



South Coast Homeowners Association

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NEXT SOUTH COAST HOA MEETING - SEPTEMBER 26, 2018

CALIFORNIA COMMON INTEREST DEVELOPMENTS THE CHANGING INSURANCE ENVIRONMENT

We are pleased to have Timothy Cline, AJ Scott and Ryan Gesell of the Cline Agency Insurance Brokers in Los Angeles present our fall program. Mr. Cline and his staff have been long-time members of South Coast HOA and have done several programs and contributed newsletter articles over the years.

For those associations that insure dwellings, insurance is a major operating expense. With the recent fires throughout California and the mudslides/floods in Montecito, there are questions about coverages and changes in costs going forward.

Changing California Earthquake Insurance Marketplace – AJ Scott, CPCU

Premiums are starting to rise after a 12-year low – Why?
Negotiating the best terms for your Association’s earthquake program
Informing your members about the importance of investigating personal earthquake Insurance

Condominium Master Policy Coverage – Ryan Gesell, CIRMS, CMCA

New companies entering the marketplace?
Competition is forcing carriers to offer vastly improved coverage options
Insurers respond to increasing California wildfire activity, more emphasis on insuring to value
“Package” Director & Officers liability forms – What is covered vs standalone D&O policy
Water, water, water – why do these types of claim matter?

2008 – 2018: A decade of Interesting claims and Insurance Exposures – Timothy Cline, CIRMS

Three most interesting claims

Most unusual Directors and Officers Liability Claims

Third Party employment exposures

New workers compensation Supreme Court decision

Hiring contractors and subcontractors

New crime exposures (identity theft, bank transfer fraud, computer fraud, social engineering)

Question and Answer Session

Date – Wednesday, September 26, 2018

Time – 7:00 – refreshments at 6:45

Place – Encina Royale Clubhouse, 250 Moreton Bay Lane, Goleta

No charge to attend

Meeting refreshments are being sponsored by ASR Construction and Blue Horizon Property Management. Contact information for both companies is at the end of the newsletter.

COMMON ISSUES/COMPLAINTS ABOUT BOARDS AND MEETINGS/ USE OF EMAIL!

By Beth Grimm, Attorney AKA Californiacondoguru.

The last year has been pretty volatile for HOAs in California. Legislators in Sacramento have been busy and so have I, writing about new bills and laws and proposed bills. I just returned from doing my annual program in Goleta, California, for the Southcoast group where people are always attentive, good questions are asked, and a lot of information is presented, including almost an hour of straight Q&A which may be my favorite part of the program. It involves board member and owner questions directly from the trenches. Thanks to all those who attended; I love coming to your town each year! I will share the highlights with my E-newsletter readers and you can share with your friends, this summary of some of the most important things that are happening and being talked about in the industry. As a reminder, all my E-newsletters are archived on my website at www.californiacondoguru.com and I passed the 100 mark sometime last year.

COMMON ISSUES/COMPLAINTS ABOUT BOARDS AND MEETINGS/ USE OF EMAIL!

I hear it all the time ... Our Board does everything in secret! Or they use executive session to talk about us! Or The Board members decide everything before the meeting even happens- they do it by email, so there is never any discussion on anything. What do you do about this, if you are the board, and are the brunt of these accusations? What you do if you are a homeowner and have these complaints? How do you get the Board's attention? Board, how do you respond? What happens with emails? How can use of email lead to lawsuits that go far beyond a simple claim based on the law preventing use of it for doing business?

It is true – some boards abuse the option of meeting in executive session. They talk about budgets, people they don't like, and/or fear transparency when it comes to bad news like discovery of serious deferred maintenance issues or other problems that may cost the owners a lot of money. Some communicate by email and make all of the board decisions outside of board meetings either because it is easy or convenient or they don't like to discuss things in front of the members. Others walk the line very closely but push the envelope. The bottom line is that you will get different legal advice from different attorneys. I will hit some highlights here, but my advice always is to consult with your own Association attorney because as board members, you gain certain protections if you rely on the advice of experts and attorneys are supposed to be experts in these areas. There are two areas I talked about because of a recent article I read which highlights the fact that attorneys do not always agree. Some attorneys stick to a strict interpretation of discussion of personnel matters which are subject to executive session as relating only to employees that are paid by the Association. I brought up some examples where board members and managers conduct needed to be reviewed by the board and I thought it appropriate to discuss an executive session. One was a situation where a Board member is disclosing confidential information from executive session meetings to the members which is a violation of the director's fiduciary duty. Another was a situation where manager overstepped their authority. These particular situations involve questions that go beyond simply discussing personnel or contract negotiations. The director issue involves the question of whether the director should be subject to some disciplinary or legal action. The manager situation involves the question of whether the manager should be terminated or their contract should be adjusted to negotiate some additional terms and limitations regarding authority.

