Volume 29, Number 4 December 2016

South Coast Homeowners Association

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IN THIS ISSUE

ANNUAL LAW AND LEGISLATIVE UPDATE

It is that time of year again we when start planning for one of our biggest events-the annual legal update with David Loewenthal and James Smith. We thank them both for volunteering their time and expertise to ease us all into the new (legal) year.

This year will see South Coast HOA in its 28th year of volunteering to educate, inform and inspire you volunteers and vendors that work so hard.

We are planning a special event at the Frog Bar and Grill starting at 6:30 pm on Tuesday, January 17, 2017 (405 N. Glen Annie Rd – Goleta) with a Welcome to you all, door prize giveaways and great food. The program will start promptly at 7:00 pm so as not to miss a thing!

Due to seating space, we are limited to up to **two** Board Members from each HOA that is a Member. There is no charge to attend, however, **reservations are necessary and please RSVP to Sandie only at sfoehl@msn.com or 805-968-3435** by January 5, 2017. A waiting list will also be kept in case we get cancellations. Please only use this email or phone number for your Reservations or questions. Thank you.

For professional vendors that would like to sponsor some of the food tables or soft drinks you can also contact Sandie and set this up. We are looking into a slider table, cheese and fruit and other finger foods. You will be named in the Program as well as the official Notice and at the tables. If you would like to purchase a table to display your information and meet and greet, the cost will be $175.00 each and we have 5 available. If you would like to donate door prizes, please also let us know. This information is needed on or about December 30, 2016.

Thank you all and we are looking forward to seeing you! Don't forget to use the listed email and phone number for your reservation and questions.

THE TOP THREE LEGAL ISSUES FACING CALIFORNIA HOA BOARDS

By: Beth A. Grimm, Attorney

There are many things that HOA Boards need to know about. From a legal standpoint 3 perplexing matters in particular stand out, and they were covered in the fall 2016 South Coast HOA meeting. Here is the summarized take on these big 3:

How did I pick these topics?

- Maintenance and Replacement Responsibility for Exclusive Use Common Area – because it is the most misunderstood.
- Rental Restrictions because they are the most controversial.
- Personal Liability of Board Members because with the Palm Villas II v. Parth, this is the scariest.

I learned a new term recently at the Cuesta College Writers Workshop - "INFOBESITY" What is it? TOO MUCH INFORMATION. I will try not to boggle your mind. We lawyers tend to be quite wordy and speak a language all our own. So, it's easy to put you on overload. I can be guilty of trying too hard in a short amount of time to get too much information on the table. And that does not help you. Even though these are complicated topics, I will try to keep it simple. If there is any question in your HOA ***about any of these,*** it's best to get legal advice. It will most likely save you money in the long run because there are legal ramifications if the wrong course is chosen. Don't get started down the wrong road. It's very hard to turn around!

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I. Exclusive Use Common Area.

What happens on January 1, 2017?
The law changes with regard to maintenance, replacement and repair of Exclusive Use Common Area (EUCA). The most important difference is identifying responsibility for EUCA by separate categories of (1) maintenance/repair and (2) replacement whereby there is no such distinction in current law.

Here is what the new law says. Check out the bolded language especially. It's important.

4775. MAINTENANCE RESPONSIBILITIES IN A CID/RELOCATION COSTS

(a)(1) Except as provided in paragraph (3)**, unless otherwise provided in the declaration of a common interest development,** the association is responsible for repairing, replacing, and maintaining the common area.

(2) **Unless otherwise provided in the declaration of a common interest development**, the owner of each separate interest is responsible for repairing, replacing, and maintaining that separate interest.

(3) **Unless otherwise provided in the declaration of a common interest development, the owner of each separate interest is responsible for maintaining the exclusive use**

common area appurtenant to that separate interest and the association is responsible for repairing and replacing the exclusive use common area.

Should your practices change on handling these things?

