SOUTH COAST HOMEOWNERS ASSOCIATION

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IN THIS ISSUE

UPCOMING SOUTH COAST MEETING

Roofing Issues/Financial Analysis Update

Mr. Frank Derrick of Derrick's Roofing will speak about common roofing issues such as extending the life of your roofs, most common causes of roof failures, new roofing materials on the market, mistakes made during roof repairs and replacements, roofing contract and insurance considerations. This will be followed by a Questions & Answers session. Frank Derrick has over 40 years of roofing experience in Santa Barbara County. Contact info on the web is: www.derricksroofing.com

Mr. Michael Gartzke, CPA will present the results of his two-year analysis of HOA financial data including what is the current statistical mean (average) member assessment, changes in assessments, cash balances, investment rates of return, delinquent assessments and changes in expenses. Mr. Gartzke maintains two databases of area associations, a 60-association database for associations that he reviews financial statements and a 50-association database of smaller associations for which he only prepares a tax return.

DATE – Wednesday, September 12

TIME – 7 – 9 PM

PLACE – Goleta Union School District Board Room, 401 N. Fairview, Goleta

Directions: 101 exit Fairview Avenue North approximately 4 blocks. The school district offices are on the left directly across the street from the Goleta Public Library.

PAINTING FOR PROTECTION AND APPEARANCE

Planning and Preparation for a Successful Painting Project

By David L. Hughes

Editor's Note: *David Hughes is the Painting Division Manager at Draeger Construction in the Bay Area. He is president of the Executive Council of Homeowners (ECHO) board of directors. This article appeared in a recent issue of the ECHO Journal and is reprinted with their permission. Mr. Hughes can be contacted at 408-536-0420.*

Questions Before Starting

There are several questions an association should ask prior to beginning a painting project and setting up a schedule for future painting.

- **Why are we painting?**

  Hopefully it is obvious that you are painting to protect the assets of the association from the elements and for esthetic reasons, which enhance the living experience for homeowners, as well as maintaining or increasing the value of the property.

- **When do we paint?**

  Painting should be performed before the exterior surfaces show signs of deterioration.

- **How often do we paint?**

  It is very important for the long-term condition of substrates that they be painted based on a regular schedule. For wood that means every 4-6 years, and for stucco that means 7-10 years depending on exposure and the condition of the property. Failure to maintain a regular schedule will cost much more in the long term because of siding failure or worse, dry rot of the structure behind siding materials.

Starting The Process

Once these questions have been answered, there are three important steps that an association should take prior to entering into a bidding process with contractors. There are several ways to approach each of these issues, but we recommend using resources outside your association in order to expedite the process and simplify the work for the association.

- **Decide on a color scheme for your association.**

  If you are planning to change the color palette of your association, be prepared to spend a great deal of time on this aspect of the process. Color is very personal, and individual homeowners generally have very strong feelings concerning the color choices that boards make. Choosing an outside consultant to help you arrive at your choices is a practical and probably prudent approach to the process. Many paint manufacturers offer this service for free with the use of their product. There are also many paid expert consultants with whom your association can contract to provide and help you with color choices. Remember to start this process early at least 6 to 12 months prior to the anticipated start date of the project. Don't plan to have a painter on the job before colors are selected. Your contractor did not bid the project that way; starting the job without colors will cost him money and may slow the job.

- **Have a specification and bid package prepared.**

In order to have a method of evaluating the bids you will receive from painting contractors, you must provide bidders with accurate job specific specifications from which they can bid the project. A competent professional who is familiar with your project and has inspected the property thoroughly before preparing the documents should produce these specifications. It may be prudent to hire a consultant to provide these services depending on the size and complexity of the project. Most paint manufacturers will provide specifications for free if you agree to use their products on your project. It is important that whoever provides your specifications discusses budget issues, the condition of the project and their recommendations for properly painting your association. ***Your budget should be dictated by what you need and not by how much money you have.*** Specifications and bid packages should include the following:

- Surface preparation of all included substrates
- Detail caulking and spot-priming instructions
- Product specification by manufacturer name and number for specific substrates
- Number of coats required and application guidelines, which should include ***back rolling*** of at least one coat
- Insurance requirements for the contractor
- Contractor's license requirements
- Realistic warranty requirements
- Reference requirements
- An agreement to follow the provided specification

- **Have a General Contractor inspect and repair substrates**

It is not possible to overemphasize how important surface repair is to the integrity of your painting project. You do not want to be surprised by the problems present with your substrates when the painting contractor begins power washing and these problems reveal themselves. Wood repair must be part of the budget for painting because some work will inevitably need to be done. Painting over dry rot will not solve the problem, and your contractor and paint manufacturer will not stand behind any identified problem areas.