I also discussed one subject that is not mentioned in the Davis Stirling act but which gives boards the right to meet in executive session - that involve threats of litigation and the need for attorney feedback. Boards are entitled to confidentiality when it comes to the attorney-client privilege and I suggested that if a board justifiably believes there is a threat of legal action that the board get a lawyer involved and get good advice. Boards can arrange a call in from the Association's legal counsel during a Board meeting to get legal advice and that would qualify that meeting as an executive session. Reviewing an attorney letter would be grounds for holding an executive session. I could do a whole newsletter on boards' misuse of executive session and what all the topics are – but you can review them at the California state website www.CA.gov and navigate to the California laws, or there is a book on available on my website called **The Davis Stirling Act In Plain English**. The pertinent code section is Civil Code Section 4935.

Use of email is forbidden by California law for conducting HOA business except for situations that are require emergency attention AND that all board members agree on. That's it, that's the bottom line. The law is found at Civil Code Section 4910.

Editor's Note: The balance of Ms. Grimm's outline from her June 30 presentation is posted on our website at - <https://www.southcoasthoa.org/resources/2018%20JUNE%20SUMMARY%20THIS%20YEA%20R.pdf>

If you'd like a hard copy, please call.

IS IT TIME TO RECONSIDER CERTIFICATES OF DEPOSIT FOR ASSOCIATION RESERVE CASH?

By: Michael J. Gartzke, CPA

With the recent increases in the Federal Reserve benchmark short-term interest rates to 1.75 – 2.5%, more banks and financial institutions are offering higher rates on certificates of deposit (CD) than they have for several years. Until recently, many CD rates were not much different than so-called money market accounts. That is changing. Depending on the length of the CD, rates of 2 – 2.5% are being advertised. Here's an example of the difference can be on a \$200,000 CD.

<u>Rate</u>	<u>Annual Interest</u>
0.01%	\$ 20.00
0.10	200.00
0.50	1,000.00
1.0	2,000.00
2.0	4,000.00
2.5	5,000.00

In my experience, many bank money market rates have remained static over the past couple years. Even now, most bank money market accounts pay no more than 0.30% interest, some much less. When interest rates were near zero, banks actually paid a little more than brokerage account money market funds (i.e. Schwab, Vanguard, Fidelity). Not anymore. Brokerage money market rates rise and fall with current market yields and at this writing in late September 2018, those rates are 1.75-2%.

With the increasing burdens imposed by financial institutions in opening new accounts and the documentation required such as authorizing board minutes, expanded personal information from signers, personal visits to the bank by signers, etc., some associations are reluctant to spend all that time opening new accounts or changing banks. When rates were low, there was no incentive to go through all the extra hassle.

Further, many banks do not issue statements at year-end to show current balances. The 1099 form only shows interest earned but does not indicate the balance or whether the account is currently open. Online access may allow you to generate the statements but caution is needed to disable transaction activity by those not authorized to access funds.

Federal deposit insurance (FDIC) is limited to \$250,000 per bank per association. If you maintain more than \$250,000 in cash in any one bank or financial institution, a portion of your funds will not be insured. For those associations that have more than \$250,000 in cash reserves (or even less), you can consider a brokerage account to place multiple certificates of deposit or Treasury notes/bills. By having them in one account, it reduces the amount of paperwork necessary to maintain the investments or updating when board members change resulting in new/removed signers or address changes. Some of these accounts impose annual fees to maintain the account so be sure to check prior to setting up the account.

Many local banks participate in programs that allow you to set up an account and acquire certificates with varying maturity dates within that single account. One such account is called CDARs – Certificate of Deposit Account Registry Service. Each week, rates are published for 4,13,26 and 52-week certificates and can be placed with any member bank in the United States with FDIC insurance. Interest is paid monthly and automatically paid to your reserve money market/checking account. Statements are issued monthly and notifications are sent prior to maturity to determine whether to acquire another certificate or cash out.

Note: When operating a new account, you will be asked what type of entity your association is. You are a “C” corporation. You are not a 501(c)(3) organization when some banks ask if you are a “nonprofit”. Those nonprofits are charitable organizations while homeowner associations are not.

With a brokerage or CDARs-type account, if you acquire several certificates, you can ‘ladder’ them where you can set up certificates with varying maturities. When the first short-term certificate matures, the renewal can be placed in a longer-term certificate with a higher rate since the second certificate will now be the short-term one. Eventually, the 1-3 month certificates will be 6-12 month ones yielding a higher return.