If your CC&Rs **are clear on maintenance, replacement and repair** of common area, exclusive use common area, and the separate interest (unit) obligations, then no, the HOA doesn't need to change anything (unless there is dissatisfaction of how responsibilities are allocated) because the CC&Rs control. Note that the CC&Rs are the Declaration referred to in the statute. Even if your CC&Rs are not clear, there is no reason to panic. The Board just needs to have knowledgeable legal counsel look at the CC&Rs, determine what is needed for clarification, and appropriately weave the law and the CC&Rs together to come up with a policy or recommended CC&R amendment. The key words are knowledgeable counsel. However, it is best to do it soon so that if you do need changes to the documents before the end of the year, there is a chance of accomplishing it.

I am sorry to say that a lay board can get into pretty deep quicksand trying to do this on their own. I don't like to push anyone toward spending legal fees – but perhaps an example of what I have seen happen will help you understand the concept of pay now, or pay more later on (possibly a lot more).

Here goes: a board in a condo association does what "common sense" tells it to do either without regard to the CC&Rs or because the CC&Rs are not clear. Since the windows are in the units, the board decides the owners should replace them, not the association. For a few years this works fine, and people generally comply except maybe for some owner who decides they want a style that is completely different than what all the other units have. So that owner installs something different. The board gets into a fight with the owner to try to get that owner to change out the windows and while that is going on, a brand new owner moves in who reads the CC&Rs and says the HOA is responsible for window replacement so he demands the Association pay. The HOA Board says no, the owner goes to an attorney, and the Board gets an attorney letter that says "Look right here, the CC&Rs say that the HOA is responsible for replacement of common area and windows are common area."

So now the board has to pay its attorney to (1) interpret the CC&Rs and (2) respond to the lawyer letter, and (3) to get the Board out of hot water with both owners and (4) to resolve issues it now anticipates with all other owners who paid for their own window replacements. And believe me Boards, if you respond to the attorney on your own you will encounter even more bumps and rocks and boulders on the wrong road.

The HOA lawyer who must be honest with the Board says

(1) The new owner and attorney are right – the HOA is responsible to replace the windows and
(2) The owner's lawyer letter needs to be answered, and
(3) He or she may not give up easily and demand attorney fees and
(4) By the way, the fight with the other owner is a losing battle because you did not follow the HOA architectural guidelines procedures and
(5) Boy, (I don't use the following words because that would be insulting but) does the Board have egg on its face now, not to mention the expenditure of legal fees for the work to clean all this up and get the HOA back on track.

Like I said, it's hard to turn around when you get started down the wrong road. It can be a bumpy ride back to square one. And of course, you still have to pay for good advice about a policy or amendment that is needed going forward (see below).

How could you have prevented all this?

Start out right – get good policies together for architectural review and control, and for maintenance, repair and replacement of all components in the HOA.

A Board may think it can analyze the law and "interpret" the CC&Rs for a policy, but beware. The courts have paid attention to one important question – what do your CC&Rs say? Do your CC&Rs define "exclusive use common area" – or not? It's important. The law does have a definition in it, but the law also defers to the CC&Rs. One thing boards often miss is that the CC&Rs, for example, say that owners are responsible to maintain the decks, meaning I believe in most cases things like sweep, keep clean, and possibly touch up paint that is damaged by things on the deck, replace a rail, or something like that. But elsewhere in the CC&Rs there is language that says the HOA repairs and replaces all common area without excepting decks. The Board focused on the word "maintain" that tries to hold the owners responsible to repair deck flooring, joists, railings or the like, and might get into a fight that requires lawyer involvement.

Wouldn't it be a lot easier if the HOA had a policy that was justified by authority in the CC&Rs and the law that says who exactly is responsible for the sweeping and cleaning of the decks, the replacement of floor boards, railings, caps, joists, etc? I could go on. And would it not be easier to have in that policy that owners will be responsible for damage if they do or put anything on the deck (like floor covering) that causes damage? It's hard to justify large legal fee expenditures to clean up a mistake.

What if you have done things "wrong" in the past?

