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FOURTH QUARTER 2020

The Official Publication of
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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

My fellow CAI-Channel Island Chapter members,

It is quite amazing that the year is almost over. What a year it has been! For those of us that didn't think we could pivot and adapt to huge sudden changes in our lives, well, we now know we can. The lessons learned are that we can do anything with the correct mind shift and attitude combined with actively taking steps to change our lives. We can use the skills learned from this year to make a positive impact in our lives in the coming years. We should be mindful of our goals and vision for our futures, and learn from this year to focus on achieving those goals personally and professionally.

As my service to you as your "virtual" president draws to a close, I get to reflect and look back at our chapter and our achievements. The initial goals and vision for the year that I addressed at our annual planning for 2020 have changed. We were unable to accomplish some of those dreams and aspirations for this year. Nevertheless, we did achieve remarkable successes with our chapter that we would not have considered or perhaps made a part of our chapter a year ago. We could not have imagined how technology would be the driving force to keep us together as a community. Both young and more seasoned members of our chapter embraced its use, allowing our chapter to not just exist, but to flourish this year. Our chapter has always been on the cutting edge of new ideas. In fact, part of the visioning and discussions at the board level before this year, was the concept of integrating virtual presentations and upgrading our website to accommodate those changes. I can proudly say we did it and will continue to grow and expand access to information, knowledge, and benefits to our community even after this pandemic is behind us.

I would like to take this moment to thank the chapter board, executive committee, all the committee chairs and committee members, our executive director, and each and every one of you, our members, for a job brilliantly done this year. Soon we'll be sharing real hugs again, in person, and look back at this year and realize how remarkable each and every one of us are in our ability to stay connected despite the challenges.

Our chapter will continue to grow in leaps and bounds and under the leadership of our incoming Chapter President Chelsi Rueter, our vision and trajectory to increased growth, value and a strong and united community will continue to flourish. Thank you for your loyalty to our chapter and allowing me to serve as your President this year. I wish each and every one of you a safe, healthy and happy holiday season and beautiful year ahead.

Steven A. Roseman

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

COVID-19: What is Next?

By A.J. Jahanian, Esq.
Beaumont Tashjian

In a post-pandemic world, your community association has likely made significant and sudden changes to its operations and protocols. Since March, boards and managers have been tasked with responding to the novel coronavirus (COVID-19) and implementing new procedures, transitioning to virtual meetings, closing or restricting common areas, etc., as state and local health officials continue to revise/update their guidance and mandates, based upon best available information.

Almost six months after Governor Newsom first declared a state of emergency, what have we learned, and how should your community be responding moving forward? Depending on the location of your community and its unique facets, such as size, demographics, budget, staff and range of common area amenities, the answer to this question will certainly vary.

First, read your local jurisdiction's health department's orders or guidance. Most, if not all counties, will have issued "reopening protocols" or other mandates that may or may not apply to shared residential facilities (swimming pools, fitness centers, parks, etc.). If your county health department has not specifically issued guidance for shared residential facilities or homeowners associations, it may be prudent to consult with legal counsel to determine what, if any of the guidance and/or mandates *could* apply to your community or would create a risk of liability if not followed.

Even jurisdictions which *have* in fact issued guidance for homeowners associations, the language may not be consistent or abundantly obvious. For example, prior, Ventura County public health orders may have discussed protocols for reopening swimming pools in "shared residential settings," but did not discuss how community

leaders should be tasked with controlling or managing risk in other association common facilities (i.e., clubhouses, parks, greenbelts, tennis courts, etc.). They also did not specifically address how to proceed with association board meetings (whether in person or via video conference).

For these issues not specifically addressed by the county, community leaders may need to extrapolate and get creative. For instance, as stated above, Ventura County's prior orders did not address how to proceed with association board meetings, but they did provide that businesses *in general* which can employ remote meetings are not required to cease operations. Of course, social distancing (i.e., maintaining a physical distance of six feet or more with other non-household members) is still recommended by the CDC and the state. So the argument can be made that meeting in person is doable, if social distancing can be ensured.

Indoor fitness centers may or may not need to remain closed, depending on your local orders as well. Whether or not to consider your fitness center subject to any county orders and to decide to keep it closed will depend on your community. Is the fitness center regularly used and crowded? Is the association able to implement a reservation protocol wherein its capacity would be limited to mimic a private/personal gym? Would a monitored reservation system be feasible based upon the association's budget and logistics?