Finally, net interest income is taxable to homeowner associations. For many associations, there have been no taxes to pay because interest income was so low. If your association has not paid any Federal taxes since 2011 and will have a tax obligation in the future, you will need to open an online payment account with the IRS using their EFTPS system. Instructions to set one up are on the irs.gov website. They no longer accept checks or use the tax deposit system with banks as they did prior to 2011. If you have set up an EFTPS account and have changed signers or management companies, be sure that the account information and password have been transferred to the current responsible parties.

Under the “Tax Cuts and Jobs Act of 2017”, Federal income tax rates for small corporations (like homeowner associations) actually increased in some cases. Associations can file Federal Form 1120-H (Income tax return for Homeowner Associations) and pay a tax of 30% on net taxable income. Some associations, by making an election at their membership meeting, could file Form 1120, the tax form for regular corporations. Until 2018, rates were graduated between 15 and 35%. Starting in 2018, the tax is a flat 21%. For those associations electing to file taxes using Form 1120, the tax rate increased from 15 to 21%, an increase of 40%. An association will a Federal tax of \$1,000 prior to 2018 will now have a Federal tax of \$1,400 on the same income.

BREAKING NEWS – AB 2912 SIGNED INTO LAW – EFFECTIVE 1/1/19

On September 14, Governor Brown signed AB 2912 into law. Fidelity bonds now required for associations equal to total cash and investments plus 3 months’ assessments. You’ll need to evaluate the limits annually. Also requires reserve transfers exceeding 5% of funds or \$10,000, whichever is lower, to be authorized by the board in writing. Monthly reviews (instead of quarterly reviews) are required of the check register, monthly general ledger, assessment receivable list, bank account statements, reconciliations, income statement compared to budget and reserve account income statement. Link to bill text - http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2912

2017 Year-End Review of California Court Decisions Affecting Community and Homeowners' Associations

By Robert D. Hillshafer, Esq.
David A. Loewenthal, Esq.
Barbara A. Higgins, Esq.
Loewenthal, Hillshafer & Carter, LLP

Tract No. 7260 Association, Inc. v. Parker (2017) 10 Cal. APR. 5th 24 (*The Association can deny a homeowner member access to its membership list when the request was made for an "improper purpose", in this case aiding a party the Association was suing.*)

Significance: The right to inspect and copy certain Association records is not absolute, as some records may be withheld from a member when the Association has evidence that the request is actually being made for an improper purpose.

Facts: Parker was a homeowner and Treasurer of the Association. Eveloff was the HOA President who founded a company [Fix the City], and with Parker's help, convinced the Association to transfer funds to that company, which used the HOA funds without any benefit received by the Association or its members as a whole. Shortly after the transfer, both Parker and Eveloff simultaneously resigned from the Board, but not before making an emergency request to pay \$49,000 to the attorneys for the HOA who opined that the transfer was legal. The same date that the Association filed suit against Eveloff's company, Parker requested seven categories of corporate information from the HOA, including its membership list, and stated "legitimate" reasons such as wanting to ascertain that the HOA was following generally accepted accounting principles, and for possible communications with members to ascertain whether there were any corporate misdeeds. This request for records and the membership list was made pursuant *Corporations Code* § 8331, et. seq. A representative of the HOA met briefly with Parker and let him review certain of the documents, but not all of them, including the membership list. Parker filed a writ in court seeking an order compelling the HOA to allow him to inspect and copy the membership list and the other books and records he sought.

Disposition: The Court of Appeal denied Parker's request for disclosure of the HOA's membership list and all other documents due to Parker's improper, substantiated purpose.

Key Findings: (1) Substantial evidence supported finding that homeowner sought inspection for improper purpose, (2) mere speculation of an improper purpose is not sufficient to nullify member's inspection rights, (3) the homeowner's asserted purpose for seeking records' inspection was insufficient to defeat a finding of improper purpose, (4) failure of HOA to seek court relief first against homeowner's records' inspection did not bar the Association from subsequently relying on improper purpose defense to challenge inspection, and (5) Parker sought the membership list and records as an individual, and not on behalf of an authorized number of members (as he later tried to contend), thus the HOA was not required to first petition the Superior Court for an order setting aside the demand as required by *Corporations Code* § 8331(i).

Lee v. Silviera (December, 2016) 6 Cal.App.5th 527 (*A Complaint for declaratory relief about obtaining bids and taking verbatim notes at board meetings was filed by three HOA*

Board Members against six other Board Members} and was later stricken under the anti-SLAPP statute.)

Significance: The California anti-SLAPP statute CCP § 425.16 can act as a defensive weapon against legal in-fighting between Board Members. Also, this case represents another clarification as to what constitutes public interest in the HOA context and expands the kinds of disputes to which CCP 425.16 may apply. It also is interesting in the context of whether Boards "should" take verbatim notes or record board meeting, as opposed to recording primarily the motions and the votes on the Board motions.

