



## South Coast Homeowners Association

P.O. Box 1052  
Goleta, CA 93116  
805.964.7806

[www.southcoasthoa.org](http://www.southcoasthoa.org)  
gartzke@silcom.com

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## HOA BOARD DUTIES AND ISSUE PREVENTION

### WHAT CAN A BOARD DO TO MINIMIZE THE CHANCE OF THE ABOVE PROBLEMS HAPPEN OR PREVENT TOTAL DISASTER WHEN THEY DO?

**AND:** What can individual directors do if the BOARD is not doing what it should do and the Director wants to avoid individual liability if there is fallout? All these things are important especially in light of changes in the law regarding HOAs and discrimination prevention AND the case of Palm Villas II v. Parth that bursts the bubble of reliance on the business judgment rule defense.

### A BIG QUESTION: HOW FAR DOES THE BOARD DUTY EXTEND?

- To resolve disputes between neighbors?
- To stop discrimination?
- To enforce CC&R restrictions?
- To act unilaterally with a board asleep at the wheel?
- To make interior repairs from water intrusion? (From roof leaks, drainage, leaky windows, etc.)?
- To deal with decks, siding, or roofs that have fallen into disrepair? When is the HOA responsible? When is the owner responsible?
- To replace expensive upgrades like hardwood floors when dealing with slab leaks that are the HOA responsibility?
- To install or allow an owner to install an electric car charger?
- To make owners get approval for changes that require it?
- Or to remove what they have installed and restore the area?

### SOLUTIONS: WHAT CAN A BOARD DO TO MINIMIZE THE CHANCE OF THE ABOVE PROBLEMS HAPPEN OR PREVENT TOTAL DISASTER WHEN THEY DO?

**AND:** What can individual directors do if the BOARD is not doing what it should do and the Director wants to avoid individual liability if there is fallout? Especially in light of the Palm Villas II decision. Is it wise to sit on your thumbs and watch it happen? Is it better to resign?

These are all questions boards and individual owners are asking. See you on the 24<sup>th</sup>!

**DATE – Saturday, June 24**

**TIME – 10:00 AM (morning refreshments at 9:45)**

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

**SPEAKER – Beth A. Grimm, Attorney – Beth is a frequent contributor to our programs and newsletters**

## NEW LEGISLATION

James H. Smith, Grokenberger and Smith – Santa Barbara

### **New Disclosure, Unit Owner Information**

*SB 918; Civil Code section 4041*

**A.** Annually, Unit Owners must provide the following information to their Homeowners Association:

1. Address which notices from the Association are to be delivered;
2. Secondary address, if any, to which notices from the Association are to be delivered;
3. Name and address of Owner's legal representative, if any, including any person with Power of Attorney who can be contacted in the event of the Owner's unavailability; and
4. Whether their Unit is owner-occupied, rented or vacant.

**B.** Each year an Association must solicit the above information from each Owner not less than 30 days prior to the distribution of the Annual Budget Report.

**C.** If an Owner fails to provide the requested information, the address of the Owner's Unit shall be deemed the address to which notices are to be delivered.

**D.** A copy of the *Owner Contact Information* form, which can be used to solicit the required information, is attached.

### **Annual Budget Report Must Now Include FHA & VA Certification Disclosures**

*AB 596; Civil Code section 5300 (b) (10) & (11)*

**A.** Effective July 1, 2016, the *Annual Budget Report* must also include a statement, in the form prescribed by Section 5300, indicating whether the Association is or is not certified by the *Federal Housing Administration*.

**B.** Effective July 1, 2016, the *Annual Budget Report* must also include a statement, in the form prescribed by Section 5300, indicating whether the Association is or is not certified by the *Department of Veteran Affairs*.

## OWNER CONTACT INFORMATION

California Civil Code section 4041 requires that each Homeowners Association, not less than 30 days prior to making the annual disclosure required under California Civil Code section 5300, solicit from each Owner of a Unit in the Development the following information:

1. Please state the address of your Unit: \_\_\_\_\_  
\_\_\_\_\_
2. Please state the full and complete name of the owner of the above noted Unit:  
\_\_\_\_\_
3. Please state the address or addresses to which notices from the Association are to be delivered:  
\_\_\_\_\_  
\_\_\_\_\_
4. Please state the secondary address, if any, to which notices from the Association are to be delivered: \_\_\_\_\_  
\_\_\_\_\_
5. Please state the name and address of your legal representative, if any, including any person with power of attorney or other person who can be contacted in the event of your extended absence from your Unit: \_\_\_\_\_  
\_\_\_\_\_
6. Please note whether the Unit is owner occupied, rented or vacant: \_\_\_\_\_
7. Please provide your phone number and email address: \_\_\_\_\_

After you have filled out the above information, please return this form to:

\_\_\_\_\_

\_\_\_\_\_

Please Note: (1) If you fail to provide the information requested in paragraphs 1 and 2 above to the Association, the address of your Unit will be the address to which notices from the Association will be delivered. (2) Please fill out one form for each Unit you own.

