NUMBER OF SEPARATE INTERESTS IN THE DEVELOPMENT</p> <p style="margin-left: 40px;">Forty-two (42)</p>												
<p>11. THE INFORMATION CONTAINED HEREIN IS TRUE AND CORRECT.</p>												
<table style="width: 100%; border: none;"> <tr> <td style="width: 40%; border-bottom: 1px solid black;"></td> <td style="width: 20%; border-bottom: 1px solid black;"></td> <td style="width: 20%; border-bottom: 1px solid black;"></td> <td style="width: 20%; border-bottom: 1px solid black;"></td> </tr> <tr> <td style="font-size: small;">TYPE OR PRINT NAME OF PERSON COMPLETING THE FORM</td> <td style="font-size: small;">SIGNATURE</td> <td style="font-size: small;">TITLE</td> <td style="font-size: small;">DATE</td> </tr> </table>					TYPE OR PRINT NAME OF PERSON COMPLETING THE FORM	SIGNATURE	TITLE	DATE				
TYPE OR PRINT NAME OF PERSON COMPLETING THE FORM	SIGNATURE	TITLE	DATE									
SI-CID (REV 03/2007)	APPROVED BY SECRETARY OF STATE											



### **Line 5 – President**

The address of the President must be different than that of the managing agent shown on Line 4. A phone number or email address must be provided for the President. According to the instructions, the information on Line 5 is not open to public inspection.

### **Line 6 – Managing Agent**

If the association has a managing agent, the address and phone number of the agent must be different than the President's. The address on Line 6 cannot be a P.O. Box.

### **Line 7-8 – Physical Location**

The county and the city the association is located must be shown. If it is not in a city, then the closest city should be shown. Just like on the Statement of Information, the front street, cross street and 9-digit zip code are listed on Line 8.

### **Line 9-10 – Type of Association/Number of Units**

Be sure to check the type of Association you are and enter the number of units, lots, properties, etc. that are included in the association. Even though the association may not have any maintenance responsibilities on individual properties or provide any direct services such as utilities or insurance, your count should include the number of properties that pay assessments to the association.

The Secretary of State will return forms that are not completed correctly. A single item not filled in will trigger a rejection and you will have to resubmit the form. To maintain your corporate status, you need to respond quickly if the forms are returned to you. Failure to submit correct Statements of Information and Common Interest Development with the Secretary of State can result in penalties and corporate suspension.

## **IS YOUR ASSOCIATION'S CORPORATE STATUS SUSPENDED?**

By Michael Gartzke, CPA

**Editor's Note:** Back by popular demand, a version of this article ran several years ago in the newsletter. I have updated the article and added some additional information that has changed since the original version was published.

- I. **What is Corporate Suspension?** – Every corporation formed in California, whether a mutual benefit corporation such as a homeowners association, a professional corporation or a major corporation, is registered with the California Secretary of State's office. Upon incorporation, the corporation is assigned a corporate number and is required to file a statement of information (SI-100) on a biennial basis (every 2 years) with the Secretary of State and to file tax returns with the Franchise Tax Board and

pay taxes as required on an annual basis. In addition, all homeowners associations are now required to file a Statement of Common Interest Development (SI-CID) with the Secretary of State every two years as well. Failure to meet any of these corporate filing obligations can eventually lead to corporate suspension or revocation of corporate powers by the California Secretary of State or the California Franchise Tax Board.

Some commentators have opined that 10 percent or more of California's homeowners associations are suspended. Some of these associations may only exist on paper (i.e. articles were filed to establish the corporation but the project has never been built). With over 40,000 homeowners associations in California, that means that 4,000 to 5,000 associations may be suspended.

**II. Why is this important?** – Under California Revenue and Taxation Code (R&TC) Section 23304.1(a), "Every contract made in this state by a taxpayer during the time that the taxpayer's corporate powers, rights and privileges are suspended or forfeited pursuant to Section 23301, 23301.5 or 23775 shall, subject to Section 23304.5, be voidable at the instance of any party to the contract other than the taxpayer." Section 23304.5 requires that a lawsuit be brought by the other party in order for the contract to be voided. This could be problematic for a suspended association in the following situations:

- a) A dispute arises in a maintenance contract (roofing, painting, landscaping, etc.) and cannot seem to be worked out other than through the courts. If the association's corporate powers are suspended, the other party could void the contract and/or the association has no ability to enforce the provisions of the contract since the association is suspended.
- b) The association is involved in construction defect issues that lead to litigation. Should the corporation be suspended, it cannot pursue the legal remedies permitted until the corporation is "revived".
- c) The association is attempting to collect delinquent assessments from a homeowner. Liens could not be enforced or small claims could not be pursued if the association has its corporate powers suspended. The inability to secure the association's assessments during a suspension period could result in lost assessments by the association.
- d) If an association is looking to obtain a bank loan to make major repairs, it cannot do so if its corporate status is suspended.
- e) Without corporate powers, the association may not be able to enforce any provisions of its governing documents (CC&Rs, etc.)
- f) Board members may not have the immunities provided by the Davis-Stirling Act if the corporation is not in "good standing".