Get help in coming up with a plan – for example – some deck repairs should have been owner responsibility or should have been HOA responsibility. and you find out after some repairs have been made already that the docs say otherwise. Do you give refunds? Do you fix all decks? You need a plan! A good lawyer can help with that. Sometimes it requires special wording or grandfathering in an amendment to make everybody equal.

For more on this topic see the July 2016 E-newsletter on my website at *www.californiacondoguru.com*. The E-News is called "Exclusive Use Common Area Responsibility- Clarify Things Now, or Fight Later."'

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II. Rental Restrictions

Does it make sense to consider a lease limitation - or rental cap? It Depends (a typical lawyer answer, right?).

Considerations: The effect may not be immediate as in today's law, all owners (etc.) are grandfathered or exempt from a new prohibition on leasing that is approved by members. This is not really much of a change if, since as was the case for many HOAs before the law, they needed to grandfather all owners simply to get a limitation passed.

Why have one? It is the only conceivable way to limit the number of units that can be rented.

Why limit rentals? Large numbers of rentals can mean extra problems and large percentages of rentals can adversely affect financing as well as insurance options by decreasing the pool of owner-occupied units. Many lenders and some insurance companies make decisions based on the number of owner-occupied homes in the development and when it is under 50%, one can talk to any manager or board dealing with that situation and find out that management spends more time dealing with absentee owners than resident owners and faces, as a rule, more problems with rental units.

Why not have one? In an honest answer they are controversial. The general consensus out "in the world" is an assumption they are not legal. This misperception causes a lot of misunderstanding. So the restrictions can lead to legal battles and expenses; and they may require extra bookkeeping and priority lists. They also deter investors so the potential purchase pool is affected.

What are things that make them less controversial? Less subjectivity in the language; consistent and responsible enforcement; making sure proper legal disclosure is made to new buyers; full education of members in the voting process.; striving for widespread acceptance and understanding of membership.

Why is allowing for hardships important? Because the cases across the US that came before the law emphasized the necessity of providing for things like active military duty and temporary job transfers. The legislators who supported the law expressed great concern that the provisions were being enforced against veterans.

How do you enforce them? The same way you enforce any restrictions: warnings, hearings, disciplinary action utilizing authority that appears in your CC&Rs for any violation, usually found under the caption "Enforcement Rights" or something like that.

How do you know what is in your CC&Rs? Read them**.**

How do you add teeth to the CC&Rs when there is none? Propose an amendment to the members. Explain why and what benefit will accrue. "Sell it." Meaning explain it well. Give the owners sufficient information to understand the importance of such an amendment.

For much more on the pros and cons and information that you can provide to board members and to owners, see the Article called "Lease Limitation Restrictions – Are they Legal?" on the main page of my website *www.californiacondoguru.com*.

The most important questions for the board in determining whether to propose such an amendment is: "How much fear do you have of getting up over 50% rentals? Have owners been turned down for financing because of a high percentage of rentals? Do you already have a high percentage of rentals and are you having more trouble with these than resident properties?

Short term rentals, AirBnB-type, Issues, What can be said about these?

They have resulted in divided communities. Some owners want the rental income, some want the more residential quality of longer term rentals, some want to limit rentals. Boards need to read the CC&Rs checking for rental rights, obligations and restrictions if any, before trying to

enforce anything about rentals. If the Board wants to initiate a minimum rental period via adoption of rules (which does not require owner approval, rather than posing a CC&R amendment (which does require owner approval), beware of doing that. Get legal advice. Besides the governing CC&Rs, there is law on the topic in the form of appeals court decisions regarding imposition of rental term restrictions, imposing fees that non-landlord owners do not have to pay, adopting rules that are different for vacation rental owners, etc. Questions are: Is it a commercial enterprise prohibited by commercial restrictions? Is a permit from the California Coastal Commission required in coastal communities (note the commission opposes prohibiting vacation rentals but so far generally has not gotten involved in any HOA cases)? Do you have a local municipal or county ordinance that comes into play? Again, if you are in an HOA that is grappling with these issues, whether you are an owner or on the Board, you need legal advice.