Bidding The Job

Once you have your bid package in hand, you can begin the process of choosing a painting contractor. The telephone book will probably not be your best recourse in this regard. Painting contractors that work with associations have experience working with multi-family housing and individual homeowners. They will meet the higher standards for insurance and communication necessary for your association's job.

A maximum of 4 or 5 contractors should be invited to bid the project; any more bidders will make it unlikely that all those bidding will spend the time to provide a competitive proposal because the chances of getting the job is minimized. Your management company, consultant or paint manufacturer can provide you with a list of qualified painting contractors and will assist in facilitating a mandatory job walk for all those interested in bidding the project.

A job walk will insure that all bidders understand the specifics of your job and what is required. The job walk also provides an opportunity for bidders to bring up any concerns they have about your project. If any changes result from the job walk, all participating contractors should be notified in writing in the form of an official addendum from the association. Bidding should not be a hurried process, and you should give the participating contractors time to put together an accurate proposal. Two weeks is probably more than adequate.

Hiring Your Contractor

You have received all your proposals from the painting contractors who attended your job walk and now must choose one for your project. Unfortunately all too often the choice is made to accept the lowest bid. Price is a prime concern, but it should not be the total determining factor. All proposals should be carefully read to insure that each contractor's proposal accurately reflects the specifications in terms of preparation, number of coats and application. For example, it would seem that asking for two coats would be easily defined; however different contactors define coats differently, depending on their working methods. In general manufacturers define two coats as one application ***allowed to dry*** followed by a second application. Some contractors will define it as two coats crosshatched wet (spray technique) or sprayed and back rolled with the back roll being considered the second coat. Because these are competitive perspectives and may or may not be appropriate or specified for your project, it is important to compare such aspects of the several proposals.

In the end most professionals recommend that you interview the contractor you are contemplating hiring at a minimum and preferably the top two or three bidders. This is particularly worthwhile if the bids are close. The selected contractor will be on the association's property for several months or more and will be interacting with homeowners on a regular basis. You need to feel comfortable and confident in your decision.

Interviewing Contractors

The process for interviewing contractors should be the same for each for each interviewee to get a proper comparison. Putting together a group of questions to ask will speed your decision process. The following is a sample list of questions to aid you in your interviews.

- With whom do we communicate and how?
- Will a job foreman be on site at all times when work is being done?
- Do you have a clear process for us to communicate with you?
- Can you be contacted after hours and on weekends?
- What are your proposed working hours?
- Where will you store painting materials?
- Are you providing your employees an on-site restroom?
- How will you maintain a clean and safe jobsite?
- Do you hold weekly safety meetings per SB 198?
- What is your estimated completion date?
- How many employees will you have on the job?
- When would be your proposed start date?
- How will you notify homeowners for power washing, preparation and painting?
- What is your procedure for painting front doors?

- How long have you been in business?
- Will you add the association as an additional insured on your policies for the project?
- With which organizations are you associated? (CAI, CACM, ECHO, CAA)
- Do you have a Maintenance Program? (***Your association should have one***)
- Do you provide a closeout binder on job completion?

You can and should add to this list. By asking these questions, you will have a much better picture of how the painting contractor will perform on your job and confidence in the choice you make.

Following these basic procedures should help make your painting project as stress free as possible.

Assembly Bill 2100 (Effective January 1, 2007): *How It Changes Reserve Studies and Related Disclosures*

By: Chris Andrews, President – Stone Mountain Computing Corporation

Editor's Note: Chris Andrews is a long-time member of South Coast HOA and is a frequent contributor both as a writer and presenter at our seminars. Chris performs over 100 reserve studies annually throughout California. Recent legislation has changed some of the annual disclosures required with your budget. Chris' contact information appears in the sponsor section of the newsletter.

Overview

With the passage of Assembly Bill 2100 – effective January 1, 2007 – new California Civil Code 1365 changes require homeowners associations to disclose yet even more financial information to their members annually.