**III. How does suspension occur?** – Listed below are several scenarios that have occurred in my practice that I believe are not unique but occur regularly:

- a) **Suspension soon after incorporation** – The association was incorporated by the developer’s attorney in 1983 and but was suspended in 1985 for failure to file tax returns or pay the California minimum tax. This 5-unit association was built, had a bank account with the manager’s tax ID number. Mailing addresses had changed from the attorney to one or more of the owners to the manager over the years. Notices sent by the FTB may not have been received or returned to the FTB due to the change in address. The suspension was discovered when management changed in 1999, fourteen years later.
- b) **Suspension due to failure to file Statement of Information** – As noted in the first scenario, association mailing addresses can change frequently. If the association uses an officer’s mailing address or its management company’s address as its mailing address, there is a strong possibility that the mailing from the Secretary of State will not be forwarded to the correct address when officers or managing agents change. Follow-up notices, penalty notices and suspension notices will likewise not be forwarded. This was a problem when the Statement of Information was an annual filing. Now that the statement is filed every two years, nonfiling will probably increase, resulting in more suspensions. Filing forms and requirements can be found at the Secretary of State’s website – [www.sos.ca.gov](http://www.sos.ca.gov). Missing one filing but making the subsequent filings does not “revive” the corporation. The penalty for failure to file the nonprofit statement of officers is \$50 and is assessed through the Franchise Tax Board.

**RECOMMENDATION** – The Statement of Information can be amended at any time during the two-year filing period at no cost. This form could be revised at the same time that signature cards are changed to reflect new officers, corporate mailing address change or change in agent for service of process. A fill-in form is available on the Secretary of State’s website – [www.sos.ca.gov](http://www.sos.ca.gov)

- c) **Suspension for failure to file FTB Tax Form 199** – An association was suspended in 1987 because it had not filed a Franchise Tax Board Form 199 form for 1986. 1986 was the last year that filing of the 199 was required of all nonprofit corporations regardless of revenues received. The \$25,000 annual revenue minimum filing requirement for Form 199 was effective in 1987. In order to “revive” (meaning restore corporate status), the association had to file a 1986 Form 199 (in 2001!). My 1986 forms book was in storage so a colleague came to the rescue. The association did not have a 1986 income statement so we used a 1987 one. (The FTB suggested that the form be filled in with “zeroes”) The 199 has a \$10 filing fee. If the form is filed late, the fee increases to \$65 plus interest.
- d) **Suspension for failure to file CA FTB Tax Forms 100 and 199 and pay resulting penalties** – While this can happen due to the address, officer or management changes noted above, it can also happen due to the negligence of the financial managing agent.

There are companies in California that provide financial management to associations. Some are owned by tax and accounting professionals who hold themselves out as providing all the necessary financial statement and tax preparation services needed by an association. This scenario can be attractive to a small association board as it allows them to feel confident that these matters are being taken care of by a professional and that the board has nothing to worry about.

What happens when the tax returns are not filed? Demand notices and penalty notices are sent by the FTB. If no response is received, a series of letters threatening forfeiture of the corporation commence leading to the eventual suspension of the corporation.

I have seen a number of instances in recent years of the former financial manager providing 3-10 years worth of Federal and California income tax returns for filing by the association at the time of the changeover in financial management. I have received numerous calls over the years outlining this scenario. The managers know that tax returns are due annually. These associations are going to incur late filing penalties as well as late payment and interest charges on any taxes due for both Federal and California. These associations have been suspended. Once these associations are revived, then they will have to go to small claims court to recover the penalties and interest incurred as a result of the negligence of the former financial manager. This is not an isolated incident. Many notices have to be ignored and thrown away for a corporation to be suspended.

Associations with \$25,000 or less in annual gross receipts are not required to file Form 199 with the Franchise Tax Board. However, if the association's corporate status becomes suspended, then the FTB will require that all 199s be filed and the resulting, fees and penalties be paid even if receipts are below the normal filing requirements.

- IV. How do you find out if an association is suspended?** Some information from the Statement of Information filing is maintained on a database on the Secretary of State's website – [www.sos.ca.gov](http://www.sos.ca.gov). Access "business filings" through the California Business Portal from the Homepage. From there enter into "California Business Search".

Enter the corporation's name or a portion of the name (if you are not sure of the exact name) to obtain name matches and corporate information. For example, I entered "Summerland Association" and 6 matches were returned. One of which was a suspended homeowners association, the Summerland Villas Homeowners Association. A "click" on the corporate name generated another report showing the corporation mailing address and the agent for service of process mailing address. It does not show when the corporation was suspended, just that it is suspended.

- V. How do you return the association to active status?** If your association is suspended, you need to contact the California Secretary of State and the Franchise Tax Board to determine what triggered the corporate suspension.