### "Caution"

**This form is provided as a courtesy by James H Smith, Esq. of the law firm of Grokenberger and Smith. Telephone: (805) 965-7746. Email: [jhs@grokenberger.com](mailto:jhs@grokenberger.com). Your Association's Governing Documents and/or changes in the law may require this form to be modified.**

## A REVIEW OF 2016 CALIFORNIA COURT DECISIONS AFFECTING COMMUNITY AND HOMEOWNER'S ASSOCIATIONS

By: Robert D. Hillshafer  
David A. Loewenthal  
Barbara A. Higgins

Loewenthal, Hillshafer and Rosen, Sherman Oaks

### 1. ***Nellie Gail Ranch Owners Association v. McMullin*** 2016 S.O.S. 5455\* (A Quiet Title and Equitable Easement Case in favor of the Association)

**Significance:** This case is a victory for HOAs seeking to regain control over their common area encroached upon by homeowners as it clarifies the application of the legal doctrine of adverse possession and prescriptive easements to common areas.

**Brief Facts:** Plaintiff Nellie Gail HOA sued the McMullins, (Defendants), for quiet title and to compel the McMullins to remove a retaining wall and other improvements they built without HOA approval on more than 6000 square feet of common area that the HOA owned adjacent to the McMullins' property. After a bench trial, the trial court entered judgment for the HOA and awarded them their attorneys' fees. The McMullins appealed, claiming the trial court should have awarded them quiet title, or at least should have granted them an equitable easement over the disputed property based on communications from the Association.

**Disposition:** The Court of Appeal affirmed the trial court's judgment in favor of the HOA.

**Key Findings:** The Court noted that the essential elements for equitable estoppel were lacking in the evidence.

Defendants based their equitable estoppel claim on the two written communications they received from the HOA Board of Directors telling them they had decided not to pursue the unauthorized construction of the retaining wall and related improvements as a CC&Rs violation, but instead instructed them to work with the Nellie Gail's architect to develop a landscaping plan to screen the wall from view. In reliance, thereon, the McMullins assert they spent \$20,000 on a landscaping plan for the area around the retaining wall.

The Court was not sympathetic, finding that the McMullins could not have justifiably relied on the written communications from the Board of Directors since the communications occurred well after the McMullins spent \$150,000 to construct the wall and improvements, and that amount did not include landscape screening, irrigation, and drainage around the wall. Moreover, the Court concluded that the HOA did not know all the essential facts regarding the extent of the encroachment when it voted not to pursue the wall as a CC&Rs violation

and approved the plans to screen the wall in an effort to reach an amicable solution. The Court also found that the McMullins were not ignorant of the facts because they concealed their rear property line's location from the HOA and knowingly started construction without written approval from the HOA.

(2) The Court of Appeal also disagreed that the McMullins acquired any interest in the disputed property by Adverse Possession ("AP"). The Court concluded that the Defendants did not meet their burden of proving that they either paid taxes on the property at issue, or that no taxes were levied or assessed. Instead, they argued the common area had no value, so there was no taxation. Payment of taxes over a five-year period (or a showing that no taxes were levied or owed) is one required element for AP. It was noted that common areas like the one at issue do have value and the property taxes for it are levied and paid by the individual homeowners of an association.

(3) The trial court's grant of an injunction against the McMullin's encroachment (requiring them to remove the visible portions of the retaining wall and restoring the surrounding area) was confirmed on appeal as not being an abuse of discretion. To do otherwise, would have resulted in an equitable easement for which three factors had to be present. First, the defendant must be innocent, meaning the encroachment must not be willful or negligent. In this case, the Court of Appeal did not even have to consider the second and third factors involving injury and hardship to the parties, because the McMullins were found to be not innocent in constructing the wall on HOA property, and intentionally did not identify their rear property line even though they were asked to supply that information in their applications, and they knew that their previous plans for the retaining wall had been rejected in writing before they constructed it.