In retrospect, part of the changes seem to address a problem created when the Legislature introduced the requirement in July 2005 that associations must fill out the *"Assessment and Reserve Summary Disclosure"* form and distribute it to their members 30-90 days prior to the first day of their next fiscal year.

The problem was that Question #6 on the form required an annual calculation of the "required amount in reserves" (in actuality, they meant the "100% funded amount"). But at the same time, the Civil Code only requires that a reserve study be performed every 3 years. So how were the associations supposed to disclose the "required amount in reserves" on an annual basis without having a reserve study done every year instead of every 3 years?

To solve this dilemma, the State Legislature added a Question #7 to the "Assessment and Reserve Summary Disclosure" which asks for the next 5 years of "required amount in reserves" and the next 5 years of "percent funded estimates." Thus, associations will have that data already calculated in advance for the next few years in which they are not required to do a full reserve study.

Note that larger associations often do an annual reserve study update in the intervening two years. Even though it is not required, they do it for sound financial planning reasons. Many small-to-medium sized associations simply follow their reserve study plan for 3 years, only making minor adjustments to reserve funding for each new budget year.

Also as of January 1, 2007, Question #6 on the *"Assessment and Reserve Summary Disclosure"* was changed to require disclosure of the Percent-Funded Estimate (the ratio of how much cash is in reserves relative to the depreciation-to-date on reserve components) as of the current year.

The changes to the "Assessment and Reserve Summary Disclosure" and other new requirements are described in more detail below:

Your Pro Forma Operating Budget Must Now Include:

1. Civil Code 1365 (a)(2)(D) –The current deficiency in reserve funding must be expressed on a per unit basis…

$$\frac{\text{(Amount of money reflecting the 100\% Funded Amount) MINUS (Cash in Reserves)}}{\text{(Number of Units)}}$$

For example, if your association has 40 units and the depreciation-to-date is $100,000, but your association only has $60,000 in reserves, the "current deficiency in reserve funding" would be $40,000. Expressed on a per-unit basis for a 40-unit association would be a $1,000/unit deficiency.

2. Civil Code 1365 (a)(2)(A) – A statement as to whether the board of directors of the association has determined to defer or not undertake repairs or replacement of any major component – with explanation.

3. Civil Code 1365 (a)(2)(D) – A statement whether the association has any outstanding loans, as specified.

Your Reserve Study Must Include a "Reserve Funding Plan:"

Civil Code 1365.5 (e) (5) *-- [The reserve study must include…] "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."

So, just what does this "plan" look like?…

If you've been having a diligent reserve study prepared, you probably already have a recommended reserve funding plan in the form of a 30-Year Cash Flow Analysis if it shows a schedule of projected future reserve expenses and future regular assessments and special assessments that will fund those projected expenses. You simply have to "adopt the plan."

In order to do so, consider writing a brief narrative indicating the *Optimized 30-Year Cash Flow Analysis* is the association's "Reserve Funding Plan" and that the current board plans to follow this plan with regular & special assessments as shown. Make sure that the adoption of this plan is cited in your Board meeting minutes. And you might want to include a disclaimer that the current board has no control over how future board members implement the plan and that the plan assumes that future reserve expenses will occur as projected. Make sure your members understand that *the reserve study is a projection, not a prediction*.

New Question #7 Added to "Assessment & Reserve Disclosure Summary"

As of January 1, 2007, the *"Assessment and Reserve Summary Disclosure"* form you distribute to your owners must now include new measurements of financial status:

- The *Required Amount In Reserves* at the end of each of the next 5 fiscal years
- The *Percent-Funded Estimate* at the end of each of the next 5 fiscal years
- The *Projected Reserve Fund Cash Balance* at the end of each of the next 5 fiscal years

Note there are two components to this question:

- The reserve study must indicate 5 years of the foregoing data "…*Taking into account only assessments already approved and other known revenues"* and,
- You must also indicate similar data assuming the "reserve funding plan" is implemented.

Here's the new Civil Code section:

1365.2.5 (a) (7) *– Based on the method of calculation in paragraph (4) of subdivision (b) of Section 1365.2.5 of the Civil Code, the estimated amount required in the reserve fund at the end of each of the next five budget years is $_____, and the projected reserve fund cash balance in each of those years, taking into account only assessments already approved and other known revenues, is $_____, leaving the reserve at _____ percent funding. If the*

reserve funding plan approved by the association is implemented, the projected reserve fund cash balance in each of those years will be $_____, leaving the reserve at _____ percent funding.

