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RULES REWIND: Best Practices for Adopting & Enforcing Association Rules

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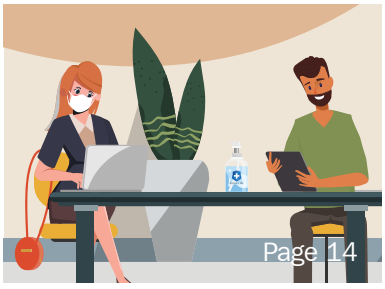

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CAI - CHANNEL ISLANDS CHAPTER
P. O. Box 3575, Ventura, CA 93006
(805) 658-1438 • Fax (805) 658-1732

Leah Ross - Executive Director
leah@cai-channelislands.org

The Channel Islands Chapter of Community Associations Institute is dedicated to empowering Homeowner Association members, managers and service providers through information and educational opportunities.

president's message

Steven A. Roseman, Esq.
Roseman Law APC

CHANNEL ISLANDS CHAPTER community ASSOCIATIONS INSTITUTE

Dear Members,

As I wrote this President's message, I was thinking back to when I wrote my prior message in February 2020. So much has happened. Our world has been turned upside down. We have all lived through and continue to live through the Covid-19 "experience". Our experience includes significant limitations on our business and social lives, immense emotional and financial pressure and hardship, and the fear and uncertainty of a disease that no one seems to understand, let alone treat or cure. Some have experienced the devastation of losing a close friend or loved one from the corona virus. We could delve in the world of sadness, fear, and self-pity, or we could look at the world through rose-colored glasses. Rather than focus on the negative side of this pandemic, I decided to focus on a few of the positive benefits of this craziness. I could write many more, but the limitations of this column require I focus on a few.

First and foremost, our environment, both globally and in our own microcosm, has cleaner air. Less pollution. Less accidents leading to death and injuries. Our planet has had a chance to breath and heal itself. Animals roam around freely and there are far fewer cars on the roads.

Second, our lives have slowed down dramatically. Less driving. Less eating out. Less distance travelling. We have had time to reflect. To communicate with family and friends. To experience life at a pace that was unfathomable 6 months ago. We have enjoyed our homes. Shared many moments and experiences with our loved ones that normally would never occur.

Third, hygiene around the world has improved which will likely lead to less infections, less bacterial driven diseases and perhaps longer and healthier lives for many in our world.

Finally, people that have not normally embraced technology have had to adapt to the use of video and telephone conferencing platforms and social media. Seniors, who have been trapped in their homes without outside exposure can now relate to the use of technology and communicate with the outside world through those mediums. Many have been forced to adapt – and many have thrived on this new world opening up for them. Without Covid-19, they would never have been forced to learn how to use an iPad, smart phone, PC or Mac.

As our economy and world slowly reopens, many of the experiences we have lived through will disappear and seem like long lost memories. But perhaps some may be worth holding onto in the future to add meaning and depth to our every-day existence.

We could set time aside to spend more time with our family, friends and loved ones. Connecting and sharing our lives in a slow, uninterrupted and dedicated time away from the "crazy' of the world.

How about this novel concept? Could you imagine a world in our industry where volunteer board members could attend board meetings during the day rather than give up their evenings? Where managers could work a full day and still have time for their family at night rather than attending board meetings almost every night. Where all homeowners in a community could attend meetings via video conference or telephonically and be informed about the happenings in their community.

Our industry has always dictated that "volunteer" board members must give of their time to attend board meetings, usually in the evenings not to clash with work schedules. It is also customary for meetings to be at night in order to allow owner participation. That concept is not a legal requirement but merely circumstances to avoid volunteer board members who usually work during the day, from interrupting their workday to attend meetings, and homeowners, who want to participate in meetings, being unable to leave work to attend. It is evident from the many meetings we attend, that there is a desire and possibly a trend towards meetings during the day. Compliance with the Civil Code for "in person" meetings will still be adhered to by management or a board member having a location for owners to attend "in person" with the vast majority in attendance remotely. Perhaps this is the start of a whole new revolution in the way board meetings are conducted in the common interest development world. Perhaps we will go back to the way it was, or perhaps our lives in our industry have been changed forever.

CAI-Channel Islands Chapter along with CAI-National have adapted to the current times of "going virtual". We have found that our members appreciate the availability of continued learning through webinars and the additional online resources available. As a chapter, we look forward to the day when we are able to once again host in person events but due to the current times, it has also given us the opportunity to adapt to virtual learning as an option for our members. In the coming month, we are excited to launch our new chapter website with additional resources, on demand webinars and more. Visit www.cai-channelislands.org for more information.

Steven A. Roseman

Steven A. Roseman, Esq.
CAI-Channel Islands Chapter President

Authority and Enforcement of Rules

An Association's Authority to Adopt and Enforce Rules and Regulations Governing the Common Interest Development

By H. Rachel Coleman, Esq.
Myers Widders Gibson Jones & Feingold LLP

As a board member for a homeowner's association ("association"), one of the most important duties is to enforce the covenants, conditions, and restrictions (CC&Rs), bylaws, and rule and regulations of the association. Enforcing rules protects association members and their property values, as well as to provide guidelines for behavior within the community. This article discusses the authority of an association board to enact rules and regulations, including emergency rules, and the board's authority to enforce the rules and regulations against fellow board members and members.