These are all issues that should be ironed out with your association's legal counsel, as the COVID-19 research and county orders based on said research are continuing to evolve. When in doubt, at this time, it is best to err to the side of caution by proceeding with video conference meetings and considering your common area facilities subject to your county's health orders. If facilities are being reopened (based upon county orders or legal counsel's advice), appropriate waivers should be implemented and signed by residents who wish to use these facilities.

In all instances, wearing a facial covering while traveling through common areas is required, as this is an order from the state level. Boards can enforce this requirement through the adoption of emergency rule changes and disciplinary hearings, but of course, defer to compassion and empathy. These new rules and government directives are new to us all, and we have been lucky that they have not been the norm for us until 2020. There will be slip-ups, but blatant violations of association rules should be enforced.

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Finally, a common question that boards and managers might have is, **"What do we do if there has been a suspected or confirmed diagnosis of COVID-19 or some other communicable disease within the community?"** Given the unprecedented nature of this pandemic, and the health and safety risks posed by COVID-19, the board is entitled to require members and residents to inform the association (via phone or email) if in fact they have contracted or tested positive, or have traveled to what health organizations (the CDC, WHO or others) might consider a "high risk" location. Note that while boards must be sensitive to confidentiality and privacy, associations are not subject to the privacy protections in the Health Insurance Portability and Accountability Act (HIPAA). These protections apply to healthcare providers only, such as doctors, hospitals, pharmacies, dentists and the like.

If confirmed ("positive" diagnosis), the association should conduct a phone interview with the resident, asking: when they in fact tested positive and when they began engaging in self-isolation, if at all; where they have walked within the community (i.e., elevators used, parks, fitness center, etc.); and if they have been in close contact with another resident or personnel of the association within the last fourteen (14) days since exposure (or whatever length of time the virus/communicable disease is considered alive and infectious, pursuant to health officials' recommendations).

Additionally, the board is entitled to send a mass communication to the community, informing them of the confirmed case within the community, without divulging any personal information of the resident. While confidentiality should be maintained in the mass communication, it may be reasonable in some situations, especially for senior communities, for the association to divulge to all residents of a particular floor/building cluster that there has been a confirmed case on their floor or in their building cluster. Going any further, exposes the association, board and management to liability claims. Remember, all residents should assume each have the virus; thus, all residents should be required to social distance and wear masks.

The resident should be reminded again to practice self-isolation, and he or she may be required to schedule garbage pickups, dog walks, or other activities, which may impact the community as a whole. Specifically, and especially in high-density communities, it is reasonable for the resident to be required to contact management at least thirty (30) minutes prior to leaving his/her residence, so that management can clear the area of other residents and clean the common areas after his/her use or walk-through.

To help create consistency in responding to the current pandemic (or future pandemics), as county orders continue to change, boards should implement a pandemic response policy or adopt protocols which give homeowners and residents advanced notice of how their membership privileges may be impacted by these events.

A.J. Jahanian, Esq. *is an associate attorney with Beaumont Tashjian, where he devotes his time servicing the unique needs of the firm's clients throughout California. Mr. Jahanian's devotion to residential and commercial common interest developments for the entirety of his career make him specialized to advise boards and management in the preparation and enforcement of governing documents and contracts, risk management, dispute resolution, fair housing compliance, and all other issues impacting community associations. Mr. Jahanian is an active member of CAI, and is the current editor of the CAI-Greater Inland Empire Chapter's Connect Magazine.*

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Planning and Preparing for Major Component Projects

By David A. Loewenthal, Esq.
Kevin P. Carter, Esq.
Loewenthal, Hillshafer & Carter, LLP

Your association is about to enter into a construction contract. What does this mean? How do you figure out what is fair and reasonable? What should be included and excluded? What should we do? All of these and a myriad of other questions always arise when an association/owner is about to enter into a substantial construction contract.

Initial Guidance

The following are essential terms and conditions that should be included in any construction contract by and between an association/owner and a general contractor. Be wary of construction contracts provided by general contractors to an association. Not surprisingly, general contractor contracts tend to be very favorable towards the contractor since they are the party that has prepared the draft contract.