The data requested above might be more clearly summarized in the sample table below (data in the table is sample data also):

1365.2.5 (a) (7) *– Based on the method of calculation in paragraph (4) of subdivision (b) of Section 1365.2.5 of the Civil Code, the estimated amount required in the reserve fund at the end of the next five budget years is $ (Refer to line #1 in the table below) , and the projected reserve fund cash balance in each of those years, taking into account only assessments already approved and other known revenues, is $ (Refer to line #2 in the table below) , leaving the reserve at (Refer to line #3 in the table below) , percent funded. If the reserve funding plan approved by the Association is implemented, the projected reserve fund cash balance in each of those years will be $ (Refer to line #4 in the table below) , leaving the reserve at (Refer to line #5 in the table below) , percent funded.*

End of Fiscal Year That Begins in→	2008	2009	2010	2011	2012
1. Estimated amount required in reserves	$198,165	$233,114	$263,564	$342,346	$421,012
2. Projected Reserve Fund Cash Balance *(Only assessments already approved)*	$72,473	$59,941	$38,190	$57,539	$69,624
3. Projected Percent Funded Estimate (*Only assessments already approved)*	36.6%	25.7%	14.5%	16.8%	16.5%
4. Projected Reserve Fund Cash Balance* *(If reserve funding plan is implemented)*	$108,812	$136,009	$157,554	$223,955	$287,047
5. Projected Percent Funded Estimate* *(If reserve funding plan is implemented)*	54.9%	58.3%	59.8%	65.4%	68.2%

*Fund balance & Percent funded projections in the #4 & #5 calculations above assume the optimized cash flow analysis plan is adopted for the next 5 years.

In summary, while these new disclosure requirements are time-consuming to calculate and require more effort on the part of your board of directors to understand and disseminate, they will help provide more financial transparency for prospective new home buyers and for current owners.

In addition, these new requirements signify that the State Legislature is serious about requiring associations to implement fiscally prudent financial planning. With the preponderance of financial disclosure requirements and a requirement to have a reserve funding plan, they are making it more difficult for board members to ignore the realities of proper reserve funding – and rightly so!

LIBEL, SLANDER & DEFAMATION

The Evolving World of E-Mail

By: David A. Loewenthal, Attorney at Law

Editor's Note: David is another of our frequent contributors. He has shared numerous articles and has presented at our annual law updates held each winter. He is the principal partner of Loewenthal, Hillshafer and Rosen. Contact information appears in the sponsor section of the newsletter.

In the ever evolving world of litigation, the issue of who said what to whom, the context of such statements, and the intent in which such statements were made are becoming more and more critical. Political correctness has become a defining phrase in our society and in the tort realm of defamation, what you say or write can cost you.

The following article will provide general definitions, as well as examples of conduct that can be considered defamatory, whether it be through libelous writing or slanderous statements. As a result of the dramatic increase in the use of emails and the inability to control the republication of such writings, the claim of defamation has grown exponentially.

Defamation is generally defined as the act of harming the reputation of another by making a false statement to a third person. The reputation of another may refer to a person, a group of people or to a legal entity, such as a partnership, corporation, sole proprietorship, etc. In defining defamation, there are generally two types, libel and slander.

Libel is generally a written statement, but it can also be expressed by means of pictures or signs.

Slander is generally a defamatory statement that is not in a fixed format and generally includes spoken words and gestures.

Proving defamation is not as easy as one may think since there are various elements that must be established. The following is a general overview of the items that must be included to constitute a defamatory statement, followed by the defenses that may be asserted.

The first issue that must be established is whether or not the alleged defamatory statement was actually published. Specifically, was the statement, gesture, etc. communicated to a third person who understood that the statement was in fact defamatory and applied to the person who claims to have been injured. Importantly, an otherwise defamatory statement made to an aggrieved party, but not published to any third party, is not by definition a recoverable tort for defamation since it did not go to a third person. However, the person who makes the original alleged defamatory statement would be liable for any foreseeable republication of that statement. Thus, if the person who makes the statement or gesture knows that it would be foreseeable that it would go to third persons, then the tort of defamation would exist.