The Board's Authority to Adopt and Enforce Rules

A board obtains its authority to adopt and enforce rules through statutes and its governing documents. Most common interest developments ("CIDs") are subject to the Davis-Stirling Common Interest Development Act. (Civ. Code § 4000, *et seq.*) The majority of CID's are nonprofit mutual benefit corporations. The CID is managed and governed by an association. Owners of property within the CID typically become members of the association simply by owning property in the association. Associations that are corporations must exercise their powers by or under the direction of a board of directors. (Corp. Code § 7210). The CC&Rs are enforceable as equitable servitudes that benefit and bind all the owners of separate interests within the development. The CC&Rs may be enforced by the individual owners, by the association, or both. (Civ. Code §5975 (a)). For the association to adopt rules and regulations, the association must have rulemaking authority pursuant to statute, CC&Rs, articles of incorporation or bylaws. (Civ. Code §4350 (b)).

The board may adopt rules that relate to various items: the use of the common area or an exclusive use common area; architectural standards and procedures for approving or disapproving changes to a member's separate interest or common area; member discipline (such as monetary penalties for violating rules); standards for delinquent assessment payment plans; procedures for resolution of disputes; and election procedures. (Civ. Code §4355 (a) (1)-(7)).

Having established the authority for the board to adopt rules and regulations that govern the association, the board must follow a specific process to enact or change the rules. Before the board may adopt or amend a rule or change the fine schedule associated with penalties for not following the rules, the board must typically provide notice to the members of the proposed rule change at least 28 days prior to making the rule change. (Civ. Code § 4360 (a)). The notice shall include the text of the rule change including a description of the purpose and effect of the rule change and the date the rule change expires. (*Ibid.*).

Decisions regarding the proposed rule change must be made at a board meeting where the board considers comments from association members. (Civ. Code § 4360(b)). After the rule change has been approved, the board must deliver notice to all members of the rule change "not more than 15 days after making the rule change." (Civ. Code § 4360(c)).

Emergency Rules

Emergency rule changes have become a hot topic due to current public health restrictions related to Covid-19. The board has the power to enact an emergency rule change required to address either an "imminent threat to public health or safety" or "imminent risk of substantial economic loss to the association." (Civ. Code § 4360(d)). In case of an emergency, the board is not be required to give notice to the members 28 days prior to making the rule change. The board may enact the rule change without comment from the members.

As with a normal rule change, when a board makes an emergency rule change, it is required to provide notice to the members of the change within 15 days. (Civ. Code § 4360 (dc). With the notice, the board must include the text of the rule change, a description of the purpose and effect of the rule change, and the date the rule change expires. (*Ibid*.) An emergency rule change is only effective for 120 days. (*Ibid*.) The board may not merely readopt an emergency rule change. (Civ. Code § 4360 (d)). If the board wishes to make the emergency rule permanent, the board must go through the rule change process that is set forth in the previous paragraph. (Civil Code § 4360 (a)(c)(d)).

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Enforceability of Rules and Regulations

For a rule to become enforceable, the rule must be in writing, within the authority of the association, and not in conflict with the CC&Rs, articles of incorporation or bylaws. The rule must also be adopted in good faith, substantially compliant with the civil code, and reasonable. (Civ. Code § 4350). Whether a rule is reasonable will not be based upon how a restriction affects an individual homeowner, but based on the "goals and concerns of the entire development." (*Dolan-King v. Rancho Santa Fe Association* (2000) 81 Cal.App.4th 965, 975-976). Rules should be enforced by the board unless they are arbitrary, or impose a burden on the member that far outweighs any benefit of the rule or violates a fundamental public policy. (*Narhstedt vs. Lakeside Village Condominium Assn* (1994) 8 Cal.4th 361, 386). Associations enforce compliance with the rules and regulations through imposition of fines, suspension of privileges and—as a last resort, litigation.

In conclusion, as long as the board follows the proper procedures set forth in the Civil Code, and the rules are reasonable, adopted in good faith and substantially compliant with the current laws, the rules and regulations of the association will be enforceable.

H. Rachel Coleman *is an associate attorney at Myers, Widders, Gibson, Jones & Feingold LLP and is a board member of the Ventura County Bar Association (VCBA) and an editorial member of the VCBA magazine Citations.*

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A Member Continues to Violate the Rules: Now What?

Guidelines and Tips for Successfully Imposing Fines and Other Discipline Against Association Members

By Tara Radley, Esq.
Beaumont Tashjian

After exhausting "softer touch" approaches for gaining member compliance with association's rules and governing documents, an association board may turn to formal discipline to compel the member to correct the violation. Generally, this means imposing monetary fines or other discipline against the member. The threat of a fine or temporary loss of common area amenities can often serve as the motivation the member needs to comply. But how can a board implement this process fairly and in line with applicable legal requirements?

Due Process: Discipline may not be imposed unless and until the board first conducts a disciplinary hearing. The member must be given the opportunity to address the violation. This is often referred to as the "due process" procedure, and it is required by Civil Code Section 5855.

Notice: Due process begins with written notice to the member stating the nature of the violation, describing the discipline that may be imposed and inviting the member to attend a hearing. "Discipline" typically consists of fines (when the association has a fine schedule of monetary penalties distributed annually to the members), reimbursement assessment for common area damage and/or suspension of common area privileges (if authorized by the association's governing documents). The notice must include the date, time and location of the hearing. The notice must also inform the member of the right to attend and address the board. The notice needs be sent at least 10 days before the hearing, but do check your association's governing documents to determine if greater notice is needed. Schedule the hearing during executive (closed) session to protect the member's privacy and preserve confidentiality.