An association should never simply accept the contract provided by the general contractor without a thorough review and understanding of its terms and conditions. Though there is an expense involved, any construction contract that is monetarily sizable, impacts common area components which, if not properly constructed, can create liability for the association, cause the association monetary damage and/or damage to the association property and/or individual units, should be reviewed by counsel. It is better to be cautious upfront, prior to entering into the contract, than learning of the deficiencies with the contract once a problem has arisen.

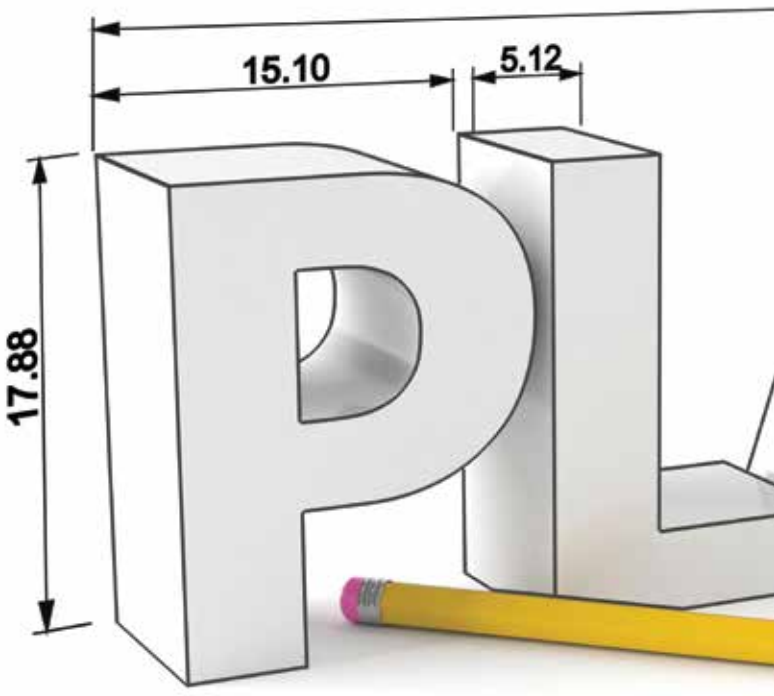
Pre-Contract Background Check and Due Diligence

Prior to the preparation and/or review of a construction contract, the association must first take the necessary steps to ensure that the proposed contractor is actually qualified for the project. This includes, but is not necessarily limited to, having the proper license(s) to perform the construction project, bonded, insured (automobile, workers compensation and general liability), and is experienced in the type of project that you are seeking to contract for.

Once the background check has been completed, it is imperative that the contract contains certain critical terms and conditions so that all of the parties understand the rights, duties and obligations pursuant to the contract.

Essential Terms and Conditions of a Construction Contract

1. **Type of Contract:**
   - Fixed Cost Contract: All of the work is to be performed for an agreed sum of money determined prior to executing the contract.



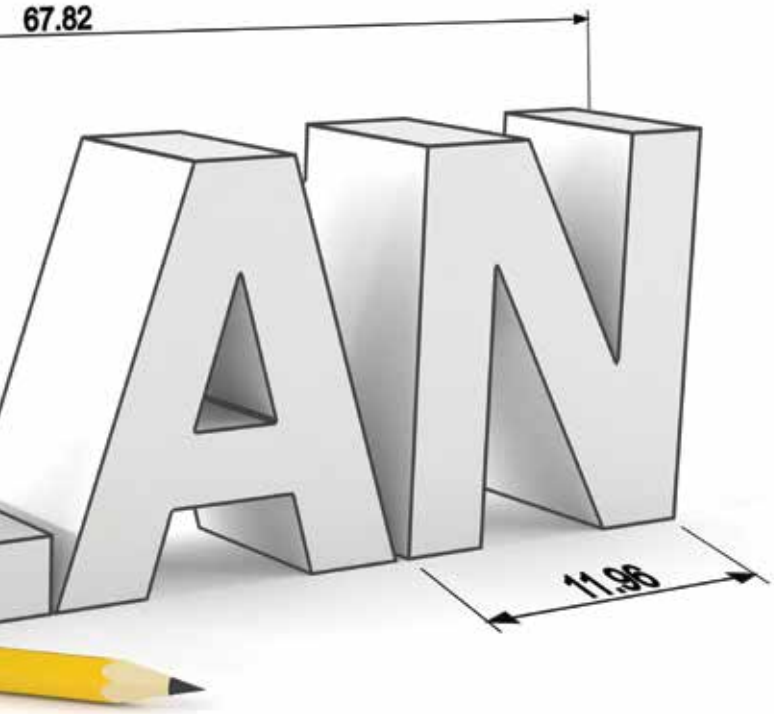
- Time and Material: Contractor charges an hourly rate for all labor and time as well as for material and surcharges. The association does not know what the actual cost of the construction project will be at the time of contracting.