The second element in order to establish the tort claim for defamation is that the statement that was made is in fact defamatory in nature. In dealing with a libelous statement, the aggrieved party must show that the statement caused them either some kind of special damage or that the statement is considered libel "per se." Specifically, an item can be construed as being libel per se if it is defamatory on its face and as such there would not be any need to prove that there was actual damage done to the aggrieved party. As an example, a statement that Joseph is a thief is an example of libel per se; whereas the statement that Joseph is a Republican is not. The statement Joseph is a Republican could be considered

libelous in certain circumstances if, as an example, Joseph was a paid consultant for the Democratic Party. In this instance, Joseph would have to prove that he was somehow damaged by the statement in order to state a cause of action. Slanderous statements are similar to the proof required for libelous statements. Slander per se statements would include stating that a person has been charged with a crime or directly injuring a person with respect to his office, profession, trade or business.

In the circumstances where a statement is not either libel or slander per se, but have a more ambiguous meaning or, on their face appear to be innocent and can only be considered defamatory based upon outside evidence, then the aggrieved party would need to plead and prove that the intent was to be defamatory in nature.

In order to defend a claim for defamation, several defenses can be asserted. The first and most commonly known is that the truth of the statement made will act as a complete defense against civil liability for defamation, regardless of bad faith or malicious purpose for which it was made. As such, the aggrieved party would need to state that the defamatory statement was in fact false and then the party being charged would have the obligation to prove that the statement was in fact true.

A second defense is one arising from privilege being held by the accused party. As an example, there are certain privileges which are considered to be absolute in nature and in those instances, there is no liability even if the statements were made with actual malice by the party being charged. Such privileges include executive officers, judicial officers, legislative bodies, and husband and wives. In that same regard, if an aggrieved party has consented to the publication of the defamatory statements that also would constitute an absolute privilege.

In addition to absolute privileges, there are also conditional or qualified privileges that can be provided to a party that has been charged with making such a defamatory statement. As an example, where an alleged defamatory statement is made to protect a recognized interest that is made in good faith without malice, that can constitute a qualified/conditional privilege. If, however, the party being charged had made such statement improperly or maliciously or where the party making the statement knew that the statement was false such a privilege would not apply. As an example, if the owner of a management company advised their employees that one of the managers had been terminated for failing to arrive at work on time on a continuing basis, that fired manager could not bring suit for defamation unless the owner of the management company had made such statements with malice or actual/reckless disregard for the truth, i.e., knowing that the statements were in fact false.

Qualified privileges also arise in the arena of opinions and free speech Specifically, an opinion or a false statement of fact are in fact protected as a qualified privilege as long as the statements were made without actual malice or not knowing of the falsity or lack of truth of the statement being made. It should be noted that individuals that are in the public eye which include, but are not limited to, public figures, elected officials, actors, professional athletes, etc. generally are provided with less protection for defamatory statements made against them because of the fact that they are in fact in the public. Conversely, statements regarding private individuals or private circumstances generally have a higher degree of privacy and therefore the ability to bring a claim for defamation by a private/nonpublic figure is generally easier to establish.

As stated previously, the use of emails has become an interesting portal where defamatory statements can arise. In many respects, an email is an instantaneous written communication of thought, opinion, fact or statements made by one individual to another. The difficulty with email is the inability to control the flow of information and the ease in which an email can be

forwarded to others. Also, the issues involving the use of reply and reply all on a computer is often mistaken. Embarrassing situations can arise where a manager is communicating with one board member about another board member, in not the most friendly of terms, and accidentally or intentionally by the recipient the email is sent to the entire board thus causing not only embarrassment but also the real possibility that such a written communication is in fact defamatory. As such, in sending emails or instant messaging, the author should always think to oneself *what would happen if this email or instant message was viewed by a third party*. If you would not want such communication to be viewed by a third party, then I would strongly recommend that the context of such an email/instant message be modified. I would also suggest that if you believe that an email may be controversial that you sit back and let the email remain unsent for a short period of time so that it can be again reviewed prior to forwarding it to a recipient so as to ensure that you are in fact satisfied with the text.

Overall, a person should always think before they speak or write a statement about another and present that statement to third parties. As our society appears to promote the idea of blaming others, the ability to sue for defamation is one in which all of us should be concerned about and thus we should all govern our actions as well as speech accordingly; otherwise, what you say may end up coming back to cost you.