Disciplinary Hearing: At the disciplinary hearing, the member must be given the chance to tell his/her side of the story. This may include presenting documents to the board and/or bringing witnesses to discuss the circumstances surrounding the violation. Before the hearing begins, the board can impose reasonable requirements to promote efficiency, such as time limits and requiring all parties to be respectful to one another. There is no formal procedure required; the hearing is not a "trial," interrogation or legal proceeding. The key is to allow the member the reasonable opportunity to defend against the allegation in order to fulfill the due process requirements. If the member desires to bring

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legal counsel, require in the notice that the member discloses this by a certain date (e.g. five (5) days before the hearing) so that the board has the option to have its own legal counsel present to best protect the association's interests.

Deliberation: After the member has addressed the board, excuse the member from the hearing. The board then deliberates in executive session to determine whether a violation has been verified. The board should consider all information from the member, as well the information in its file, such as photographs, videos, staff reports, witness statements and so forth. If the board confirms the violation, the board then decides the amount of the fine or other form discipline, if any. If appropriate, the board may give the member a deadline and, if there is compliance by that deadline, the fine will be waived. If the member does not attend the hearing, the board may impose discipline in his/her absence.

Notice (Again): Following the disciplinary hearing, the board must give written notice to the member disclosing the discipline. This notice must be sent within 15 days of the hearing unless the association's governing documents prescribe a longer period. In the event of a continuing violation (e.g., for architectural violations), ensure that the notice discloses any fine being imposed on a daily, weekly or other continuing basis.

Enforcement: Following the imposition of discipline, create a plan for enforcement. For example, the board can delegate to management to follow up to determine whether the violation was corrected by the deadline given. If the member does not comply, the board may need to repeat this process to increase the fines or discipline and/or speak with legal counsel to determine if the matter should be escalated to legal action.

If the board fails to satisfy any of the steps described above, the discipline imposed will become null and void. Therefore, the cornerstone of any successful enforcement is to ensure the board precisely follows all procedural requirements for due process, including those set forth in its governing documents.

Tara Radley *is an associate attorney with Beaumont Tashjian, where she devotes her time to the firm's litigation practice as well as provides general counsel services to the firm's clients. Prior to joining the firm, Ms. Radley handled insurance subrogation and business litigation matters where she engaged in significant law and motion practice, participated in numerous mediations and arbitrations, and appeared in a wide array of cases in both state and federal court.*

Manager's Perspective:
How This Pandemic Has Changed the Way We Conduct Business

By Matthew Bland, CMCA, AMS
PMP Management, AAMC

While businesses across the country are still being disrupted with the COVID-19 pandemic, we look at the challenge of continuing to manage our communities now and into the future. Just a few months ago, most people were not familiar with words like social distancing or self-quarantine. These words are now part of everyday vocabulary but with the assistance of technology, we can still manage effectively.

The current pandemic has closed many businesses and communities' common areas but board of directors still have the fiduciary duty to manage the affairs of the association. This has led to video and audio teleconference meetings, virtual or facetime walkthroughs, and limited time in our own offices.

Board Meetings

Many board meetings would take place in an onsite location such as a clubhouse or public locations such as a library, public school, or even your office's conference room. These meetings would normally take place in the evening after everyone was home from work. During the pandemic, this has been switched to teleconference and virtual online meetings to prevent in person gatherings. It was a big learning curve for most community managers, including myself. Prior to this event, I had not seen meeting guidelines for audio or video teleconferences. Associations should have guidelines and decorum in place for their teleconference meetings.

Since this pandemic started and after a meeting or two, board members seem to enjoy the ability to conduct board meetings from their couch or home office. The flexibility of being able to log in or call in and hold a meeting from any location has expanded the options on when and where meetings can be held. It is now possible to even hold board meetings during the day. We have also noticed that many homeowners are appreciating the ability to log in from home and have better accessibility in participating. Community associations should contact their legal counsel to discuss adopting video and teleconference policies for holding board meetings during the pandemic and moving forward.

Walk-throughs

Even though there is a safer at home order in place, associations still need site inspections to identify any potential safety issues. There are many ways these can be done while continuing to observe social distancing. You can drive through your properties and not contact any other person during your site inspection. If you will need to leave your vehicle to check common areas that are not visible from the roadways, make sure to keep your distance from other homeowners. If you are going to meet your vendor partners, committee members, or board members onsite, try to limit the amount of people to no more than three persons. You could have one board member or committee member, vendor partner, and yourself. Nowadays everyone has a cellphone so you could easily facetime a vendor to show them a safety concern while you are onsite. This also gives you the ability to communicate with a board member about an issue onsite in real time. Video calls are a great way to communicate and stay connected with board members or your business partners.

Office Traffic

I am sure everyone has seen a reduction in foot traffic to your office. These have been replaced with websites being utilized more often for items such as digital payments, applications for architectural modifications, or parking permit applications. Other homeowners prefer to come in to have a cup of coffee and talk with you in person. These interactions will be taking place over video calls instead of in person. It is important for homeowners and board members to still have the face-to-face conversations. There is no telling how long the social distancing restrictions will be in place, but I am sure some boards and homeowners will prefer telecommunications.

No one could have predicted a pandemic of this magnitude or the challenges associations would face, but it has prepared us for adapting to times such as this in the future. Associations and homeowners have met digital change with positive responses. This should give us the ability to continue to hold virtual meetings and open to more electronic communications. I believe there will be a point when there is a vaccine or herd immunity and we will be able to gather again. I personally believe board meetings will continue to be held electronically even after the safer at home order has been lifted.

