SOUTH COAST HOMEOWNERS ASSOCIATION

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IN THIS ISSUE

UPCOMING SOUTH COAST HOA MEETING – JANUARY 26

It's time for our annual law and legislative update for the New Year. Our attorney panelists, James H. Smith (Grokenberger & Smith – Santa Barbara) and David A. Loewenthal (Loewenthal, Hillshafer & Rosen – main office Sherman Oaks) are planning to discuss numerous topics including:

- Senate Bill (SB) 150 – Applicability of Rental Restrictions
- SB 209 – Electric Vehicle Charging Stations
- SB 563 – Open Meeting Act, email, executive sessions, actions without a meeting
- Assembly Bill (AB) 771 – Documents to be provided to a buyer
- Numerous New California Court Cases affecting HOA Operations such as Architectural Guidelines, Maintenance Responsibilities, etc.

Compared to the past two years, there have been significant changes made to the Davis-Stirling Act and the Civil Code which govern your association. Mark your calendars now.

Date – Thursday, January 26, 2012
Time – 7-9 PM (Refreshments 6:45!)
Place – Encina Royale Clubhouse - 250 Moreton Bay Lane, Goleta
Directions – Fairview exit off 101 - north 2 blocks to Encina Road, right one block to Moreton Bay Lane - left into Encina Royale - clubhouse on the right just inside the entrance

BAD DEBT ALLOWANCES IN HOMEOWNERS ASSOCIATIONS
An Emerging Issue

By: Michael J. Gartzke, CPA

Author's Note: This article and the following article on reserve fund borrowings were presented at the 2011 California CPA Education Foundation's Common Interest Realty Associations (CIRA) Conference in San Francisco this past September. For the past 20 years, the Education Foundation and volunteer colleagues have provided the conference for CPAs who provide services to homeowners associations. I have been privileged to have been a part of this conference for many of the past 20 years. NOTE for SCHA readers: The focus of this article is for CPA's, so some of the suggestions are directed to CPA's doing annual reviews for HOA's.

In the past 25 years, very few homeowner associations had to be concerned about whether their assessments receivable would be collectable. With the exception of the early 1990s, property values rose or remained stable. If an owner fell behind on assessments, the association had the power to lien the property for the assessment and if the lien was not paid, the association could pursue foreclosure. In many cases, the threat of a lien would compel the owner to pay the past due assessments as the owner would have equity in the property and would not risk the loss of that equity. The foreclosure process was quite rare. If there was sufficient equity, the owner could refinance the property to obtain needed cash or could even sell the property and the association would be fully paid.

That is not the case today. Throughout the nation, property values have declined by 30%, 40% and even 50% or more from their peak several years ago. Homeowners who bought or refinanced units at the top of the market now find themselves "underwater", where the loan balances greatly exceed the current value of the property. Lending practices during the past decade allowed owners to buy property with little or no money down, with variable interest rate loans with ultra-low start rates at the beginning of the loan and negative amortization loans (where payments do not pay all the accrued interest and unpaid interest is added to the principal). The expectation was that property values would continue to rise and that property could be sold or refinanced as needed.

If a unit is foreclosed in an association, the lender is not responsible for assessments prior to foreclosure. These assessments remain the responsibility of the former owner. Lenders are under political pressure not to foreclose quickly in hopes a modification can be worked out (unlikely). The result for the association is that getting a new owner into the property is delayed and more assessments are lost. The remaining owners then subsidize the lenders by continuing to maintain the property within the association without receiving assessments.

Some associations have not been impacted at all from past due assessments. They have been able to continue to collect assessments all along. A large association with relatively low assessments (limited common area maintenance) may be able to tolerate some losses. However, smaller associations, or condo associations which provide a high amount of services (utilities, insurance, landscaping, building maintenance, etc.) cannot handle losses without passing them through to remaining owners.