- Cost Plus: The association pays for the actual costs/ expenses of the project including labor, subcontractors, material supplies, etc., plus a fixed percentage or monthly fee to the general contractor for overhead and profit.

- Guaranteed Maximum: Contractor sets a maximum price for the cost of the work plus an agreed upon profit with provisions for the contractor to obtain competitive bidding from subcontractors. This may also include a cost savings provision. Note: contractor responsible for cost overrun unless based upon agreed change orders.

2. **Scope of Work/ Representation and Warranties:**
The contract needs to specifically identify the job description/scope of work. As part of the description, the contract should reference the approved plans, specifications, engineering documentation as well as written descriptions of the work.

A representation should be included in the contract stating that the contractor will comply with the city-approved plans, specifications, industry standards and building codes. If the contract calls out for specific materials, name brands, manufacturers, etc., that should be included in the contract.



Further, exclusions to the contacts should be specifically identified so as to avoid ambiguity as to the scope of work during the construction.

Avoid ambiguity upfront.

3. **Commencement and Completion of Work/Time is of the Essence/ Liquidated Damages:**

Associations generally have a specific time frame in which they expect the work to be completed. This is especially important when the construction involves waterproofing, such as a new roof, which needs to be completed prior to winter rains.

The contractor needs to provide sufficient forces to ensure that the work is completed within the designated timeframe with exceptions for force majeure events.

In order to help ensure timely completion of a construction project, the inclusion of a liquidated damages provision may be appropriate. Such a provision requires the contractor to either forfeit monies otherwise owed under the contract or repay money to the association for each day the contract goes beyond the initial completion date. This can be limited based upon change orders agreed to by and between the contractor and the association as well as force majeure events (acts of God, war, labor strikes, etc.).

4. **Payment Schedule/Retainage:**
Depending upon the type of contract entered into, an appropriate payment schedule is essential.

The contractor cannot require more than ten percent (10%) of the contract amount or $1000, whichever is less, at the time of entering into the contract.

The contract should be written so that the association's payment is always owed after the work, that is the subject of the payment, has been performed. The association should not pay for work not yet performed. The timing of payment provides significant leverage to the association.

At a minimum, the association should negotiate upfront a 10% retainage to be paid once the project has been completed including all punch list items performed, final sign-off/ approvals received from governmental authorities and the providing of lien releases from all subcontractors, material suppliers, vendors and the general contractor.

(Continued on page 12)

5. **Change Orders and Cost Contingencies:**
Many "fixed cost" contracts contain a cost contingency. A contingency is an estimate and not a promise as to what that item will cost. There are situations where a cost contingency is fair and reasonable and there are other situations in which an association should ask for the actual cost. Such contracts also often included an "allowance" providing a certain amount of money for an item, such as windows, cabinetry, tile, etc.

In addition, change orders are often reasonable and necessary. To avoid being "change ordered to death", the contract should require change orders to be in writing and signed by the contractor and the client. The contract should also require a reasonable level of specificity for change orders including, but not limited to, anticipated delay (if any), cost and detailed scope of work.

6. **Insurance and Performance Bond:**
The general contractor and all subcontractors must have all appropriate insurance including automobile, workers compensation and general liability. Regarding general liability, require written confirmation that there are no exclusions for work performed on a common interest development/multi-family residential project since that is a standard exclusion in many contractors' liability insurance policies.

Also require that the contractor name the association and community association management company as additionally insured under the general liability policy. By being added as additional named insured, the association/management company will have direct contractual rights with respect to the insurance policy in case of any liability claim.

Especially regarding the liability insurance, the policy limits should be more than enough to cover damages should the work performed be deficient.

Depending upon the size of the project, you may also require a performance bond, which is generally two to three percent (2%-3%) of the contract amount. The contractor may require that to be a cost paid by the association. A performance bond can come into play if the association has pre-paid for work and the contractor fails to complete its work, possibly triggering the bond company to pay for completion of the work.