HOMEOWNERS ASSOCIATION MINUTES - WHAT ARE SOME FREQUENTLY ASKED QUESTIONS ABOUT MINUTES?

By: Beth Grimm, Attorney At Law

Editor's Note: The following article was included in our "Summer Law Forum" meeting given by Beth Grimm in July. Beth is a long-time supporter of South Coast HOA through articles and meeting presentations. Her contact information is included in the sponsor section of the newsletter.

The following information comes from a number of blogs (an internet web page with a stream of questions and answers) that I have written on the subject. You can examine blogs on many subjects on my website, by going to the second page, and clicking on "Beth's Blog" OR go to www.calfiorniacondoguru.com

All About Minutes - What Goes in Them? Everything? Nothing?

I get many inquiries about minutes. So I decided to put the most recent questions into one blog.

Question: "Our BOD puts copies of the monthly minutes on our doorsteps. Many owners do not live onsite. For the "Financial Report" section, the only reference is that the motion to approve the financial report was approved. There is no information about the financials. What rights do we have? Can anyone require them to put at least that minimal information in the minutes?"

Answer: Generally what goes in the minutes are statements about whether there was a quorum, who was present, statements of what reports were given, motions and action on the

motions. There certainly are associations that list financial information in the minutes, or attach reports, but there are also those that do not. There is no specific law that says what must go in the minutes. Occasionally governing documents have some specifics (would usually be in the Bylaws). However, in regard to the question, the best opportunity to get the Board to include financial reports with the minutes is through voluntary compliance. If that does not work, the owners who cannot come to meetings and get the information by being present can request copies of financial reports that have been generated, whether interim or annual. The association can charge for the copies.

Question: "The Board recently approved a request of an owner to remove [a fireplace/deck/etc.] that was declared unsafe. There may be other similar improvements in the development that are unsafe. The request was an architectural request and the Board in our association makes the decisions on architectural applications. The action did not appear in the minutes. Isn't the Board required to list all actions that are taken in the minutes of the meetings?"

Answer: I would say generally, the answer is yes. However, there are times when the Board takes action in executive session and although those actions should be logged in the executive session minutes, those minutes are not open to review or copying by the members. And there are associations that do not list architectural decisions in the board meeting minutes (although they should if the Board is making the decisions). For more, see the next question.

Question: "About executive session minutes. New board members need to know what the prior board's actions were with respect to a legal matter. Must executive actions be recorded in special minutes and if so, are they privileged as to new board members? I would think that minutes of executive sessions should be kept and that successor board members would have access to them in their role as current board members. Your thoughts?"

Answer: It is my belief that in California anyway, Boards should make sure that all action items are noted either in open meeting minutes, or, where the meeting is an executive session (as allowed by law), in the executive session minutes. However, there seems to be some disagreement among attorneys about this. Some recommend not even taking executive session minutes because if they should become discoverable in a court case, the decisions or actions could lead to liability that does not otherwise pertain or the "discovery" of such minutes might hurt the association's case, especially if there were notations constituting harmful admissions of some kind. Some feel that *all* actions must be noted, and that everyone present must be disclosed, and that the action items must all be listed in the open meeting minutes of the next open board meeting. That last item, I do not agree with. California law requires that if the Board meets in executive session at times that are not the same evening or day as the open meeting, that at the next open meeting, the Board must note that an executive session was held, and the purpose must be stated. This makes sense because that would let the owners know whether the purpose was legitimate (a personnel matter, a contract negotiation matter, that it was about litigation, a disciplinary matter, or an attorney-client privileged matter).

As for any director's right to review of executive session minutes from prior boards, California law (Corporations Code) allows board members access to all association records. However, case law suggests that there are times when this unfettered access can be limited. In a

California case, a board member was denied access to proxies. He wanted to see who voted for him, but the court decided that the director was elected and so there was no need to view the proxies. So, it is conceivable that a board member may be denied access to certain association records such as executive session minutes. One such scenario might be if the board member is suspected of disclosing association confidences.

Committees - How Accountable Do They Need To Be?