**2. Palm Springs Villas II Homeowners Association, Inc. v. Parth (2016) 248 Cal.App.4<sup>th</sup> 268**  
**(A Board of Director's Breach of Fiduciary Duty and CCRs Summary Judgment Case – important test for the Business Judgment Rule)**

**Significance:** This case is important because it tells us there is no *automatic* immunity, presumption of innocence, or deference granted whenever an officer or member of a Board of Directors acts or believes he or she is acting in good faith, but is actually mistaken in the actions taken, or decisions made because the officer or Board member did not properly investigate or follow the rules in the Association's governing documents. *In addition* to acting in good faith, the individual must exercise "reasonable diligence" by following the governing documents, including CC&Rs and By-Laws, (especially with regard to member or voting approval, and the subject matter at issue), and investigating contractors, and any other contractual (or other) issues before binding the Association. This decision could have significant impact on defenses asserted by members of a Board, as well as on Association D & O insurance issues since the Business Judgment Rule is a prime avenue of defense.

**Brief Facts:** A condominium homeowners' association sued an individual, 87-year-old former Board Member and President of the Board ("Defendant") for breach of fiduciary duty and breach of the Association's governing documents. At the request of the Association's property management company, the Defendant, who was President at the time, went to the management office and signed multiple construction contracts allegedly without investigation of contractor licenses and without Board approval or a vote. The HOA was later sued by one contractor for breach of contract when they terminated his services early. Over a four-year period, the Defendant also signed at least two large promissory notes secured by Association assets to fund common area paving and walkway projects, and a 5-year landscaping contract extension, with some Board resolution and authorization to do so. However, the Bylaws required member approval for both. Defendant President also found and hired a roofing company on her own (without initial notice or approval by the Board) after the members voted against a special assessment to offset repairs for an estimate submitted by another roofer. Issues later arose about the licensing and [poor] quality of the roofer's work. Defendant also renewed a one-year security company contract without a Board vote and approval, while one Board member was actively obtaining bids from other companies. Defendant testified she acted in good faith, in the best interests of the Association, and did not receive any pecuniary gain or personal benefit.

**Disposition:** The Court of Appeal reversed the summary judgment granted in Defendant's favor under the Business Judgment Rule. The Court concluded there were genuine issues of material fact as to whether Defendant breached the governing documents, whether she exercised reasonable diligence in investigating and paying the contractors, and whether she acted in good faith. The Court also found that genuine issues of material fact existed as to whether the exculpatory clause in the CC&Rs or the Business Judgment Rule applied at the summary judgment stage.

**Key Findings:** The Court agreed with the Association, finding that summary judgment could not be granted in Defendant's favor on the basis of the Business Judgment Rule or the exculpatory clause because the record disclosed triable issues of fact that should not have been resolved without a trial.

**3. Almanor Lakeside Villas Owners Association v. Carson (2016) 246 Cal.App. 4th 761 (HOA awarded larger attorneys' fees than the amount of fines it requested.)**

**Significance:** Although *most* of the Association's \$54,000 fines were disallowed, it was awarded more than \$100,000 in attorneys' fees as the prevailing party, making it the overall winner in the case. The Court recognized that the Association had the right to adopt and enforce its own reasonable rules, and that some of the fines/fees charged were justified.

**Brief Facts:** Homeowners' Association brought action against unit owners of two properties, seeking to enforce fines and CC&R provisions which were intended to prevent owners from using their properties for rentals less than thirty (30) days in duration, or for hotel purposes, unless the owners provided the board with the rental agreement at least seven days before the rental period.

**Disposition:** The Court of Appeal affirmed the award of attorneys' fees and the judgment on the owners' Cross-Complaint in favor of the Association} and awarded them costs on appeal.

**Key Findings:** Although both sides claimed to be the "prevailing party", the Court awarded attorneys' fees to the Association under CCP Section 5975 of the Davis-Stirling Act, deeming it to be the prevailing party in an action to enforce the governing documents. Since the statute and Act do not define "prevailing party", the test to make that determination is "whether a party prevailed on a practical level by achieving its main litigation objectives." Even though both sides achieved some positive net effect (and had mixed results), the Court concluded that since some of the fines were enforceable, the Association had met its objective and satisfied the criteria needed "to enforce the governing documents". Therefore, there was no abuse of discretion in determining the HOA was the prevailing party.