7. **Indemnity:**
Often the contractor will require the association to indemnify, defend and hold harmless the contractor in the event of a claim. The provision should be reversed and written in favor of the association so that in the event of a claim arising from the acts and/or omissions on the part of the contractor that give rise to damage or injury, the contractor will defend, indemnify and hold harmless the association.

This provision is extremely important especially when the construction project will involve significant renovation to a project which has the potential to damage individual units that could lead to homeowners bringing a claim against the board or the association for related damage.

The insurance provisions, including being named as an additional insured, along with indemnity are essential provisions that need to be included within a construction contract to properly protect the association.

8. **Limitation on Liability/ Exculpatory Clauses:**
A contractor should be prepared to stand behind his work and accept responsibility if he provides deficient services. Contract clauses attempting to limit liability for defective work take many forms, but each takes away rights associations have under California law.

Such clauses should either be fully eliminated from a contract or properly negotiated so as to limit their impact. Examples of such clauses are as follows:
- "Contractor shall not be liable to association for any acts and omissions other than intentional or grossly negligent acts";

- "Contractors liability for damages is limited to the dollar amount paid the contractor under the contract";
- "Association agrees to waive any and all consequential damages arising from contractor's work."

Again, in negotiating the contract, these provisions should be deleted, if possible, or, at a minimum, significantly modified so as to properly protect the association.

9. **Termination Clause:**
This is a standard provision in construction contracts. The provision should be viewed in several parts: (1) who is the terminating party (owner or contractor) and (2) is the termination for cause or without cause.

To the extent that the association can negotiate the right to terminate without cause (simply for convenience), that is beneficial. In such an event, the contract should attempt to limit any termination fees to be paid by the association to the value of the work/services performed up through the date of termination and possibly certain limited additional costs involving demobilization.

The methodology of termination and the associated fees are generally negotiable.

10. **Alternative Dispute Resolution Mediation/Attorney Fees:**
Parties to a construction contract often focus on the actual work to be performed without thought as to what happens in the event of a dispute down the line.

In anticipation of a potential dispute/claim, the parties may wish to include in the construction contract a mediation provision stating that in the event of a dispute or claims prior to instituting a formal lawsuit, the parties will first attempt to resolve the disputes/claim through the use of mediation. Such mediation is typically performed through the use of a third-party neutral who is either a retired judge or an attorney with significant experience in this field. There are several large and individual mediation services throughout California.

The provision is generally written so that if a party institutes litigation without first proceeding to mediation that the party waives its rights to recover attorney's fees.

An essential hammer in any construction contract is an attorney's fees provision. The provision generally states that in the event of an action (litigation or arbitration) arising from the contract or the work performed therein, the prevailing party in any such action is entitled to the recovery of reasonable attorney's fees and costs as well as expert consultant fees and costs.

Board/ Association Liability

A primary purpose and obligation of an association and its Board of Directors is to properly assess for the maintenance, repair and replacement of the common area which is largely premised upon the duty to perform a reserve study at least once every three years.

A board/association can be found in breach of such obligations for failure to properly maintain, repair and replace the common area. As such, there is always potential liability as to the association and the board for failing to carry out those primary functions.

Such duties and obligations, including visual inspections of exterior elevated elements, such as decks/ balconies, have been recently codified in (SB 326) Civil Code sections 5551, 5986 and 6150. Inevitably, these new statutes will lead to additional construction projects that will be the subject of construction contracts.

An association will live and die by the construction contract it enters into. Being thoughtful and careful upfront in the negotiation and drafting of the contract will save an associate tremendous time, cost, expense and heartache in the event of a dispute.

David Loewenthal *is one of the founding Partners of Loewenthal, Hillshafer & Carter, LLP, a firm which specializes in representing community associations in Southern California. His practice includes representing associations as both plaintiffs and as defendants in litigation matters ranging from construction defect litigation to actions to enforce association governing documents, providing general counseling to associations, drafting and amending of governing documents and contracts. Mr. Loewenthal has lectured on various topics effecting community associations through the Greater Los Angeles and Channel Islands Chapters of CAI and California Association of Community Managers.*

Kevin P. Carter, Esq. *is a Partner of Loewenthal, Hillshafer & Carter, LLP, and has more than nineteen years of experience handling many forms of complex litigation, with an emphasis on construction defect, community association, real estate, and business litigation.*

Words a HOA board member never wants to hear

"Your Baby is Ugly"

By Timothy Cline, CIRMS
Cline Agency Insurance Brokers

Nobody wants to talk about it, but if your common interest development was built before 1980, there is a good chance your Association is beginning to look a little beat. And we're not just talking about the outside appearances of a building. With 40+ years of wear and tear, hidden within the common area recesses, are undoubtedly some large and expensive building components that desperately need attention.