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III. Director Liability After Palm Springs Villas II

What is this case really about?

A director's actions might be scrutinized by a court now, whereas before this case was filed and decided in the 4th district appellate court in California, most believed there was very limited potential for scrutiny as to how a board reached a decision or for individual liability because of the Business Judgment Rule and other factors. And in this case, the actions of an individual director are what is in question. The HOA sued a Board member seeking responsibility for losses related to some bad contractual decisions, claiming she was acting on her own.

The reason is that the Business Judgement Rule (BJR) has for the most part prevented the trial courts from examining the actions of the Board members if it is believed they were acting in good faith and in their capacity as board members. Only arbitrary and capricious behavior would have led to closer scrutiny before this case. Now negligence might be a factor. One cannot tell for sure because there has not yet been a trial on the merits relating to the director's actions. There has only been an attempt in this case to stop a legal action against an individual board member (by her lawyers) from going forward through the filing of a motion for summary judgment (asking for summary judgment to dismiss the case). A request for California Supreme Court review of the appeals court decision is currently on the table, holding the presses on the whole case for now.

The importance of knowing your HOA documents.

The BJR which applies to incorporated and unincorporated associations being challenged has its limits. And a board of directors acting on behalf of an incorporated HOA are subject to claims of "Ultra Vires" as a corporate officer. This means they can be held responsible for losses the HOA incurs if they act without authority (as in act without authority in the governing documents or authority of the board). And to determine if their actions were not authorized, one has to step overcome the Business Judgment Rule in order to hear the evidence.

A case called **Lamden vs. La Jolla Clubdominium** is the important case in California that stands for the proposition that if the Board acts in good faith and within the authority of the docs and within their capacity as directors, the court will not examine their actions because of the Business Judgment Rule. But **Lamden** also seems (to me) to require board involvement

in a plan or procedure that makes sense, not a director purportedly acting alone in making big decisions and ignoring document restrictions on things like signing for loans and signing big contracts like what has happened in Palm Villas II.

May Board Members who sit by and watch a bully strong-arm the board be liable?

It seems to me that this case could conceivably eventually be applied to address things like apathetic directors, directors who are too intimidated to speak up, or directors that disagree with a majority decision and act out in a way that causes harm to the HOA or the members.

Can the Other Board Members Exclude a Director from Board Meetings?

Conceivably, yes, if the director is disrupting meetings, causing problems, threatening the board, disclosing confidential information of the board to others, or threatening to sue? But legal counsel should be consulted first. There may be restrictions on this, or hearing requirements, or other things to consider. Get legal advice if this is a problem.

Should a Director Resign if He or She Becomes Concerned?

All I can say is that if the director resigns he or she will lose all power, all information, all opportunity for meaningful input on the board, and the right to attend executive sessions, and the right to vote on all board actions. You will lose all influence over any directors who are sitting on the fence and may come over to your side with some rational responses. If the information stream is cut off it is much harder to identify or get others to object to poor decisions by the Board. If you want to resign, it is bests to get legal advice to help determine when and in what way is the best time and process.

What is status of Palm Springs Villas II case?

It is in limbo right now because of the request for Supreme Court Review. We will stay tuned.

For more information see the September 2016 E-Newsletter in the archives on my website at *www.californiacondoguru.com*.

You may contact Beth Grimm through her website or by emailing her at califcondoguru@aol.com. She has been practicing law in this area for 30 years, and coming to Goleta for about 20 years doing a program each year on the hottest topics. She is a prolific author and has the website, two blogs, and a free E-newsletter that provides HOAs and homeowners in them solid nuts and bolts and legal information and her take on the issues, that cannot be found anywhere else.

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We have ordered the 2017 Condominium Bluebooks which is included in your 2017 dues renewal. If you have not yet renewed, please do so today. We expect to receive the books in late December .

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