Matt Bland, CMCA, AMS *is a Community Asset Manager with PMP Management. Mr. Bland has been in the Community Management Industry for over 15 years. Matt is active in the CAI-Channel Islands Chapter and currently serves on the California Legislative Action Committee (CLAC) as the chapter's liaison.*

QUESTION: Does an assessment lien automatically secure assessments falling due after the lien records or should an association keep filing liens?

By Richard G. Witkin, Esq.
Witkin & Neal, Inc.

ANSWER: Are we alone in the universe? When did time begin? If we evolved from monkeys, why are there still monkeys? Add to these ageless questions, the one above: Do assessment liens secure assessments accruing after the lien records?

One might think the answer to the latter was, if not obvious, at least ascertainable through a bit of good old-fashioned, high-priced, legal research. One would be wrong. A tear in the fabric of legal space and time has created two parallel universes with opposite answers to this same query.

So, the real question for us mere mortals is: in which universe do we live? Do we have a choice? Or are we simply puppets whose fate is pre-ordained by factors beyond our control? Well, as it turns out, we're the unfortunate puppets in this scenario.

You might wonder, fairly, what I'm talking about by this point in time so let me bluntly lay before you the explanation for the predicament in which we find ourselves.

The California Court of Appeal, in the case of Bear Creek Master Association v. Edwards, (2005) 130 Cal. App.4th1470, held clearly and unequivocally that assessment liens do secure additional assessments accruing after a lien records. To hold otherwise, would create an endless morass of subsequent lien filings that would be confusing and expensive for all parties involved.

But, lo, the United States Bankruptcy Appellate Panel (BAP) has recently held the opposite in the case of Highland Greens HOA v. de Guillen, 604 B.R. 826 (9th Cir. BAP 2019). The panel did not specifically endorse an endless morass of subsequent filings but, nonetheless, its ruling requires same. I spoke with the judge who wrote the de Guillen opinion and his first words to me were "Sorry about that."

There's not much point in evaluating which court made the right decision because due to the parallel universe thing, neither court can overrule the other.

One could simply determine in which universe one resided (state court universe: liens do accrue or federal bankruptcy universe: liens do not accrue) but for one big problem: which universe you are in can change in the blink of an eye, to wit: a state court matter can be transferred to federal court by the filing, by the homeowner, of a bankruptcy petition.

This is where the real problem arises. You can start out under state law and, possibly be unwillingly transmogrified over to federal court where the post-lien accrual rules are totally different. You would actually have to be in your 80s to remember from whence the expression "What a revoltin' development this is" came but it seems applicable to the situation. See bio below.

So, what to do? What to do? HOA attorneys differ on their recommendations. Certainly, the association cannot just file just one lien and then hope against hope for years to follow that the matter never finds its way to federal bankruptcy

court. Tens of thousands of dollars of assessments could be lost that way when the post-lien accruals are held to be unsecured and, therefore, dischargeable (avoidable) in a Chapter 7 bankruptcy. And yet, on the other hand, the expensive "lien every month club' will be unlikely to find favor with any court.

My recommendation is to file a lien as soon as California law and the association's collection policy permit and then track the amount of post-lien assessments that are accruing. If assessments are small and there are no post-lien special assessments, the association can take a chance that the matter will remain under the aegis of the state courts and, if perchance the matter is transferred to federal court, the post lien loss will be minimal. But...if after the initial lien is recorded, there is a $10,000 special assessment the following day, a new lien will have to be recorded to secure that new amount because the association cannot and should not take the risk that the matter will be transferred to federal bankruptcy court and the $10,000 special assessment will be discharged and uncollectible.

There are important issues that I do not have the space to address in this article. For instance, not all federal bankruptcy courts must follow the BAP decision in de Guillen (the decision is not binding on all bankruptcy courts, but your case might end up in front of a court that does follow the BAP ruling!). Also, CC&Rs should be amended to state that assessment liens do secure future assessments - that might help in the bankruptcy courts.