Copper pipes, drain lines, wood siding, roofing are just the obvious examples, but it is important to consider the deteriorating planters, tree root-impaired sidewalks, and hidden wet rot, dry rot, and termite damage.
If there is one positive outcome of the new law (often referred to as the "Balcony Bill" law), it is the recognition that there may be real damage to the common area, and one may not even know it.

Starting in 2025, the California Civil Code §5551 requires condominium associations with three or more units to conduct visual inspections of load-bearing components six feet above ground, supported substantially by wood. All structures must then be reinspected every nine years. This would appear to be a good time to broaden the scope of the instructions to address other aging common area improvements.

Fixing aging components can be expensive. If the reserves are inadequate, what other remedies are to the board? This article examined some funding options (traditional and otherwise):

1. **Sue the Developer?** With a 40-year old building, the statute of limitations undoubtedly ran out several decades ago, but check with the board. Besides, unless the lawsuit alleged poor construction or materials, or workmanship,

what would you sue? The march of time? Things wear out. The roof, the siding – all have an expected lifespan. If you were able to find the developer, it would be hard to argue that he/she had anything to do with the aging building just doing what aging buildings do.

2. **Submit it under the Association's Master Policy:** Insurance policies protect the Association against fortuitous or unforeseen losses. Normal wear and tear, deterioration, termites – these are all "expected" losses. Only the unforeseen perils would apply to the resulting damage. For example, the resulting damage from a burst water pipe is likely covered, but the cost to repair the pipe portion that failed is not.
3. **Levy a Special Assessment:** This is an excellent financing mechanism, but it may not go smoothly if the special assessment is large and the amount of equity an owner has, is not. Equity is defined as market value minus any loans or liens. A more interesting discussion is whether or not a unit owner could submit the special assessment under the "Loss Assessment" coverage on the unit owner's HO-6 policy. This coverage is designed to protect the unit owner against special assessments that occur as a result of a covered peril. In the case of the unit owner policy, the covered perils are typically limited to bodily injury, property damage, and the same perils defined under the underlying HO-6 coverage (fire, explosion, smoke, wind, hail, aircraft, riot, vehicle damage). To simplify, if it's excluded from the Master Policy (because of normal wear and tear, deterioration, wet rot, dry rot, termites), it's likely also excluded on the HO-6. Nevertheless, personal lines adjusters seem inclined to pay all sorts of claims they aren't obligated to cover. They seem to just want to get the claims off their desks. So, my advice is to submit these special assessments to your insurance agent/broker anyway and see what happens.
4. **Borrowing from Reserves:** A board would be well advised to review Civ. Code §5515(a) carefully and then check with an attorney. Unlike a private lender, these loans must be paid back within a year. Consult with an attorney to make sure you comply with the disclosure obligations.
5. **Private lender?** Every bank or financial institution with an HOA program usually has a robust HOA loan program as well. If the governing documents allow this alternative, it could potentially provide the Association with a longer term to pay the costs back. Sometimes, after large disasters, the SBA offers loans, too. For example, after the Northridge Earthquake (Jan. 1994), the SBA offered up to $1.5 Million at 4% to 5% interest amortized over 20 years.

Board members who recognize their obligation to be proactive on these sorts of building components may receive some criticism from the membership in the short term, especially if larger reserve contributions are necessary each month to meet the goals. A review of a "component list" with your Reserve Study preparer might be a good first step to identify what large, big-ticket components should be considered and added to the reserve study.