Should Committees be accountable for their meetings, decisions, and roles in the Association? Certainly, they should be formed and should operate in a business like manner and serve a purpose. How does that tend to happen? It happens when they have structure, and guidance, and instructions, and a functional purpose. It is more likely to happen when they have a "charter" or are appointed by a resolution of the Board that specifies who will serve, how they will be chosen/appointed/elected, how long the members will serve, what the purpose of the committee is, what kind of reporting is required to the Board, and whatever limitations may need to be stated.

Seem simple enough? Surprisingly, it is all too common that the Board members are conducting business and something comes up like, for example, a decision to look for a new landscaping contractor. A board member makes a motion to appoint a committee to bring information to the Board to help find a new contractor. Two of the board members volunteer (out of 5) and two owners sitting in the audience volunteer and voila, a committee is appointed. The meeting minutes reflect this. That is all they reflect.

In the ensuing weeks, the committee members communicate via email. They have no instructions so when disagreements arise as to how to go about it, they lose some precious time and have nothing to report at the next board meeting. The Board threatens to disband the committee. The appointees agree to try again. They continue to communicate, but do not really "listen" to each other. The two board members call a committee meeting and one of the owners comes, but not the other. They decide to interview landscapers. They start asking around for names. The 4th committee member (non board member) has a brother in law who happens to be a landscaper just starting a business. The other three decide they want to beat out the member with the brother in law and so they decide among themselves to choose one of the contractors interviewed.

At the next board meeting, one of the board members on the committee reports that the committee has interviewed 4 contractors, received bids for the work and signed up one of the contractors. No specifications were provided. to the contractors. They just asked for the usual "mow and blow" services. The 4th committee member pipes up that his cousin wants to bid the job and he has brought in the bid. He explodes when he hears that the other committee members already chose a contractor. He says the bid was much lower than the one signed by the committee. In fact, the bids are quite vastly different. No one on the committee has checked licenses or references.

The Board is quite offended. The committee was not supposed to commit the Association. And there is no follow-up to check licenses; no one checks references; no one investigates why there is such a difference in the bids (which are all produced on a one page tear off

contractor form proposal), and of course, no legal review of the contract that is ending or the contract that was signed by the Committee Chair. The Board assumes it is stuck.

On top of all that, an owner asks for a copy of the minutes of the meetings of the committee. In California, owners have a right to inspect minutes of committee meetings. Of course, there are no minutes since everything was done via email.

Good committee experience? Not..... This association could be headed for trouble.

First of all, the committee exceeded its authority - it did not have the right to commit a landscape contractor. It did not do any due diligence with regard to follow-up regarding licenses, references, etc. It did not report progress to the Board or allow the Board the opportunity to meet with contractors or ask questions about disparity in bids. It did not consider that legal review might be important, and worst of all, it acted in haste with an improper purpose. And furthermore, it produced no minutes for the record.

Can the Board reverse the decision? That pretty much depends on whether the contractor was aware that the committee member did not have the authority to sign the contract. He or she may have even believed the committee member was a board member and had the authorization. It is possible that to get out of the contract, if that was where the board was heading, a big price would have to be paid.

Can the owner sue whose brother-in-law lost out because of an unprofessional bidding/contractor situation? There might be a "breach of fiduciary duty" claim looming here.

What about the owner who wants to see the minutes of the committee? Do they have a cause of action? Possibly, if there are damages that can be proved - but maybe not choosing the least expensive contract could be the basis for the claimed loss.

Or do owners who accuse the Board of not following the law (in this case allowing an operating committee not only to exceed its authority, possibly by providing no guidance, instructions or limitations, and failing to meet or produce minutes even have to prove damages?

Failure to follow the law in California, and probably many other states, is considered "negligence per se". In lay terms, this means one does not have to prove any damages to win a lawsuit, and get an award.

Now, I am not suggesting everyone go out and sue their board for every technical statutory violation, regardless of whether damages or losses can be proved or not. But I am suggesting that proper appointment, use, purpose and procedures for committees and committee meetings are important, not just from the perspective of any owner that might sue. They are important practices that may make the difference with regard to the question of whether the Board successfully manages the association or it becomes one of those that is "doomed" in the end for lack of structure.

Annual Meeting Minutes - Do We Have To Wait A Year to Approve?

Annual Meeting Minutes - In the coming years, California HOAs, especially in light of the elections reforms of 2006, are going to have to figure out how to handle them, in the stages of drafting and approval. Recently, an astute manager sent me a question about approval of minutes. She had obtained some materials that lead her to believe that when annual meetings of an organization are as far as a year apart, there may be a better way of handling the drafting and approval of minutes than simply waiting until the next annual meeting to seek approval of the members.