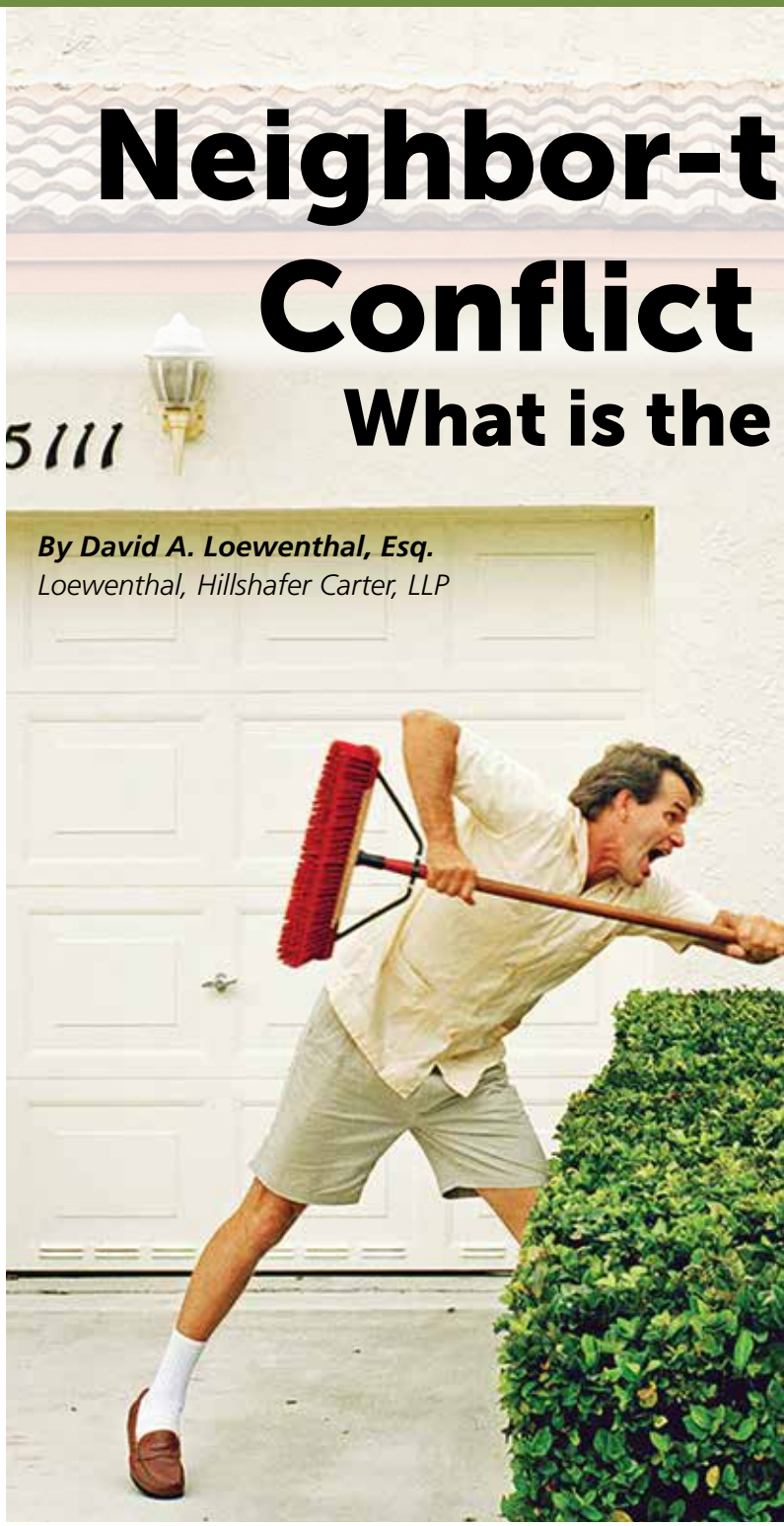
Until the federal and state courts can see eye to eye, please consult your general counsel for his or her recommendations. This article is of a general nature and does not constitute legal advice.

Richard G. Witkin *is a California real estate attorney with 45 years of experience specializing in assessment lien and deed of trust foreclosures. He advises the firm of Witkin & Neal, Inc. in Sherman Oaks, CA. He is not quite old enough (it's close) to remember "The Life of Riley", starring William Bendix.*

Neighbor-t Conflict

What is the

By David A. Loewenthal, Esq.
Loewenthal, Hillshafer Carter, LLP



Anyone who has served on a board of directors knows that one of the most difficult situations to deal with involves neighbor-to-neighbor disputes. There is really no limit as to what may constitute a neighbor-to-neighbor dispute, since what one individual may find offensive another may find acceptable.

Examples of issues that may give rise to neighbor-to-neighbor disputes include nuisances such as noise, odors, visual eyesores between neighbors; property damage between neighbors who share a common wall or floor/ceiling assembly; and harassment-related issues where there may be housing-related discrimination.

Historically, in evaluating neighbor-to-neighbor disputes, boards would generally consider whether the dispute was limited to two owners and/or did not involve the common area. Assuming that was the case, boards often would take the position that the Association would not get involved nor conduct any investigation.

In my opinion, the day of simply telling a neighbor that "the issue is between you and your neighbor and that the Association will have no involvement" is over. Boards of directors have an obligation to perform a reasonable investigation when a neighbor dispute is brought to their attention and decide what, if any, action is warranted. The role of management in these matters may include obtaining and compiling information regarding the dispute; preparing a warning or violation letter; and discussing the issues with the Board, including recommending that the Association bring in counsel to evaluate the matter.

Neighbor disputes often arise from a claim of nuisance. Homeowners are not entitled to complete isolation and separation from their neighbors; however, unreasonable noise, smell or eyesores certainly can constitute a nuisance. If the Board, after reasonable investigation, determines that a nuisance exists, the Board may take several steps, including issuing a warning letter to the member who is allegedly creating the nuisance, requesting further information as to the issue and demanding that the owner cease and desist the action that is the basis of the nuisance.

If the conduct continues, the Board can schedule a board hearing for the individual who is allegedly creating the nuisance pursuant to Civil Code Section 5855 for the purpose of determining if a fine or other disciplinary action should be taken against that homeowner. In the event of a hearing, the offending member must be given at least ten (10) days prior notice of the date, time and location of the hearing, the purpose of the hearing, and that they have a right to address the Board of Directors regarding the issues that are the subject of the hearing. The Board must decide whether or not the information presented justifies taking further action such as issuing a fine. Within 15 days of the completion of the hearing, the Board of Directors must advise the owner in writing of the result of the hearing including if there will be a levying of fines or other disciplinary action.

o-Neighbor Resolution

Board's Role?

