

# SOUTH COAST HOMEOWNERS ASSOCIATION

P. O. BOX 1052, GOLETA, CALIFORNIA 93116  
(805) 964-7806  
gartzke@silcom.com

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Michael J. Gartzke, CPA, Editor

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### Upcoming Law Update Meetings

**Santa Maria – Monday – February 25** – at 7 PM at the Quail Meadows West Association Clubhouse – 866 Whippoorwill (off Santa Maria Way near 101). Karen Mehl, attorney at law who practices in Santa Maria will provide our annual update. This is an opportunity not only to hear about new and pending changes in the law but also generally discuss legal matters of interest to those in attendance. There is no charge to attend.

**Goleta – Thursday – February 7** – at 7 PM at the Holiday Inn-Goleta, 5650 Calle Real (between Patterson and Fairview Avenues). As detailed in our January newsletter, we will have a panel of 4 attorneys – James Smith, David Loewenthal, Jennifer Tice and Karen Mehl. Each will speak to a different association legal issue followed by a moderated question-and-answer session. Again, there is no charge to attend.

### 2002 Bluebooks Published – In Stock

The 2002 Condominium Bluebooks have now arrived. For those members who renewed your membership by January 18th, your books have been mailed. Other members will receive their books upon receipt of the annual dues. We have some extra copies for \$15 each, postpaid. Some associations will order extra copies for all board members, etc. This is a most valuable resource and we have made the Bluebook a part of your membership since 1994.

**PLEASE FEEL FREE TO MAKE COPIES FOR YOUR BOARD MEMBERS  
SHARE THIS NEWSLETTER WITH YOUR ENTIRE BOARD OF DIRECTORS**

## Are Your Minutes Adequate?

by James O. Devereaux, Esq.

**EDITOR’S NOTE:** Keeping adequate minutes of association proceedings is a subject of enduring interest for boards of directors and community association managers and a question that I hear quite often. Mr. Devereaux is partner in the law firm of Berding & Weil with offices in Alamo, San Francisco and Sacramento. Phone – 800-838-2090 – web site [www.berding-weil.com](http://www.berding-weil.com). Thank you to him and the firm for permission to reproduce this article for South Coast members.

Quite often the importance, and the proper role, of minutes are not fully appreciated by directors and officers of associations and corporations which manage common interest developments. If properly drafted, minutes, particularly minutes of board of directors meetings, can play a very important role in advancing the interests of the community and in protecting officers and directors, as well as the association or corporation itself. On the other hand, if minutes are not prepared with proper care, serious consequences can result. This article will highlight the legal requirements applicable to the preparation and maintaining of minutes, discuss their purpose, and suggest some ideas about what should go into a proper set of minutes.

### Formal Requirements

All common interest developments (“CIDs”) in California are governed by the Davis-Stirling Common Interest Development Act (*Civil Code* Sections 1350 through 1376)<sup>1</sup> and the *California Corporations Code*.<sup>2</sup> The great majority of community associations, and some cooperative housing corporations in California, are nonprofit corporations governed by the provisions of the Nonprofit Mutual Benefit Corporation Law. Many stock cooperative apartment buildings are operated by regular “for profit” corporations governed by the General Corporation Law. Both the General Corporation Law and the Nonprofit Mutual Benefit Corporation Law **require** that each such corporation shall keep, among other books and records, minutes of the proceedings of its members or shareholders, board, and committees of the board.” A “committee of the board” is not the same thing as a committee of community members appointed by the board. A committee of the board is a committee established by the board which is composed solely of board members. Other committees which are appointed by the board, but which include residents who are not board members, are not “committees of the board” for whose meetings minutes are required by law. In addition to committees of the board, any other board-appointed committees, which are vested with discretionary authority, such as an architectural committee, should maintain minutes of all of

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<sup>1</sup> The Act defines “common interest development” as including a community apartment project, a condominium project, a planned development and a stock cooperative.

<sup>2</sup> Although an unincorporated association may not be subject to every provision of the *Corporations Code*, the Act (*Civil Code* § 1363) provides that, unless the governing documents provide otherwise and regardless of whether the association is incorporated or unincorporated, an association may exercise the powers granted to a nonprofit mutual benefit corporation, with certain specified exceptions.

its meetings. Some association governing documents may require minutes to be kept for other proceedings, such as meetings of particular committees, which are not committees of the board. Such specific governing document requirements should always be adhered to.

While other books and records may be kept either in written form, or in some other form capable of being converted into written form, the *Corporations Code* provides that “Minutes shall be kept in **written** form.” (emphasis added.) Thus, while an audio tape recording of a board meeting can be a useful tool to assist the secretary in preparing written minutes of the meeting, the recording cannot itself be treated as the official minutes of the meeting because it is not in written form.