**a) Secretary of State -**

Officers@sos.ca.gov  
Phone – 916-657-5448  
1500 11<sup>th</sup> Street  
Sacramento, CA 95814

My experience has been that you can get prompt email responses if you inquire why a corporation was suspended.

If the corporation was suspended by the Secretary of State simply because the last Statement of Information or Statement of Common Interest Development was not filed, you may revive the corporation by sending a letter to the Secretary of State along with the delinquent Statements and the payment of any fees or penalties imposed. The Secretary of State will send a “Notice of Revivor” to the association and notify the Franchise Tax Board.

**b) Franchise Tax Board –**

Phone - 800-852-5711  
P. O. Box 942840  
Sacramento, CA 94240-0000

My experience has been that speaking to one of the FTB Corporate telephone representatives has been fruitful in obtaining the information as to why the corporation was suspended.

The telephone representatives have information concerning why the FTB has suspended the corporation or whether the Secretary of State has suspended it. All required tax forms, tax payments, penalties and interest must be made with the FTB Form 3557 “Application for Certificate of Revivor”.

If the association is small, with little or no taxable income, the process is fairly straightforward and should not be too costly. I did have an FTB representative contact me once regarding the filing of a Form 100 for an association that had less than \$100 in nonmembership income in the year in question (e.g. interest income). The association is not required to file Form 100 when nonmembership income is less than \$100 (See Form 100 instructions and Publication 1028 – Guidelines for Homeowners Associations.) He wanted to know my authority. I cited the above FTB publications and never heard back from him.

Some associations, like the one cited in my first example, are suspended for failure to pay the minimum tax. This is because California tax-exempt status was not requested during incorporation. FTB Form 3500 must be filed and approved by the Franchise Tax Board to obtain tax-exempt status. It is not an automatic election like the Federal Section 528 election. A brief questionnaire regarding association activities must be completed and 4 years’ financial information and signed copies of the association’s governing documents must be provided with the application. Upon qualification, the FTB will refund up to 4 years’ minimum tax for associations

that qualify. Most residential associations should have no trouble qualifying for exempt status.

**VI. A new “wrinkle”:** While checking the corporate status of existing association clients recently, one association’s corporate status was shown as “dissolved”. This is an association formed over 20 years ago and has been a long-time client. Corporate dissolution is a very specific process which requires formal paperwork to be filed with the Secretary of State to dissolve the corporation. I contacted the Secretary of State’s office via email and two days later received a call from their office. I had suggested that perhaps a corporation with a similar name had been dissolved but it was posted to my client’s account in error. That is what happened. Many corporate names are similar and the one that dissolved started with the same two words but had an extra word “Plaza” and then “Owners Association”. I now check the corporate status of all my clients annually. Each year, I find at least one that has become suspended, usually due to not filing the Secretary of State Statements. About a year ago, I developed a list of all my client associations along with their incorporation dates. On a monthly basis, I mail merge this information into a letter to those associations whose Secretary of State Statements are due that month. I have already found several associations who had not received the forms and therefore had potentially saved them from being suspended. There should be a better way to help associations to keep their corporate status active.

**VII. A potential new wrinkle:** In a recent issue of the Spidell’s California TaxLetter ([www.caltax.com](http://www.caltax.com)), the Franchise Tax Board is exploring a new requirement of California income tax withholding for payments made to suspended corporations. No information was offered as to the size of the payment before withholding would be required or who would be subject to the withholding requirement or how payers would be notified that they must withhold state income tax. While I can’t imagine that individuals would be required to withhold tax on their assessment payments to a suspended homeowners association, I can imagine that a property management company could be required to withhold on payments they make on behalf of an owner for whose property the company manages. The state has explored withholding on independent contractor payments in the past. Nothing has yet come of these proposals.

**VIII. Does the suspended status have to be disclosed?** – While the CIRA Guide (Accounting Standards for HOAs) does not provide any specific guidance, it is my opinion that an audited or reviewed financial statement should disclose suspended status in the notes to the financial statements. An association without corporate powers could have its financial situation severely impacted if it cannot collect its assessments or sue for damages incurred. This is a very significant disclosure. If the board knows that its corporate status is suspended, it should disclose that fact to its members and take immediate steps to revive the corporation.

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Gayle Cagianut, CPA  
4587 Telephone Rd #209  
Ventura, CA 93003  
805-642-4658

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

James H. Smith  
Grokenberger & Smith  
1004 Santa Barbara St.  
Santa Barbara, CA 93101  
805-965-7746

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

### **Attorneys (Cont)**

Steven McGuire  
Price, Postel & Parma  
200 East Carrillo, Suite 400  
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P. O. Box 8152  
Goleta, CA 93116  
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Spectrum Property Services  
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1259 Callens Rd #A  
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Ventura, CA 93006  
805-658-1438  
[www.cai-channelislands.org](http://www.cai-channelislands.org)

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ECHO  
1602 The Alameda #101  
San Jose, CA 95126  
408-297-3246  
[www.echo-ca.org](http://www.echo-ca.org)