Factors that can contribute to a high amount of uncollectible assessments include:

- **Geography** – Some areas have been more heavily impacted by the loss of jobs including well-paying jobs. Associations may have numerous members working for the same company who lost their jobs at the same time.

- **Entry-level Associations –** While luxury and median price properties can be vulnerable to assessment collection issues, properties at the low-end are especially so. Many people in these properties bought recently with the no-down, variable interest loans described earlier. These properties are typically condominiums where the assessments are higher due to the level of services provided by the association.

- **New Associations in Years Prior to the 2008 Crisis –** Everyone bought at the top of the market. Some did not carry over any equity from a previous property. Delinquency rates in these associations can be quite high.

- **Vacation Homes –** Associations in resort areas have seen increased delinquencies due to the economic factors cited above and the fact that many of these properties were financed from the owner's principal residence.

- **Association Collection Practices –** Associations which do not promptly send late notices, pre-lien letters or follow through with collection activity such as liens or small claims court can have higher delinquency rates. If you find that your association client does not have a strong collection policy, advise them to implement one in accordance with California Civil Code Section 1365.1. The collections policy must be distributed to owners along with other disclosures sent out 30-90 days prior to each new fiscal year.

Outstanding assessment balances have grown substantially in the past five years. I maintain a database of selected financial data from annual financial statement reviews that I conduct. Here is how the assessment receivable balance has increased since I started the database.

Date	HOAs	Units	Receivable	$/unit
12/31/05	55	4,224	$100,388	$23.77
12/31/06	60	4,395	160,147	36.44
12/31/08	63	4,636	351,914	75.91

12/31/09	**64**	**4,764**	**476,888**	**100.10**
12/31/10	**68**	**5,105**	**575,671**	**112.77**
11/30/11	**68**	**5,203**	**668,603**	**128.50**

Many of these associations are in southern Santa Barbara County, an area that has been less affected than some other areas in California from foreclosure, etc. On a per unit basis, receivables have increased by 441% since December 2005. The economic experts tell us that more foreclosures will be coming soon.

At November 30, 2011, the amount of receivables per unit was distributed among the 68 associations as follows:

Amount/Unit	**HOAs**
None	10
$1 - $51	24 ($51 is the median amount)
$51- $100	9
$101-$200	13
Over $200	12 (the largest is over $1,000/unit)

As part of the CIRA engagement, CPA's doing financial reviews need to analyze the assessment receivable schedule at year-end to determine if an allowance for bad debts needs to be established or changed. As part of inquiry/analytical procedures, CPA's should consider the following:

- Obtain an aged receivable schedule, if possible. Initially, I look for assessment balances over $1,000. In some cases, $1,000 may only be one or two months' assessments or it may be twelve months or more. Look also to see what assessments are over 90 days delinquent.

- For those receivable balances that appear suspect, inquire about subsequent year payments. This is especially useful when doing the review several months' after year-end.

- If the receivable balance has not yet been paid and/or is increasing, request a member ledger showing the payment history. Inquire as to what steps the association is taking to collect the delinquent assessments. Have they filed a lien? Are they using a third party collection service?

- Recommend to the association that a bad debt line item be added to the operating budget, if they haven't already done so. In some cases, associations have reduced funding their reserve obligations due to their inability to collect assessments.

INTERFUND "BORROWING" FROM RESERVES

(aka Due to/Due From)

By: Michael J. Gartzke, CPA

The California Civil Code (also known as the Davis-Stirling Common Interest Development Act) provides for the following with respect to association assessments and reserve funds:

- **Section 1366(a) – "**… the association shall levy regular and special assessments sufficient to perform its obligations under the governing documents and this title." Limits and exceptions are provided for emergency situations, assessments which require membership approval and annual regular assessments.

- **Section 1366(b) -** "Notwithstanding more restrictive limitations placed on the board by the governing documents, the board of directors may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding fiscal year or **impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses of the association for that fiscal year without the approval of owners,** constituting a quorum, casting a majority of the votes at a meeting or election of the association conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations Code and Section 7613 of the Corporations Code. For the purposes of this section, quorum means more than 50 percent of the owners of an association."