## REVIEWING BANK STATEMENTS PROMPTLY

From time to time you receive notices from your bank about changes in your deposit account agreement that they have imposed. With ongoing issues related to fraud, it is imperative that you review and reconcile bank statements as soon after receipt as possible. A deposit agreement change I recently received stated the following –

“ ...you agree to notify us immediately of any error, discrepancy or unauthorized transaction you discover on any statement, notice or check, **no later than 21 days from when the statement was mailed or made available to you.** If you fail to do so, you may become responsible for the losses resulting from such failure. If you are a business, you agree not to entrust the writing of checks and the reconciliation and review of your account statements and notices to the same person without frequent monitoring. If this is a business account, you will have two people review your statements, notices and returned checks...”

For many years, the California Civil Code (Section 5500) requires the board to perform a quarterly review of its account statements, reconciliations and income and expense reports for both its operating and reserve accounts. You can find a sample quarterly review sample form to complete on our website – [www.southcoasthoa.org](http://www.southcoasthoa.org) under the resources tab, Financial topics (October 2010), page 11.

## HOA FINANCIAL STATEMENT ANALYSIS – SPRING 2017

By: Michael J. Gartzke, CPA

Author's Note: During 2015 and 2016, I prepared several articles for the South Coast HOA newsletter dealing with association financial data comparisons. You can find a utility expense analysis in the February 2015 newsletter; nine year comparisons of balance sheet accounts (cash, receivables, fund balances) in the May 2015 newsletter; nine year comparisons of revenue and expenses in the November 2015 newsletter and a reserve funding analytic in the May 2016 issue. You can find all of these articles on the [www.southcoasthoa.org](http://www.southcoasthoa.org) website. Look under the newsletter tab. No password required.

When I perform a review engagement for an association, I capture some financial data that I maintain in a spreadsheet for all 80 associations that I currently provide a review engagement for. Those associations receive a comparison schedule showing how their financial information compares to the totals of all the associations in the database. For this analysis, I combined all 80 associations into one "master" association containing 5,506 units.

### Balance Sheet Analysis –

Cash, CDs and Investments	\$ 35,041,834		
Assessments Receivable	213,918 <sup>1</sup>		
Net Other Assets/(Liabilities)	<u>(820,136)<sup>2</sup></u>		
Net Fund Balance	\$ 34,435,616		
Operating Fund	15.5%	5,336,716 <sup>3</sup>	3.24 months' assessments
Reserve Funds	84.5%	<u>29,098,900<sup>4</sup></u>	46 months assessments
Net Fund Balance	\$ 34,435,616		

### Notes –

1 – Only includes amounts owed at year-end. No assessments paid in advance are included. In 2011, receivables were \$668,603 or \$128.50 per unit (5,203 units). Receivables are now down to only \$38.85 per unit, a decrease of nearly 70%. While foreclosures will never entirely go away, there are fewer happening now than five years ago.

2 – Net Other Assets/(Liabilities) include all other items that appear on a balance sheet such as prepaid insurance, accounts payable, dues paid in advance and loans payable. Overall, these categories only account for 2.4% of the fund balance.

3 – The Operating Balance (aka equity, retained earnings, capital) represents 3.24 months' worth of operating assessments made. Depending upon the size of the association and the timing of major expense payments, one to three months' assessments in the operating fund is usually recommended. Overall the associations are doing well by this analytic.



4 – The total reserve fund balance represents 46 months (just under four years) worth of assessments side aside to meet the major repair and replacement obligations of the association. Over the past ten years, this amount has been steadily increasing.

**Regular Assessments –**

Operating Assessments	72.1%	\$ 19,738,144
Reserve Assessments	28.9%	<u>7,641,391</u>
<b>Total Assessments</b>		<b>\$ 27,379,535</b>

Associations receive many other forms of income, too. Some of these include late fees, laundry income, rental commissions, interest, fines, parking fees, special assessments, etc. Over the past ten years, the allocation of the total assessment to reserve funding has steadily increased. Generally, area associations are recognizing the need to set aside more funds for major repairs (infrastructure – it’s been a big word for years in HOAs, long before it became a buzzword in Washington)

**Operating Expenses –**

Utilities		25.7%	5,158,184	
Common Area Maintenance		42.6%	8,547,638	
Insurance		17.5%	3,508,281	
General and Administrative		14.3%	2,868,906	20,083,009

See the discussion following for each of these major categories of operating expenses.

**Utilities –**

Water (79)		52.3%	2,696,059	
Trash (59)		17.5%	903,951	
Electric (80)		15.6%	805,685	
Gas (57)		8.5%	436,876	
Cable TV/Internet (4)		5.2%	265,720	
Other (22)		1.0%	49,893	5,158,184

See the February 2015 newsletter for a more detailed analysis of utility costs. The number in parenthesis is the number of associations out of 80 reporting that category of expense. Even with the increased water rates imposed by cities and water districts in recent years, many associations were able to control costs from reduced irrigation and other conservation measures. Other utility costs can include soft water service and telephone for gates and elevators.