Under the *Corporations Code* (both the General Corporation Law and the Mutual Benefit Corporation Law), the accounting books and records of an association, or a corporation, and written minutes of association proceedings, must be open to inspection by any shareholder or member at any reasonable time for a purpose reasonably related to such person’s interests as a member, or shareholder. Further, the Common Interest Development Open Meeting Act

(*Civil Code* Section 1363.05) which governs all common interest developments in California establishes that members<sup>3</sup> have an unrestricted right to obtain copies of the minutes, or a summary thereof, of all board meetings other than executive sessions, upon request by the member and upon the requesting member’s reimbursement of the corporation’s copying costs. Minutes, or drafts of minutes yet to be approved, or a summary of such minutes, must be made available to members within thirty (30) days of each meeting. Under the Open Meeting Act, the board also has a legal obligation to notify all members of this right, and how to exercise it, either when the board distributes the corporation’s annual budget, or in some other general mailing, to the entire membership.

Therefore, in order to ensure that the association or corporation will be in compliance with both the *Corporations Code* and *Civil Code* requirements which mandate accessibility of minutes to members and shareholders, the board should make certain that written minutes of all appropriate proceedings be prepared, at least in draft form, within thirty days after the conclusion of the proceedings and that the minutes be kept as part of the official records it maintains.

The existing bylaws, and rules relating to the books and records, may be inconsistent with the statutes just discussed and will probably pre-date the newer *Civil Code* provision establishing the member and shareholder rights to obtain minutes upon request. Each board should carefully compare its bylaws and rules with these laws, looking for any possible inconsistencies and being always mindful of newly-enacted legislation. As long as bylaw and rule provisions are not inconsistent with the above statutory provisions, they are valid.

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<sup>3</sup> Under the Davis-Stirling Act, reference to a “member” is, practically speaking, a reference to a shareholder of a stock cooperative which is a common interest development and, although the statute does not explicitly say so, provisions which apply to an “association” can be deemed to apply as well to a corporation which governs a stock cooperative apartment building which qualifies as a common interest development under the terms of the Act.

### **Responsibility for Preparation of Minutes**

The board of directors should designate a particular person as having the responsibility for acting as “recording secretary” (1) at board meetings, (2) at meetings of members or shareholders, and (3) other meetings, and for preparing minutes of all proceedings required by law to be maintained. Typically, bylaws will designate the corporate secretary as the person with primary responsibility for “keeping” minutes of the association’s proceeding. However, there is no reason why the responsibility for preparing the minutes cannot be delegated to someone else, such as the manager, if there is a manager, or some other appropriate person, even though the secretary has ultimate responsibility for keeping or maintaining the minutes.

Whoever is appointed to serve as recording secretary, should be a person who has the time to do so on a regular basis, who is willing to make a commitment of the time necessary to prepare an adequate set of minutes for each meeting in a prompt manner and within the time frame set by law.

### **Approval of Minutes**

Minutes of a meeting of any group (i.e., a meeting of the board, of members, of shareholders or of a committee) should be approved by that particular group at its next meeting. For example, minutes of a board meeting should be approved by the board at its next meeting and minutes of a meeting of members or shareholders should be approved by the members or shareholders at their next meeting.

Although the *Civil Code* requires that, if requested, minutes be made available within thirty days of a board meeting, in most circumstances such minutes will not have been formally approved within that time span. The board will typically approve the minutes of one meeting at the meeting which follows, but boards generally meet no more often than monthly. In order to ensure that the statutory requirements are met, and to avoid any later confusion which the difference between approved and unapproved versions may create, minutes which have yet to be formally approved should be clearly marked “Draft.” This will prevent any later dispute as to which document might constitute the true record of a meeting.

### **Purpose of Minutes**

Minutes constitute the permanent, official, record of the association’s or corporation’s proceedings. They establish a written record that may be referred to in the future to determine what transpired at a particular meeting, the nature of action taken at the meeting, the circumstances under which that action was taken and the basis for the action. Thus, even apart from the statutory requirements, minutes should be prepared promptly after a meeting is held before notes get old and stale and before memories have faded.

Because they constitute part of the permanent records of an organization, minutes should be prepared on good quality paper, possibly with a reinforced left margin, so as to prevent their being damaged, or lost, with the passage of time.