- **Section 1366.1 –** "An association may not impose an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied."

- **Section 1365.5 –**

"1365.5(c) (1) ***The board of directors shall not expend funds designated as reserve funds for any purpose other than the repair, restoration, replacement, or maintenance of, or litigation involving the repair, restoration, replacement, or maintenance of, major components that the association is obligated to repair, restore, replace, or maintain and for which the reserve fund was established.***

(2) However, the board may authorize the temporary transfer of moneys from a reserve fund to the association's general operating fund to meet short-term cash flow requirements or other expenses, if the board has provided notice of the intent to consider the transfer in a notice of meeting, which shall be provided as specified in Section 1363.05. The notice shall include the reasons the transfer is needed, some of the options for repayment, and whether a special assessment may be considered. If the board authorizes the transfer, the board shall issue a written finding, recorded in the board's minutes, explaining the reasons that the transfer is needed, and describing when and how the moneys will be repaid to the reserve fund. The transferred funds shall be restored to the reserve fund within one year of the date of the initial transfer, except that the board may, after giving the same notice required for considering a transfer, and, upon making a finding supported by documentation that a temporary delay would be in the best interests of the common interest development, temporarily delay the restoration. ***The board shall exercise prudent fiscal management in maintaining the integrity of the reserve account, and shall, if necessary, levy a special assessment to recover the full amount of the expended funds within the time limits required by this section. This special assessment is subject to the limitation imposed by Section 1366.*** (Emphasis added) The board may, at its discretion, extend the date the payment on the special assessment is due. Any extension shall not prevent the board from pursuing any legal remedy to enforce the collection of an unpaid special assessment.

1365.5 (d) When the decision is made to use reserve funds or to temporarily transfer moneys from the reserve fund to pay for litigation, the association shall notify the members of the association of that decision in the next available mailing to all members pursuant to Section 5016 of the Corporations Code, and of the availability of an accounting of those expenses. Unless the governing documents impose more stringent standards, the association shall make an accounting of expenses related to the litigation on at least a quarterly basis. The accounting shall be made available for inspection by members of the association at the association's office.

1365.5*(e)(5) A reserve funding plan that indicates how the association plans to fund the contribution identified in paragraph (4) to meet the association's obligation for the repair and replacement of all major components with an expected remaining life of 30 years or less, not including those components that the board has determined will not be replaced or repaired. The plan shall include a schedule of the date and amount of any change in regular or special assessments that would be needed to sufficiently fund the reserve funding plan. The plan shall be adopted by the board of directors at an open meeting before the membership of the association as described in Section 1363.05. If the board of directors determines that an assessment increase is necessary to fund the reserve funding plan, any increase shall be approved in a separate action of the board that is consistent with the procedure described in Section 1366.*

1365.5(f) As used in this section, "reserve accounts" means both of the following:

(1) Moneys that the association's board of directors has identified for use to defray the future repair or replacement of, or additions to, those major components that the association is obligated to maintain.

(2) The funds received, and not yet expended or disposed of, from either a compensatory damage award or settlement to an association from any person or entity for injuries to property, real or personal, arising from any construction or design defects. These funds shall be separately itemized from funds described in paragraph (1).

1365.5(g) As used in this section, "reserve account requirements" means the estimated funds that the association's board of directors has determined are required to be available at a specified point in time to repair, replace, or restore those major components that the association is obligated to maintain.

1365.5(h) This section does not apply to an association that does not have a "common area" as defined in Section 1351.

The issues –

1) Can the association use monies designated as reserve funds (in segregated bank accounts) for other purposes?

2) Can the association expend reserve funds for major components not included in the reserve study? What if the association adds a major component? Where does the funding come from?

3) Can the association borrow reserve funds for other purposes and return them to reserves?

4) Can the association borrow reserve funds and not repay them?