### **Common Area Maintenance –**

Landscape (79)		51.2%	4,376,453	
Pool (53)		4.2%	363,139	
Repairs and Maintenance (79)		15.9%	1,360,734	
Other Common Area (65)		28.6%	2,447,312	8,547,638

Common Area Maintenance covers a wide range of categories. The “other common area” category covers expenses such as pest control, janitorial and security services. For larger associations, it also includes onsite maintenance and landscape staff wages and related expenses. Ten of the associations account for nearly \$2 million of the other common area costs or 81% of that category.

### **Insurance –**

Overall, insurance costs have been holding steady for most associations. The current median (half above and half below) cost of insurance for associations has declined to \$58 per unit per month from \$63 in 2008. Some associations do not cover dwellings and some do not have earthquake coverage. Some also have a flood insurance requirement. The range of insurance costs is quite wide from \$4 to \$244 per unit per month.

### **General and Administrative -**

Management (73)		55.7%	1,596,892	
Professional (80)		27.0%	774,885	
Office (79)		7.3%	208,361	
Income Tax (25)		1.2%	34,508	
Other Administrative (75)		8.9%	254,260	2,868,906

Professional expenses would include legal, reserve study, bookkeeping and CPA annual review and tax return preparation. Other administrative could include taxes and fees other than income taxes, bad debt expense and costs associated with management employees. With the substantial decrease in investment income over the past decade, income tax expense is a nonfactor for most associations. In fact, 55 of the 80 associations in the review sample had no income tax expense at all.

### **Total Operating Expenses –**

When analyzing a profit and loss or income statement, expenses can be arranged several different ways. When I prepare statements, I like to group expenses in the categories I’ve shown above. Listing them alphabetically is probably the most common method of presentation. I’ve seen some that appear to be random. One additional method is to list expense categories by highest to lowest expense, putting the highest expense amounts on top. This method can be very useful in budgeting to focus on the highest cost items that drive

the calculation of the operating assessment. Here is the breakdown of all the expenses categories from highest to lowest:

Landscape (79)		21.8%	4,376,453	
Insurance (80)		17.5%	3,508,281	
Water (79)		13.4%	2,696,059	
Other Common Area (65)		12.2%	2,447,312	
Management (73)		8.0%	1,596,892	
Repairs and Maintenance (79)		6.8%	1,360,734	
Trash (59)		4.5%	903,951	
Electric (80)		4.0%	805,685	
Professional (80)		3.9%	774,885	
Gas (57)		2.2%	436,876	
Pool (53)		1.8%	363,139	
Cable TV/Internet (4)		1.3%	265,720	
Other Administrative (75)		1.3%	254,260	
Office (79)		1.0%	208,361	
Other Utilities (22)		0.2%	49,893	
Income Tax (25)		0.2%	34,508	20,083,009

For many associations, the “big three” expenses are landscaping, insurance and water. In the total expenses shown here, these three account for more than half (52.7%) of all the operating expenses incurred.

### **Reserve Expenses Paid –**

Reserve expenses paid totaled \$6,975,927 against reserve assessments made of \$7,641,391. Reserve fund balances increased \$665,464 from net assessments during the past year. Adding reserve expenses to common area operating expenses comes to \$15,523,565 in maintaining the property, approximately 57.4% of the total expenses incurred.

## **SOUTH COAST HOA WEBSITE RESOURCES**

Our website, [www.southcoasthoa.org](http://www.southcoasthoa.org), contains resources to help you operate your association including:

- A 15-year archive of our newsletters
- A directory of our professional and vendor sponsors
- Outlines and seminar materials distributed at past South Coast HOA meetings
- Links to other HOA organizations’ websites, legislation and instructional videos

## **SOUTH COAST NEWSLETTER PROFESSIONAL SPONSORS**

### **ACCOUNTANTS**

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

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

**Gary Vogel, CPA**  
17130 Devonshire Street, #201  
Northridge, CA 91325  
818-357-5535

**Mary Widiner – Walpole &  
Co. CPAs**  
70 Santa Felicia Dr  
Goleta, CA 93117  
805-569-9864

**Robert A. Ayres, CPA**  
25050 Avenue Kearney, #207  
Valencia, CA 91355  
661-430-9276 x302

### **BOOKKEEPING SERVICES**

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

**Laura McFarland, CPA  
McFarland Financial**  
7127 Hollister Ave #25A-333  
Goleta, CA 93117  
805-562-8482  
www.mcfarlandfinancial.com