Facts: Three HOA directors or Board members filed a lawsuit against six other directors and the HOA manager for declaratory judgment arising out of disputes involving whether the Board was required to allow the Board's Secretary to take verbatim notes of Board meetings, and about whether they were obtaining a required number of bids for HOA projects.

Disposition: The Court of Appeal reversed the trial court's decision to deny the anti-SLAPP motion to strike, and held that the anti-SLAPP statute did apply because the Complaint involved protected activities, and there was no actual controversy. The trial court was directed to grant the anti-SLAPP motion to strike with respect to each director Defendant.

Key Findings: The Court concluded that the meetings of the Board in which the director Defendants allegedly engaged in the "wrongful conduct" constituted a "public forum" within the meaning of the anti-SLAPP statute, and the acts regarding their failure to obtain at least three bids for projects and allow the secretary to take verbatim board meetings (as she was a court reporter), constituted issues of "public interest" and because the project(s) involved multiple buildings in the community. Once the Defendants met that burden, Plaintiffs were not able to meet their burden of probable success on the merits since there was no evidence that the Secretary was required to, or had the discretion, to record verbatim board minutes, nor was there any "actual controversy" about the alleged failure to obtain the necessary bids because the evidence showed at least three bids were obtained.

Lingenbrink v. Del Rey Estates Homeowners Association - 2017 No. D070194 and WL 1079989. *(An Association Board was found to have acted outside its authority when it applied an unambiguous restrictive covenant in a manner other than as written).*

Significance: A Board cannot rewrite a restriction in the governing documents, or use their discretion, when the restriction's meaning is perfectly clear. The *Lamden* judicial deference rule is not extended to interpreting unambiguous CCR provisions.

Facts: When Plaintiff Lingenbrink purchased his lot, he selected it for its highest elevation and panoramic ocean views. The property across the street was vacant and had no vegetation. Another homeowner bought the lot across from Plaintiffs and planted trees which eventually grew tall enough to block Plaintiff's ocean view, even though Defendant trimmed them annually. The restrictive covenant in the CC&Rs at issue here stated:

"No trees, hedges or other plant materials shall be so located or allowed to reach a size or height which will interfere with the view from any Lot and, in the event such

trees, hedges or other plant materials do reach a height which *interferes with the view from another Lot*, then the Owner thereof shall cause such tree(s), hedge(s) or other plant material[(s)] to be trimmed or removed as necessary."
(Italics added in case report).

Although the Board agreed that Plaintiff's view was obstructed and told the other homeowner to significantly reduce them, it was later decided that Plaintiff's view was not unreasonably impeded "after "balancing the interests" of the two homeowners, such that the Board took no enforcement action. This decision was made after a meeting with the homeowner who owned the trees, and was generally popular and well-liked, while Plaintiff was not, and was considered a troublemaker. This lawsuit followed for breach of the CC&Rs and injunctive relief.

Disposition: The trial court determined that the view protection provision in the CCRs was unambiguous and must be enforced, which the Court of Appeal affirmed. In a post judgment order, the Superior Court determined Plaintiff to be the prevailing party and ruled that he was entitled to recover \$200,000 in attorney fees and \$20,621.15 in costs from the Association (Order).

Findings: Even though the Association argued that the Court should defer to the Board's judgment to exercise its discretion, the Court disagreed when the meaning and language in a restriction is clear and unambiguous. The appellate court was not sympathetic to the assertion that the tree cutting would leave the neighbor's property barren or with mutilated tree trunks, finding that both the Association and neighbor were aware of the restriction when the trees were planted, and also may have acted in bad faith by favoring one homeowner over another.

“DEAR OWNERS” (An Actual Board Resignation Letter)

Thank you for giving me the opportunity to serve on the La Brea 2016 HOA Board of Directors. It is a responsibility I take very seriously and try my best to be fair to all owners and undertake the duties of the position with honesty, diligence and integrity.

La Brea faces many serious challenges that must be addressed. Some of these issues could have been addressed years ago but due to a refusal to make and follow a financial plan for the future, these problems have only become bigger and, consequently, will cost more and more to resolve.

I have tried my best to work hard for the HOA and help in whatever small way I can. In return, I expected to be treated with respect and civility. What I have received instead is harassment and an utter disrespect of my family, my privacy and me. Very few owners in La Brea have been willing to take the time and make the effort to help guide our HOA into the future. When the few owners who do contribute are treated with such rudeness and disdain, it is no wonder it is so difficult to encourage owners to take responsibility.

The nastiness to which board members are subjected to is intolerable. La Brea is my home where I live with my family. It is my place of sanctuary and peace. I cannot allow petty disputes and power struggles to destroy that and must, therefore, resign my position on the Board effective immediately. (Editor's Note – Strive for better!)

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