5) Can the association not fund all the budgeted reserve funds during the year?

6) Can the association retain the reserve funds in its operating account(s) so that its manager or other check signer(s) can pay for reserve expenses without obtaining two officer/board member signatures?

7) What does the professional community association management community say about all this?

Issue 1 – Use of reserve funds

Civil Code 1365.5(c) referenced above only permits reserve funds to be used for the repair, replacement, restoration of maintenance of major common area components (and litigation involving same) and for which the reserve fund had been established. The use of reserve funds to pay major operating expenses is not permitted subject to borrowing rules. Temporary transfers are permitted subject to the notice/board action requirements of Section 1365.5(c)(2). – See issue 3.

Issue 2 – Major component expenditure not included in the reserve study

Is the component material? (that is, a significant amount of money) If not, then it could be paid from reserves as the impact to reserves would not be significant and the component can be included in a subsequent study and funding revised at that time. If the component is material, it may be a one-time expenditure or a recurring expenditure. Section 1365.5(e) requires the board to review the study annually and implement any adjustments needed. The association may use reserve funds for these components unless it threatens the integrity of the fund for scheduled items. In that case, a special assessment should be considered to pay for items not included in the reserve study and subsequently are revealed to need funding. If the association is going to add a new component (for example window awnings), the board may have to obtain approval from its members based upon its governing documents (CC&Rs and/or Articles of Incorporation). There may be monetary limits imposed by the governing documents for new capital improvements. New, material components that are outside the scope of the current reserve study and funding plan should be funded from operating funds (may not be likely) or a special assessment. Future replacement can then be incorporated into the reserve study. Additionally, if an association has a new reserve component expense that is not listed in the prior reserve study, they can opt to have a new reserve study commissioned to add the item(s) to the component list. After all, that is the process by which the items become officially "legitimate" reserve expenses.

Issue 3 – Borrowing of reserve funds

The transfer of reserve funds to operating is permitted subject to repayment with one year and a host of membership disclosure requirements as set forth in Section 1365.5(c)(2). A common temporary transfer is for the payment of the annual insurance premium. Some policies, especially earthquake or "difference in conditions" policies require full payment at the beginning of the policy term. There are insurance premium financing options available with annual interest rates of up to 10%. Associations are not currently earning 10% on their reserve funds. Such associations often pay the insurance premium from reserve funds and repay reserves from operating assessments over the following year to save the financing costs. It should be noted that not all associations have the fiscal discipline or available reserve funds to make the repayments and so this is not recommended for all associations.

Issue 4 – Can reserve funds be borrowed without repayment?

Section 1365.5(c)(2) describes the borrowing process. It indicates that the funds must be repaid in one year, although a "temporary" borrowing is permitted subject to board vote at an open meeting. The board can implement a special assessment subject to a member vote, if necessary. (Special assessments less than 5% of the annual "budgeted gross expenses" are permitted without a member vote – Civil Code Section 1366(b).) A permanent "borrowing" is not addressed in the code. What the code does say in Section 1365.5(c)(2) is that *"the board shall exercise prudent fiscal management in maintaining the integrity of the reserve account."* Some HOA professionals have suggested that permanent transfers are OK since the reserve study will be updated every three years and increased funding can be made at that time. In my opinion, this is a most dangerous practice. As noted above, the Civil Code allows for 12-month borrowing, temporary delays and special assessments to restore funds. It stresses maintaining the reserve funds' integrity. Nowhere does the code address permanent transfers. If your association has made a permanent transfer, then the financial statement preparer/CPA must do the following:

- Show the transfer on the change in fund balances statement between the operating and reserve funds

- Insist that board minutes reflect that the permanent transfer has occurred

- Describe the permanent transfer in the notes to the financial statements

- Stress the provisions of the Civil Code with respect to transfers and maintain reserve fund integrity in your management letter.

Issue 5 – Can the association underfund reserves during the year? Is this a borrowing?