A board should only levy a fine if the board has performed a reasonable investigation to determine the validity of the complaint, which may include evaluating evidentiary support against the violating member. This includes considering any written complaints that have been presented to the board; violations witnessed by members, residents, third parties, board members, or the manager; independent confirmation by outside sources such as a police, animal control, building department report. Ultimately, if the Association wishes to collect on a fine or enforce the governing documents, it may be forced to file a lawsuit. As such, unless the Board reasonably believes that its decision regarding the issuance of a fine or taking other disciplinary action is supported, it should not so proceed.

It is important to note that simply because the Association issues a warning letter and conducts a disciplinary hearing does not automatically obligate the Board to proceed forward with litigation even if the conduct continues. Generally, the Board has discretion in determining whether to proceed forward in instituting legal action against the offending party.

Neighbor disputes also arise when there is physical property damage between units often caused by water originating from one unit into an adjacent/connecting unit with attached walls or floor/ceiling assemblies. Generally, if the source of the water is a separate interest item, such as a washing machine hose or refrigerator water line, the owner in control of that separate interest item would be responsible for the costs associated with the damage. Conversely, if the water source is a common area element, the cost of repair would generally be the Association's responsibility. A thorough review of the facts and the governing documents of the Association, including the Condominium Plan, Covenants, Conditions and Restrictions, Maintenance Matrix (if one exists) and Civil Code, is essential in making these determinations.

Regarding neighbor-to-neighbor property disputes, the Association should perform a reasonable investigation into the cause and extent of the damage in determining responsibility. Board action may include submitting a claim to the Association's master policy of insurance, since it is often the case that the Association's insurance has broader

(Continued on page 20)

coverage than what the CCRs identify, and members are often identified as beneficiaries under the policy and/or pursuant to the CCRs. Also, in cases of water-related damage between neighbors, it is often better to attempt to limit the claim by remediating the damage, including dry-out, as soon as possible and then continue to sort out who is actually responsible and costs.

Finally, an area that has become hotly contested over the last several years pertains to claims of harassment and housing-related discrimination. Boards have an obligation to investigate claims of housing-related discrimination once it is brought to their attention. Specifically, effective October 14, 2016, the U.S. Department of Housing and Urban Development (HUD) established regulations requiring all housing providers to take steps to end harassment. Homeowners associations are included as a housing provider.

The alleged harassment must be related to the complaining person's membership in a protected class, which includes harassment based upon race, color, religion, national origin, sex, familial status, or disability. This includes homeowners associations involving harassment by other residents, board members, managers and vendors.

Pursuant to 24 Code of Federal Regulations Section 100.7(a)(1)(iii), a person is "directly liable" for "failing to take prompt action to correct and end a discriminatory housing practice by a third party, where the person knew or should have known of the discriminatory conduct, and had the power to correct it." Pursuant to CFR Section 100.20 a "Person" includes associations which can be held liable for a resident's harassment of another resident when:

1) The harassment is based upon race, color, religion, sex, national origin, disability and familial status;
2) The homeowners association knew or should have known of the harassment;
3) The homeowners association had the power to correct and end the harassment; and
4) The homeowners association failed to take prompt action to correct and/or end the conduct.

In order to attempt to avoid liability, an association's board must take some action to address any alleged discrimination by residents or other people within the authority of the board of directors/association. In a neighbor-to-neighbor discrimination claim, the board's failure to take action could lead the association to being sued and potentially be liable for monetary damages.

The type of action to be taken by the association depends on the circumstances and factors involved. It could include a warning, either verbally or in writing, as well as the demand that the discriminatory conduct stops. If preliminary steps fail to correct the actions, a board may consider proceeding forward with making a request for Alternative Dispute Resolution (Civil Code section 5925 et seq.) prior to commencement of an enforcement action. If ADR fails, legal action, including seeking a harassment restraining order, may be warranted. In performing its investigation, the board may wish to engage the services of an independent investigator to interview the parties involved, witnesses, etc. and provide an opinion.

HUD's position on these types of claims is that a community association generally has the authority to deal with harassment claims as empowered by the association's CCRs or by other legal authority, including notices of violations and fines.

In the Association's evaluation of the issues, facts, evidence and claims, it could arrive at a decision that the complaining party is not a member of a protected class or that the discrimination is not attributable to that status. Not every claim of discrimination in fact rises to the level of a housing act violation. The Association should conduct a thorough review of the issues and claims and make an informed determination of what it can do to eliminate the claimed discrimination, if it determines the discrimination exists, or whether it is even actionable discrimination in the first place.

The historic positions of boards were that disputes between neighbors were not the association's concern is no longer the case. Boards need to take appropriate steps, including a reasonable inquiry and investigation, in order to determine what action, if any, is required.

David A. Loewenthal, Esq.
is a partner in the law firm of Loewenthal, Hillshafer Carter, LLP, which serves community associations throughout California.

QUESTION: Should HOA's be lenient with assessment collection while COVID-19 is still a threat?

By Sandra L. Gottlieb, Esq., CCAL
SwedelsonGottlieb

Addressing the Second Pandemic for Community Associations: Financial Strain

ANSWER: "*Community associations are non-profits and have only one major source of income – the assessments. Without those assessments, associations will not be able to pay for essential services, like water, power or insurance, management services and similar fixed costs."*

Across California, Stay at Home or Shelter in Place orders imposed by the government to curb the spread of COVID-19 are resulting in loss of jobs, by layoff or furlough, and significant financial hardships for people and businesses. Having maxed out credit cards and fearing that their cash flow will be non-existent, homeowners are reaching out to the boards of directors of their associations requesting an assessment deferral, and waivers of late fees and interest, to avoid an assessment collection action.