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

**Oasis Bookkeeping  
Patti Karr**  
P. O. Box 132  
Carpinteria, CA 93014  
805-684-7461

### **ATTORNEYS**

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

**James H. Smith  
Grokenberger & Smith**  
152 East Carrillo  
Santa Barbara, CA 93101  
805-965-7746

**David A. Loewenthal  
Loewenthal, Hillshafer & Carter,  
LLP**  
21 E. Carrillo #230  
Santa Barbara, CA 93101  
866-474-5529

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

**Myers, Widders, Gibson, Jones  
& Feingold, LLP  
Kelton Lee Gibson**  
5425 Everglades Street  
Ventura, CA 93003  
805-644-7188

## **ASSOCIATION MANAGEMENT**

**Coast Community Property Management**  
**Sandra G. Foehl, CCAM**  
P. O. Box 8152  
Goleta, CA 93118  
805-968-3435

**St. John & Associates**  
**Kristin St. John CCAM**  
5266 Hollister Ave, #108  
Santa Barbara, CA 93111  
805-683-1793

**Team HOA**  
**Geoff McFarland**  
7127 Hollister Ave - #25A-333  
Goleta, CA 93117  
805-562-8482  
[www.teamhoa.com](http://www.teamhoa.com)

**Goetz Manderly**  
**The Management Trust**  
**Gordon Goetz**  
3710 State St, Suite C  
Santa Barbara, CA 93105  
805-348-4080

**Spectrum Property Management**  
**Cheri Conti**  
1259 Callens Rd #A  
Ventura, CA 93003  
805-642-6160

## **RESERVE STUDIES**

**Stone Mountain Corporation**  
**Chris Andrews**  
P. O. Box 1369  
Goleta, CA 93116  
805-681-1575  
[www.SmartReserveStudy.com](http://www.SmartReserveStudy.com)

**Reserve Studies, Inc.**  
17315 Studebaker Rd #213  
Cerritos, CA 90703  
800-485-8056  
[www.reservestudiesinc.com](http://www.reservestudiesinc.com)

## **INSURANCE**

**Cline Agency Insurance Brokers**  
**Tim Cline, CIRMS**  
12400 Wilshire Blvd. Suite 200  
Los Angeles, CA 90025  
805-299-0899

**Bill Terry Insurance Agency**  
**Barbara Terry**  
4213 State St #205  
Santa Barbara, CA 93110  
805-563-0400

**Baxter Insurance Services**  
**Dan Baxter**  
1033 Santa Barbara St.  
Santa Barbara, CA 93101  
805-963-4048

## **CONTRACTORS**

**Raymond Arias Construction**  
1 N. Calle Cesar Chavez  
#230-B  
Santa Barbara, CA 93103  
805-965-4158

**Blake Fuentes Painting, Inc.**  
79 S. Kellogg Avenue  
Goleta, CA 93117  
805-962-6101

**Santa Barbara Painting**  
**Gustavo Dabos**  
5874 Hollister Ave  
Goleta, CA 93117  
805-685-3548

**ASR Construction**  
1830 Lockwood St. #107  
Oxnard, CA 93036  
805-988-1040

## **LANDSCAPE CONTRACTORS**

### **TriValley Landscapes**

#### **Colin Anderson**

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

## **PAINT SUPPLIERS**

### **Vista Paint**

#### **Alex Castenado**

2020 E, Orangethorpe Ave  
Fullerton, CA 92831  
805-994-6711

## **FINANCIAL SERVICES**

### **Union Bank**

#### **Mahendra Sami**

445 S. Figueroa St, 10<sup>th</sup> Floor  
Los Angeles, CA 90071  
877-839-2947

## **RECORDING SECRETARY**

### **Sharon D. Brimer**

949-233-0107  
sbrimer@gmail.com

## **ORGANIZATIONS**

### **Community Associations**

#### **Institute (CAI) Channel Islands Chapter**

P. O. Box 3575  
Ventura, CA 93006  
805-658-1438  
[www.cai-channelislands.org](http://www.cai-channelislands.org)

### **Executive Council of Homeowners - ECHO**

1960 The Alameda #195  
San Jose, CA 95126  
408-297-3246  
[www.echo-ca.org](http://www.echo-ca.org)