Section 1365.5(e)(5) describes the reserve funding plan that the board adopts after approving and implementing the reserve study recommendations. Funding at a level below the adopted funding plan amount would constitute a "borrowing" as the funding plan specified the reserve fund portion of the regular assessment and thus, the proforma budget had not been met. Reasons for underfunding reserves include:

- Unanticipated or unknown increases in operating costs such as insurance premiums (after Hurricane Katrina), water rates (16% in the Goleta Water District for example, effective July 1, 2011) with only 30 days notice or repairs outside the scope of the reserve study (uninsured water damage)

- Increase in assessment receivable balances and bad debt issues

- Unrealistic budget expectations when developing the proforma budget. *"For the fifth year in a row your Association board of directors is proud to announce that no increase in regular assessments is necessary for the upcoming year"*.

Issue 6 – Can the association keep reserve assessments in its operating account to facilitate payment of reserve expenses without the hassle of transferring funds and getting officer/board member signatures?

Some associations do not regularly transfer reserve assessments to the reserve accounts. If this is done, the operating cash account will have more cash in it than it should and the board (and the members) will think that the association operations are in better shape than they are. I recommend that reserve assessments be transferred from operating monthly and scheduled automatically via the bank just like any other monthly utility, landscape or insurance payment. The operating account will then only have operating funds in it.

These same associations are then able to pay reserve expenses from operating accounts without having to obtain 2 signatures on the check. In many associations, the manager can be the sole signer on the operating account or may use electronic funds transfer to make the payment. The Civil Code control is bypassed. Have these major expenditures been approved by the board?

In some cases, especially in smaller associations, there is only one reserve bank account and no checkwriting privileges on it. In that case, the board could make the transfer from the reserve account to the operating account for the amount of the reserve expenditure, approve the reserve expenditure at a board meeting, and pay the expense through the operating account.

As part of your review procedures, you will need to perform a reconciliation of the due to/due from reserve fund balance. In many cases, neither the association nor its manager has booked this interfund liability. Your reconciliation could look something like this:

Reserve Fund Balance – December 31, 2010	***$ 250,000.00***
+ 2011 Reserve Assessments (per budget)	**50,000.00**
+ Investment Income – Reserve Funds	**2,000.00**
- Reserve Expenditures	**(32,000,00)**
Reserve Fund Balance – December 31, 2011	**$ 270,000.00**
Reserve Cash & Investments -	**255,000.00**
Due to Reserve Fund – December 31, 2011	**$ 15,000.00**

The proper booking of an amount due to the reserve fund can have a substantial impact on the operating fund balance..

Issue 7 – What does the professional community association management community have to say about this?

At the 2011 California Association of Community Managers (CACM) law seminar held earlier this year, Lisa Esposito, CCAM and Kevin Mallett, Esq. discussed some of the interfund borrowing issues. From the conference manual, pages 96-97, they state:

"Q. Is not funding budgeted reserves considered "borrowing"?

A. It is not a formal transfer of cash from a reserve fund to a general operating fund. But it is an "unfunded reserve" and a due to/due from equal to the variance between budgeted and actual reserve contributions should be recorded on the balance sheet. The board (and

homeowners that might review financial statements) should be reminded that budgeted reserve contributions were not actually made. The budget was distributed to the membership and the membership will be expecting the contributions to be made.

If the board and management believe they will have an operating fund deficit, they should suspend reserve funding until cash flows are adequate. This is better than transferring funds to reserves and then having to formally borrow them later.

Q. How long should "unfunded reserves" stay on the balance sheet?

A. At a minimum, the unfunded reserves should stay on the current fiscal year balance sheet. It needs to be transparent to the membership since the board represented that the contributions would be made. If the board has a plan to make up the contributions in the next year, the unfunded reserves should roll from one year to the next. The board can then make decisions on next year's budgeted reserve fund contribution with the understanding that the prior year's unfunded reserves will eventually have to be made up in subsequent year contributions.