Lessons learned from the 2008 Great Recession lead us to project the obvious. Unemployed people cannot pay their mortgages, along with their other financial obligations, subjecting them to potential foreclosure. Although a federal mandate has placed a moratorium on mortgage foreclosures for a set period of time, the same does not apply to homeowners associations. Whereas banks and lending institutions can leverage the debt owed to it by other income sources and income streams, the same does not apply to associations where, as a rule, assessments are the only source of income to enable associations to meet their financial obligations. The day will come when the moratorium for mortgage foreclosures is lifted. But let us not kid ourselves. The number of homeowners subject to those foreclosures will only increase as we weather this pandemic.

While some benevolently suggest that associations should defer assessments and waive late fees, interest, and assessment collection actions during the pandemic, that suggestion ignores certain economic realities. Community associations are non-profits and, as mentioned above, have only one major source of income – the assessments. Without those assessments, associations will not be able to pay for essential services, such as water, electricity, or insurance and similar fixed costs. Associations will not be able to pay their vendors, such as the landscaper who is performing the essential part of its services only, or the accountant who is preparing the annual financial review or the association's community managers. The failure by associations to require the payment of assessments just accelerates and expands those affected by the downturn in the economy, adding associations to the list of entities that cannot meet their financial obligations. Boards that are criticized for not deferring assessments or for not allowing more leniency to delinquent owners, likely know that most community associations, unlike banks or lending institutions, were not provided any relief as part of the recently approved two trillion dollar "stimulus package." Most associations who have employees do not qualify for the Payroll Protection Plan and must check with their bank to determine eligibility for an SBA loan. This is a tough reality because unlike most "businesses," associations are non-profit corporations. The qualification for financial assistance at the corporate level has changed rapidly since the assistance was announced. A board of directors should continue working with financial advisors and legal counsel to determine accessibility to various programs.

Because associations are non-profit, there is normally no room for an across the board deferral for assessments. Let's not forget, boards owe a fiduciary duty to their associations, which includes their obligation to collect assessments (all of them) so their associations can meet their financial obligations to pay for the essential services needed. It would be virtually impossible for a board to estimate the amount it should discount assessments in order to cover expenses associated with essential services only. Without the means to meet their financial obligations, the end result, as we learned in 2009, will be a deterioration of the association's infrastructure resulting in special and/or emergency assessments. We also learned, and this will apply now as well, that deferred maintenance leads to loss of property values, further mortgage foreclosures and an increase in breach of fiduciary duty claims against board members and their associations.

In California, board members are required to prepare an annual budget, with specificity, identifying by line item the association's annual expenses and levying assessments to pay for the same. Deferring assessments may lead to claims that the budget, as prepared, was not actually necessary. How else could a board so easily defer the payment of assessments? Been there. Seen that. Don't want that to happen again!

So, what do we do, recognizing this pandemic is unheard of in any of our lifetimes? Are we so heartless that we cannot help our fellow homeowners in their time of financial need? Of course not! But we must follow and comply with the association's collection policy. That said, there is nothing wrong with a board communicating with a delinquent owner, on a case-by-case basis, with the end result being the waiver of interest and late fees. Homeowners that reach out to the board before or while the delinquency is occurring, as opposed to owners who wait until a collection action is commenced, would likely place themselves in a preferred position to ask for and receive the waivers they are seeking. To secure the payment of assessments, associations must timely record liens, a necessity to protect the association's ability to collect those monies especially if an owner attempts to sell their home or files bankruptcy (and we can expect a rise in bankruptcy filings as a result of all the layoffs and terminations).

While recording a lien sounds harsh with so many owners being out of work, it is not intended as a punishment to the delinquent owner. Rather, it is a business necessity to protect the corporation and its other members. If one owner is unable to pay their share of the essential services, the rest of the owners are burdened with picking up the difference in costs with increased assessments. While all of this is going on, boards need to plan for how they are going to deal with potential deferred maintenance issues, breached contracts, and emergency situations that associations face in even the best of circumstances.

Boards will need to be fiscally responsible and work with management to evaluate their association's financial condition to determine how it can continue to pay the bills as more and more owners become delinquent. Boards also need to determine what can be done to decrease, even in the short term, association expenses. Our economy was doing well before the world stood still and it is likely (lessons from the Great Recession notwithstanding) that our association budgets lacked the appropriate 10% line item for bad debt. As a result of reduced cash flow, boards may need to impose spending moratoriums on work and services that are not absolutely required to ensure that associations can meet their financial responsibilities, while allowing delinquent owners to work out alternative payment arrangements with their associations. There are options, such as payment plan agreements that include a voluntary (recorded) lien and, if appropriate, waiver of late fees and interest.

Boards relying on the ability to defer assessments now and increase assessments or levy special assessments later should remember that homeowners are reluctant to approve regular assessment increases over statutory amounts and/or special assessments for needed repairs and maintenance or other association expenses in a good economy, let alone an uncertain one. Even those homeowners who have not been directly and/or significantly affected by current financial hardship are watching their money, cutting back on expenses, and are not as likely to approve assessment increases due to their concern about the economy.

So, association boards should follow their association collection policies while being the good neighbor, reach out to delinquent homeowners promptly to follow up on the delinquent assessment(s), and advise the delinquent owner of payment plan options. Dealing up front with the available payment options frequently leads to a better chance of recovery. To avoid claims of disparate treatment, treat all delinquent owners alike, considering each of their unique circumstances to determine if special circumstances give rise to the reduction or waiver of late fee and interest payments. Do not discriminate. And remember, mortgage deferment programs and the prohibition of mortgage foreclosures will enable homeowners to use their resources to pay their assessments with a little help from their association.