She sent me the question as to whether interim approval and finalization of minutes is appropriate, and I went to the website I have found to be very informative and appearing to also be very authoritative (www.parli.com) and asked the question. I received the following feedback which I believe is pertinent, important, and which deserves - in the current elections reform for HOAs - due consideration.

The question: Is there a way that HOAs can finalize approval of the minutes of the annual meeting before a year is up and the next meeting occurs?

I believe the answer if you are using Roberts' Rules is "yes", based on the response I received from the provider at *www.parli.com*, which I will share with you:

"Thank you for writing. First, let me respond to a committee approving the minutes. This is very common in parliamentary organizations where there is one meeting a year, for example our state meetings and our district meetings. A common practice is for the presiding officer to appoint several members present to serve on the committee. This does not have to be the case. An organization could have a regular committee to do this.

Minutes Approval Committee: In organizations that meet yearly or semi-annually, it is best to have a committee correct the minutes of the meeting. Those who serve on this committee have the same responsibility as the secretary to take accurate minutes. These members need to pay close attention to the business presented at the meeting because the organization is relying on them to see that the content is correct.

In organizations where not much business takes place, the Minutes Approval Committee members may only need to write down on paper the essential business transacted. If organizations where meetings are complicated, then the members of the Minutes Committee need to have the same form as the secretary to keep an accurate account of the meeting.

Often times in small organizations, the presiding officer appoints the members of the committee at the meeting. This may not be a good approach. The best approach might be to have this as a standing committee with members who are trained in taking and writing minutes. Having this pool of talent available and trained, can be a place to look for future secretaries, or for a secretary pro tem in the absence of the secretary."

I believe this is a very good approach, especially given the fact that the new elections reform is wreaking havoc with the annual meetings processes. Some associations are doing away with them. Others are turning them into a social affair, and/or using them as a "kickoff" for the annual elections for the Board. All these may be very good ideas. There are issues and

questions that are going to arise about quorum. If the meeting is held in conjunction with the secret ballot elections, then the quorum may be established with the help of the return ballots. In a very small association, or any association that has been able to engender interest by any means, the quorum may be established. If there is no quorum, there will be no action taken at the annual meeting, in which case a "report" may be helpful in establishing a record of the successes or failures, and might take the place of minutes.

In any event, if/when your HOA does have annual meetings a record must be made, preferably in the form of minutes and preferably by someone (the secretary) with or without the help and benefit of a "Minutes Approval Committee". Of utmost importance is to consider what skills are needed by the Secretary and the Committee Members to understand what should be put in the minutes, and maybe even more importantly, what should not! If you want more information on this subject, visit www.californiacondoguru.com for a more detailed article passing along more information about how to make the "Minutes Approval Committee" work for you, and also visit www.parli.com for much more information on parliamentary procedure, questions and answers, and resource materials to help your association cope.

Appointing A "Minutes" Committee - Who Is Right For The Job?

A reader of my materials wrote this email to me about appointing a "Minutes Approval Committee":

"I'm very interested in your article about approving annual meeting minutes. It makes sense to me that the Board can approve them now. (We don't really need a Minute Approval Committee.) "

This is an example of how Boards can sometimes accept adaptations of what is said without thinking through all of the issues that might arise. In my business, believe me, the result of years of experience is that the questions sometimes start popping in your head as soon as a premise or conclusion is offered. The makeup of the "Minutes Approval Committee", if it is the Board and no other members of the Association, could be called into question. This is why:

The basis for the "Minutes Approval Committee" comes from **Roberts Rules,** and not a specific law on the subject of approving minutes. There is no guidance I can find that defines who should serve. While it might be OK to designate the Board as the committee, from a practical standpoint, if there was any question about objectivity, not having any non-board members on the committee might cause it to be seen as self-serving and the actions taken might be suspect - if any owner ever makes a challenge to the process.

In many associations, finding members to serve on the board is hard enough, let alone trying to find additional members to serve on committees. And of course the "Minutes Approval Committee" must consist of members that will be present at the annual membership meetings, since it would be charged with writing and finalizing the minutes. So, it seems it would make sense to have at least one non-board-member on the "Minutes Approval Committee".

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