If the reserve analyst and board have considered the unfunded reserves in their Civil Code 1365 reserve and budget disclosure, then the unfunded reserve placeholders on the balance sheet should not be included as an asset and liability in the CPA's review, and they can be removed from the HOA's balance sheet at the start on the next fiscal year."

Based upon the Civil Code and the discussion of these issues earlier, I would raise the following questions to the management/legal community

1) Why is the reserve funding plan as defined in Civil Code (CC) section 1365.5 (e)(5) not being followed?

2) Under CC Section 1366 (a) – Why did the association not levy sufficient assessments to meet its obligations?

3) Did the association consider imposing a small special assessment of up to 5% of budgeted gross expenses as permitted by CC 1366(b)?

4) Did the association consider putting a larger special assessment up for a membership vote as permitted by CC 1366(b)? If so, did the assessment get defeated?

5) Is a reserve assessment included in the total regular assessment considered reserve funds under CC 1365(c)(1)?

6) By not transferring the reserve portion of the regular assessment, has the association exercised prudent fiscal management in maintaining the integrity of the reserve account under CC 1365.5(c)(2)?

7) What factors contributed to the funding problem?

    a) Assessment collections
    b) Unanticipated expenses

c) Poor budgeting
d) Unrealistic assumptions
e) Lack of political will

8) Why have designated reserve funds at all?

9) Does the Raven's Cove Townhomes case from 1981 (114 Cal App 3d 783) continue to hold boards of directors accountable for failure to provide for adequate reserve funds? Is it a breach of a board member's fiduciary duty not to properly fund reserves or attempt to do so? See Raven's Cove court finding below. (2004 CIRA Conference) http://www.davis-stirling.com/MainIndex/CaseLaw/RavensCovevKnuppe/tabid/844/Default.aspx#axzz1h419fLLe

"The parties have not cited, and our research has not disclosed, any specific authority in this state. Nevertheless, it is well settled that directors of nonprofit corporations are fiduciaries. The statutory provisions here applicable are former Corporations Code section 9002, which provided that the provisions of the general corporations law were applicable to nonprofit corporations. The pertinent provision was former general Corporations Code section 820, which required directors and officers to "exercise their powers in good faith, and with a view to the interests of the corporation."

"We conclude that since the Association's original directors (comprised of the owners of the Developer and the Developer's employees) admittedly failed to exercise their supervisory and managerial responsibilities to assess each unit for an adequate reserve fund and acted with a conflict of interest, they abdicated their obligation as initial directors of the Association to establish such a fund for the purposes of maintenance and repair. Thus, the individual initial directors are liable to the Association for breach of basic fiduciary duties of acting in good faith and exercising basic duties of good management." (emphasis added)

COMMENTARY: So while the Davis-Stirling Act does not specifically mandate the funding of reserves or a certain amount of reserves (yet), this California Appellate case from 30 years ago held the developer's board liable for failure to fund reserves because the developer knew that major repair and replacement expenses would occur in the future and that funds should be set aside on a current basis to meet these expenses. Should owner-elected boards be held to the same level of fiduciary duty or a lesser level? I don't see how different boards could be held to different standards.

SOUTH COAST HOA WEBSITE

We maintain an archive of newsletters on our website www.southcoasthoa.org. In addition to the newsletters, we post information about our upcoming meetings and have a professional member sponsor page if you are looking for professional services for your association. We also have links to other HOA organizations and resources.

If no one on your association board is receiving the newsletter electronically, we will be happy to add one email address from your association to our email blast to receive newsletters, meeting reminders and other information electronically. The only qualifications are that your association is a South Coast member and that there isn't another board member already receiving the email. You may then distribute the email to your other board members.