One final comment: boards should be dusting off, evaluating, and updating their association collection policies to make sure they protect their associations during good times and bad. The job of a director on a board is not an easy one, especially now. We thank you for your service.

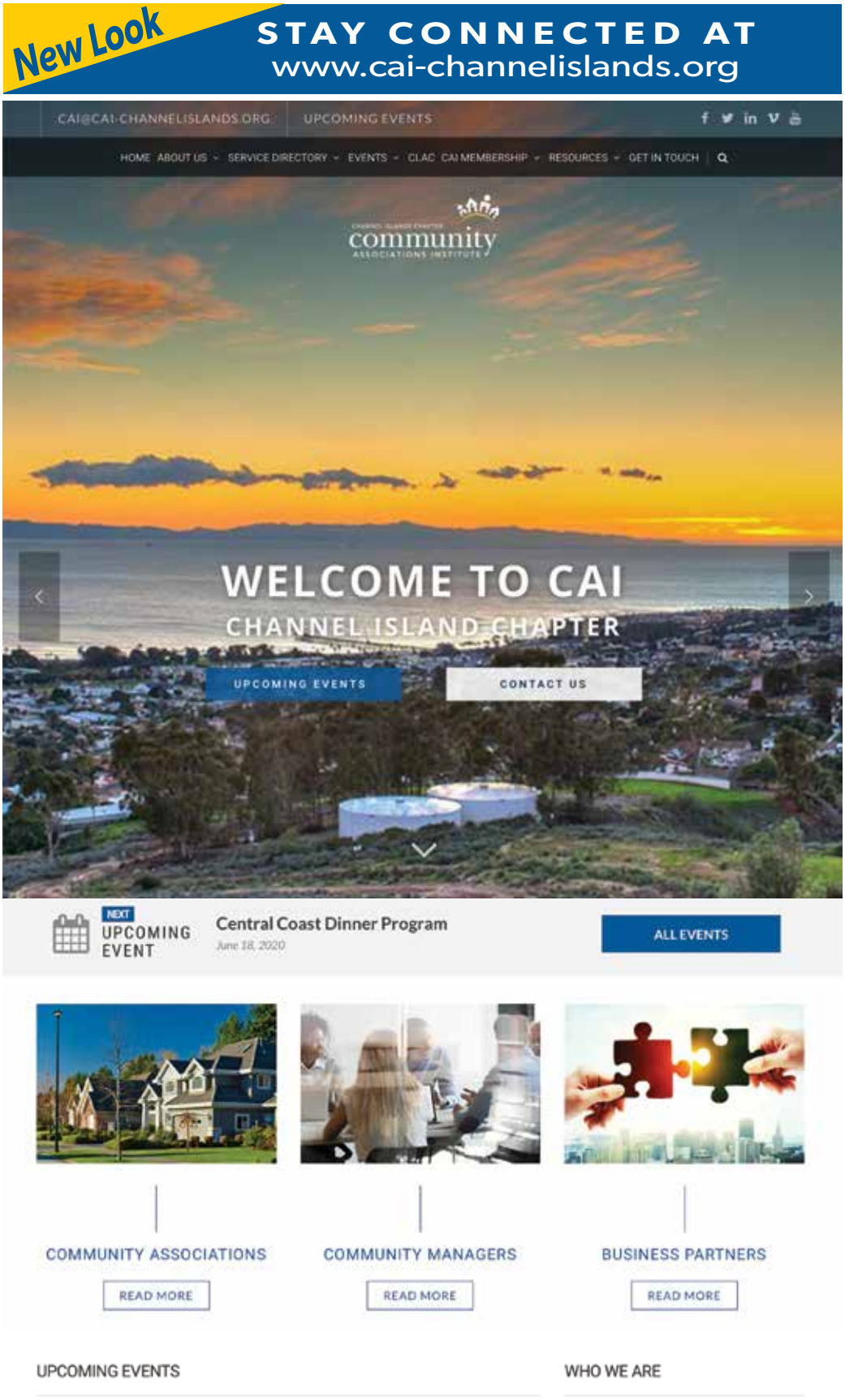
Sandra L. Gottlieb *is one of California's leading community association attorneys and a founding partner of the law firm of SwedelsonGottlieb, which limits its practice to the representation of California homeowner associations, including condominiums, planned developments and cooperatives. Sandra Gottlieb has served as President of the board of directors of three Chapters of the Community Associations Institute (CAI) in Los Angeles, Orange County and Channel Islands. On a national level, she has represented the firm on the CAI National Faculty, the CAI National Attorneys Committee, and is a member of the CAI College of Community Association Lawyers (CCAL).*

Upcoming Chapter Events

Due to COVID-19, CAI-Channel Islands Chapter has postponed all in-person events until further notice. We do miss seeing our chapter members in person and look forward to the time when we are able to do so again. We are grateful that we are able to transition to webinars and virtual training to continue to provide you with industry education, updates and information. Upcoming webinar dates and online resources are available at www.cai-channelislands.org and www.caionline.org. Questions, please reach out to us at 805-658-1438.

Congratulations

Congratulations to CAI-Channel Islands Chapter for earning CAI-National's Membership Award for "Best Net Membership Retention for a Very Large Chapter in 2019". We are the proud recipient of this award because of the continued support of our chapter members. Thank you for your dedication to CAI-Channel Islands Chapter!



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