## Executive Sessions

Usually, minutes of executive sessions of the board should not be prepared. Matters discussed in executive session, such as litigation in which the association, or corporation, is or may become involved, and member disciplinary hearings, are sensitive and the purpose of the board's convening in executive session is to preserve confidentiality. Minutes reflecting a board's discussion of sensitive issues relating to litigation should not be maintained because there is a serious risk that any minutes, which do exist, may be the subject of a "discovery" request by the opposing parties in a lawsuit, and the board could be required by a court to make any such writing available to the adversaries.

One limited exception to the precept that minutes of executive sessions should not be kept is in the case of a disciplinary hearing held in executive session. The Open Meeting Act states that one of the purposes for which a board may convene in executive session is to consider discipline for violation of the governing documents, including the rules. It also provides that the board "shall meet in executive session, if requested by a member who may be subject to a fine, penalty or other form of discipline." Whenever a board conducts a hearing relating to an alleged violation of the governing documents, which may result in a finding of a violation and imposition of a fine or other disciplinary sanction, the board should make a record of the hearing so that, if the matter should come before an arbitrator or a judge, evidence can be presented that the board accorded the member or shareholder all necessary due process, made appropriate findings supported by the facts presented to it and otherwise acted in a fair and reasonable manner. Written minutes should be limited to the hearing relating to the disciplinary matter and, to protect the privacy rights of the affected person, those minutes should be segregated from minutes of regular board meetings, and should not be made available to any members or shareholders, other than the person who was the subject of the hearing.

## Importance of Minutes

Under California law, the original minutes, or a certified copy of the minutes constitute *prima facie* evidence of the holding of the particular meeting and the matters stated in the minutes. The fact that minutes constitute *evidence* of what occurred at a meeting means that, in litigation to which the corporation is a party, the minutes may be subject to "discovery," the process by which one party to a lawsuit may be required to supply documentary, or verbal information, to the other party, and the minutes may also be admissible as evidence at trial for certain purposes.

Also, as mentioned above, a meeting or executive session of the board, may serve as a hearing at which the board considers a claim that a member has violated some provision of the governing documents and may consider imposition of sanctions. In such circumstances, minutes of the hearing constitute the record of the hearing. In the event the board is required to initiate an enforcement action against a member or shareholder or, conversely, in the event a shareholder or member should file a suit against the corporation challenging the board's determination, and action, relating to the alleged violation, the court may review the minutes of the hearing to determine if due process was accorded, and whether the board's determination was reasonable. In the absence of minutes which show that the board provided due process to the person involved, and took disciplinary action based upon

appropriate findings, a court might well refuse to uphold the board's actions and might award some form of redress to the member or shareholder.

Moreover, if properly prepared, minutes of a board meeting may constitute important evidence to show that the board of directors acted prudently, and in good faith, in a manner the directors believed to be in the best interests of the corporation, and that they appropriately sought and relied upon the information, opinions or reports presented by others, all in accordance with the prudent business judgment rule set forth in the *Corporations Code*, to which directors are subject.

In addition, certified copies of minutes are frequently required in connection with transactions of the association or corporation. For example, if the association or corporation enters into a written contract with a third party, the other contracting party will frequently require that the board provide a certified copy of minutes of a directors meeting, or of a board resolution, showing that the board has duly authorized the president to execute the written agreement.

### **Content of Minutes**

In view of the foregoing purposes which minutes can serve, substantial care should be taken in the preparation of minutes to be sure that they are both **accurate** and **adequate**. Minutes should document that the meeting was properly, and duly, called and held, including proper notice of board meetings, as required by law, to all directors and to all members and shareholders and, in the case of membership or shareholder meetings, proper notice to all members, or shareholders, pursuant to the bylaw provisions and as required by law. If the meeting was called by means of a written notice, a copy of the notice should be attached to the minutes along with a certificate of the secretary stating when, and how, the notice was transmitted to the directors, members, shareholders or committee members, as the case may be.

If a meeting of directors is held pursuant to a waiver of notice or a consent to the holding of the meeting without notice, the waivers and/or consents signed by the directors should be attached to the minutes. Likewise, if a director is absent from a particular meeting but thereafter approves the minutes of the meeting, that director's signed certificate approving the minutes should be attached to the minutes. Should circumstances which could not have been reasonably foreseen require immediate attention, and possible action by the board, and such circumstances of necessity make it impracticable to provide the required notice to members or shareholders, thus necessitating an "emergency meeting" as provided by the Open Meeting Act, the minutes should describe the circumstances that precipitated the emergency meeting.

Each set of minutes should document that the required quorum was attained by setting forth the names of the directors, or committee members, in attendance or, in the case of a meeting of the members or shareholders, the number of memberships, or shares, represented at the meeting. The minutes should set forth the date, time, and location where the meeting was held.