SELECTED HOMEOWNER ASSOCIATION COURT CASES FROM 2011

By: Christopher E. Haskell, Esq., Price, Postel and Parma, LLP

Editor's Note: Mr. Haskell is a partner at Price Postel & Parma LLP, one of the oldest firms in the Western United States, tracing its Santa Barbara roots to 1852. Mr. Haskell's practice focuses on real estate and construction. He has represented numerous Homeowners Associations in the Santa Barbara Area. Mr. Haskell's firm is a South Coast member and contact information appears at the end of the newsletter.

JURY FINDS HOMEOWNERS ASSOCIATION'S RESTRICTIONS ON INSTALLATION OF SOLAR ENERGY SYSTEMS REASONABLE UNDER CALIFORNIA SOLAR RIGHTS ACT [*TESORO DEL VALLE MASTER HOMEOWNERS ASSOCIATION V. GRIFFIN* (SECOND DISTRICT COURT OF APPEALS, CASE NUMBER B222531, NOVEMBER 1, 2011)]

Installation of solar energy systems has become more and more popular in California as a result of increased energy costs, tax credits, and other public and private financial incentives. Under the California Solar Rights Act (CSRA), an Association can "reasonably regulate" the installation of such systems, but cannot: (1) completely preclude the installation of these systems; or (2) significantly increase the cost of their installation; or (3) significantly decrease their efficiency or specified performance; or (4) preclude the installation of an alternative system of comparable cost, efficiency, and energy conversation benefits (Civil Code section 714).

It was only a question of time before a dispute erupted, pitting a Homeowners Association, attempting to impose "reasonable restrictions" through its CC&Rs on the installation of a solar system, against an owner dead set on how and where his solar system should be installed.

The Tesoro Del Valle Master Homeowners Association required its homeowners to obtain the Architectural Control Committee's (ACC) approval before making any improvements to their lots, including the installation of solar energy systems. The ACC imposed certain architectural standards on solar system installations.

In 2007 the Griffins (Tesoro homeowners) submitted an application to install a solar energy system. When they submitted the application, the Griffins were told by the Association's

Manager that their application was unlikely to be approved because it failed to specify any of the requirements under the ACC's standards. Among other issues, the Griffins' application showed the installation of three dozen or so solar panels on a landscaped slope outside the Griffins' property perimeter wall. The ACC issued a letter formally denying the application. Undeterred, the Griffins argued the denial was "untimely" (one day late under the CC&Rs), and thus of no affect. The Griffins then announced to the Board their intent to proceed with the installation of their solar energy system. The Griffins proceeded with their installation full speed ahead, ignoring letters from the Association's counsel to stop and desist.

After the installation was complete, the Homeowners Association filed suit alleging breach of the CC&Rs. The Griffins responded with a cross-complaint alleging violations of the CSRA. The jury ultimately found in favor of the Association and the trial court subsequently denied the Griffins' motion for judgment notwithstanding the verdict.

The Court of Appeals for the Second District (our Court of Appeals) affirmed the jury verdict. The court reasoned that the CSRA did not prohibit homeowners associations from enforcing CC&Rs which imposed "reasonable restrictions" on the installation of solar energy systems, and the court was not going to second guess the jury's finding that the Association's restrictions were in fact "reasonable."

The lesson here is that care needs to be taken in drafting CC&Rs (or owner rules and regulations) which impose restrictions on solar energy system; they need to be objectively reasonable. Some of the issues that need to be considered in fashioning such restrictions are: drainage, landscaping, and aesthetic considerations.

ASSOCIATION NOT LIABLE FOR INJURIES SUSTAINED IN A FALL CAUSED BY A WALKWAY SEPARATION WHICH WAS LESS THAN AN INCH IN DEPTH (*CADAM V. SOMERSET GARDENS TOWNHOUSE HOA* (SECOND DISTRICT COURT OF APPEALS, CASE NUMBER B219261, OCTOBER 28, 2011))

Trip and fall cases have been with us for decades. Many of these cases involve the duty of public entities, and sometimes adjacent property owners, to maintain a public right of way (i.e., sidewalks) in a reasonable manner so as to avoid trip and fall incidents. Adjacent homeowners can be liable if their vegetation (i.e., tree roots) was deemed to be at least partially at fault for the accident.

The Cadam decision is helpful to homeowners' associations. The court ruled that, "as a matter of law," the Association could not be held responsible for a trip hazard which was less than an inch in height.

In 2006 Ms. Cadam leased a townhouse in the Somerset Gardens Townhouse Homeowners' Association, a housing development of 93 town homes. Her town home had a cement walkway extending from the driveway to the front door. As Ms. Cadam was walking on the walkway towards the garage she caught her right foot in a walkway separation, falling on her hands, shoulder, elbow, and knee. The difference in height between the two walkway segments which created the separation was between 3/4 and 7/8 of an inch. Ms. Cadam allegedly required six surgeries as a result of her injuries. She filed a lawsuit for premises liability and negligence against Somerset Gardens Association, and against the association's management firm.

Although the jury found in favor of Ms. Cadam, the trial court granted the defendants' motion for judgment notwithstanding the verdict, finding that the walkway separation that caused Ms. Cadam to fall was a "trivial defect." The Court of Appeals affirmed, concluding that a property owner was not liable for damages caused by a minor, trivial, or insignificant property defect. Further, public or private maintenance of walkways does not require maintenance to result in absolutely perfect conditions, and a property owner is not required to repair minor defects. Here, the parties had agreed that the walkway separation was 3/4 to 7/8 of an inch in depth. There was no protrusion from the separation and no other persons had fallen there. Further, the accident occurred on a sunny day and the view of the separation was not obstructed. Therefore, the Appellate Court, as a matter of law, ruled the defendants were not liable for Ms. Cadam's accident.

In the opinion of this author, this is a well reasoned decision which should provide some peace of mind to associations—and their insurance carriers. Hopefully, it will also preclude the filing of other similar types of actions against homeowners' associations where plaintiffs are often motivated to seek a deep pocket to recover some expenses.

COURT UPHOLDS ASSOCIATION RULING BANNING DISABLED CARS IN COMMON GARAGE

In *Sui v. Price* (2011) 196 Cal.App 4th 933, a court of appeal confirmed that a homeowners association may adopt a new rule prohibiting the storage of unsightly, disabled cars in parking spaces, even if the new rule impacted only one homeowner.

Sui owned a condominium unit governed by the Pacific Homeowners Association. As a homeowner, he had the exclusive use of a parking space. When the family van (a 1987 Mitsubishi van) broke down in 2003, Sui left the van in the space, where it never moved again. Three years later, the Association amended the parking rules to prohibit the parking of disabled, inoperative vehicles in a parking space. When Sui refused to move the dilapidated van, the Association had it towed. Not one to let the opportunity to file a lawsuit pass, Sui sued the Association for trespass, intentional infliction of emotional distress, and discrimination, among other claims. The focus of Sui's lawsuit was the section of the Association's CC&Rs, which provided that the Association rules would not "discriminate amongst owners". In a common sense ruling, the trial judge dismissed the entire complaint.

The court of appeals affirmed, holding that the new rule prohibiting the parking of disabled, inoperative vehicles was perfectly reasonable. As to Sui's claim of discrimination, the court ruled that whether or not the new rule was reasonable was to be determined by the objective facts relating to the common parking spaces and not by reference to the subjective facts relating to one homeowner. Accordingly, the fact that Sui was the only Association member who was storing a disabled car in his parking space, and was thus the only Association member impacted by the new rule, was legally irrelevant.

This is an important decision. Sui's discrimination claim was prefaced under the Equal Protection Clause of the U.S. Constitution. These types of claims often lead to protracted and expensive litigation between homeowners and associations. Often in these types of lawsuits even a reasonably objective rule can be challenged by evidence of a disparate impact on a minority group. This decision should give associations some peace of mind; associations now have a solid case in their favor when they proceed to adopt common sense rules which may

have a disparate impact on a small group of members, or perhaps even just one individual homeowner.

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