The minutes should describe the matters considered at the meeting and the action taken. Minutes are not required to be a **verbatim** record, like a stenographer's transcript of a court

proceeding, and generally such a verbatim record is not recommended. Minutes should set forth in **concise, narrative form** with reasonably adequate detail the subjects which were considered, and discussed, and the action that was taken, so that an objective determination can be made by someone reading those minutes in the future as to what was, and what was not, authorized and/or decided. The factual details set forth in the minutes should contain sufficient information to allow anyone reading them to establish the basis for the decisions made, and actions taken, such as the surrounding circumstances and facts considered, that led to the action or decision.

Minutes should set forth any motions that were considered and any resolutions adopted. It is usually not necessary to identify the particular individuals who make, or second, a motion but, if the vote on a particular motion is divided, it is good practice to identify those who voted for, those who voted against, and those who abstained. Also, if a person opposing a particular matter requests that his, or her, opposition be reflected in the minutes, the minutes should record that opposition.

If written reports are presented to, and considered at, a meeting, it is sufficient for the minutes to simply state that the report was submitted, reviewed, discussed and accepted, as the case may be, with a copy of the report attached to the minutes as an exhibit (e.g., Exhibit "A"). This will avoid having to "clutter" the minutes with great detail regarding the content of such reports.

However, in the case of resolutions adopted at the meeting, it is very important that care be taken to set forth the exact language of the resolution, word for word. For that reason, care should be taken in phrasing a resolution prior to its being voted upon, and the recording secretary should take the time to write down the exact language of the resolution, so that it can be included **verbatim** in the minutes. The person recording the minutes should not hesitate to stop the proceedings, as necessary, to ensure that his, or her, notes are complete and correct, and to be sure that the exact language of resolutions is set forth accurately. After minutes have been approved, they should be signed by the secretary, or other authorized person, and the date of their approval should be noted.

### **Liability for Falsification of Minutes**

Corporate minutes are treated as a very serious matter under California law, which includes a strong policy of promoting accuracy in minutes. The *Corporations Code* provides that any officer, director, employee, or agent of a corporation may be held liable for any damages suffered by the corporation, or others, who relied thereon if he or she makes, issues, delivers, or publishes any report, certificate, financial statement, or other document respecting the corporation, or its business or accounts, which is knowingly false in any material respect, or participates therein, or knowingly makes, or causes to be made, any materially false entry in the corporation's books, **minutes**, records, or accounts, or who alters any entry in the corporation's books, or records, with intent to deceive.

### **Conclusion**

As can be seen, the preparation and maintaining of minutes is a very serious, and important, responsibility. The board of directors should appoint an appropriate responsible person to

prepare minutes that are accurate and which adequately chronicle what occurred at a meeting in sufficient detail to show what action was taken and the basis for taking that action. When prepared by the recording secretary, minutes should be reviewed by the board, members or shareholders, or committee members, as the case may be (usually at the next meeting of that group), any appropriate corrections should be made and the corrected minutes should be formally approved. Particularly with regard to minutes which relate to a disciplinary hearing, but indeed for all matters, the importance of careful preparation, review and approval of the minutes of meetings cannot be too highly stressed.

## **SOUTH COAST NEWSLETTER SPONSORS**

### **ACCOUNTANTS**

#### **Cagianut and Company**

Gayle Cagianut, CPA  
P. O. Box 1047  
Oak View, CA 93022  
805-649-4630

#### **Michael J. Gartzke, CPA**

5669 Calle Real  
Goleta, CA 93117  
805-964-7806

#### **Denise Leblanc, CPA**

P. O. Box 2040  
Santa Maria, CA 93454  
805-934-6669

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5827 Hollister Avenue  
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Diane Doria, CMCA, AMS, CCAM  
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Westlake Village, CA 91361  
888-539-9616

### **ATTORNEYS**

#### **Schimmel, Hillshafer & Loewenthal**

David Loewenthal  
827 State Street #25  
Santa Barbara, CA 93101  
805-564-2068

#### **Karen A. Mehl, Attorney at Law**

1110 E. Clark Av. #230  
Santa Maria, CA 93454  
805-934-9624

#### **Allen & Kimbell**

Steve McGuire  
317 E. Carrillo #100  
Santa Barbara, CA 93101  
805-963-8611

### **LANDSCAPE MANAGEMENT**

#### **Kitson Landscape Management**

Brent Kitson  
5787 Thornwood  
Goleta, CA 93117  
805-681-7010

### **ASSOCIATION MANAGEMENT**

#### **Sandra G. Foehl, CCAM**

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

#### **Town'n Country Property Management**

Connie Burns  
5669 Calle Real  
Goleta, CA 93117  
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