Timothy Cline, CIRMS *is one of the United States' foremost authorities on insurance for common interest developments and is President of Cline Agency Insurance Brokers, which specializes exclusively in coverage for condominium associations, homeowners associations, planned developments and cooperatives throughout California, Oregon, Washington, and Arizona. In addition to speaking weekly before homeowner groups, Tim is a regularly featured speaker at educational seminars and programs throughout California and the U.S., including numerous programs sponsored by CAI. His involvement and expertise have made him the recipient of more than a dozen awards from CAI.*

By Kelly G. Richardson, Esq. CCAL
Richardson / Ober / DeNichilo LLP

Recently our board stopped dues collection for 6 months because they said some homeowners were experiencing financial hardship. The board has no plans to ask owners to pay back dues. Is this legal?

ANSWER: One of the HOA board's fundamental responsibilities is to make sure the association's bills are paid, and that means also collecting the money to pay those bills. Civil Code Section 5600 states that "the association shall levy regular and special assessments sufficient to perform its obligations…" A similar situation came up in the Great Recession of 2008-2009, when many owners were in financial distress and some boards struggled with whether to require such owners to pay their assessments. However, members who fail to pay assessments harm those who are paying their share of the HOA costs, so associations must insist that all members pay their assessments. The HOA's bills do not stop during the pandemic so assessments cannot stop either. The board should be businesslike in its handling of HOA finances, which includes good stewardship of the HOA's income – and not cutting it off!

Our HOA over the last 20 years has used up its reserves because of increasing maintenance and irrigation costs. The CCRs forbid raising the annual dues and special assessments are only permitted for litigation emergencies. We have tried to modify the CCRs but we cannot get a majority of the homeowners to vote to OK a change. What would you suggest?

ANSWER: The law has a provision which allows HOA boards to adopt modest increases in assessments, and that is Civil Code Section 5606(b). Under this statute, HOA boards can increase regular assessments by up to 20% per year without member approval, regardless of anything contrary in the governing documents. The same statute allows boards to impose a special assessment each year of up to 5% of the association's annual budgeted gross expenditures. Such an action must occur in an open board meeting, and it is helpful to explain to the members the necessity of the increase. Depleting reserves to subsidize long term operating cash deficits is a bad idea; discipline is better.

Can members delinquent in payment of their HOA dues be on the board?

ANSWER: Civil Code Section 5105(c)(1) allows associations to "disqualify a person from nomination" due to assessment delinquency unless that person is in a payment plan with the HOA to catch up. Under the law as it changed in 2020, delinquency in assessments is one of four optional eligibility qualifications that associations may adopt along with the mandatory qualification of membership in the HOA. Such eligibility standard, if desired by the HOA, should be adopted in a change to the HOA's election rules.

Many bylaws contain provisions also disqualifying sitting directors if they are delinquent in their assessment obligations. One of the many unanswered questions from this new law is whether in addition to the four specified optional candidacy standards there can be additional disqualifications of sitting directors (such as, for example, missing several meetings. Many HOA attorneys believe that the new law applies only to candidacy and not disqualification of sitting directors.

Our reserves are extremely low and our collections are growing worse by the day. In order to try and turn this around, are the following actions legal: Can we deny access to the automatic gate by delinquent owners and require that they wait for entrance at the guarded gate? Can we deny entrance for guest and guest parking, or the use of pool, tennis, clubhouse, laundry room, etc.? If the board has not taken these or other serious actions, could the board be sued? To date, we just lien properties that go back to the bank and we rarely get paid or go after an owner.

ANSWER: The association, and by extension the board governing it, have a legal and moral responsibility to collect assessments from all members. Boards often are concerned about the harshness of pursuing neighbors for money. However, if they do not pursue, a greater unfairness will occur, as the paying members cover the expenses not paid by the delinquent members.

The law requires the association have a written collection policy distributed annually to members. If such a policy exists, follow it. If not, adopt one.

Under Civil Code Section 1361.5 an association may not bar a member or member's tenant from the residence. It can cut off access to services and amenities, or even voting rights, if it pursues the proper disciplinary hearing process, but it cannot cut off utilities.

While these actions will help get a member's attention, the most important action is to consistently pursue and enforce assessment obligations. Follow up on those liens - it's not fair not to. Yes, you can be exposed to lawsuit if you ignore this basic responsibility.

It may be unfair to assume the board is doing nothing, as most boards take care not to embarrass members by publicizing their arrearages as well as the association's actions against them.

During my four years in my association, my dues have been raised more than 33%; supposedly because of past-due dues from homeowners in my complex.

Shouldn't the board be pursuing legal action against these homeowners who are in default of their dues? When I spoke with one of the members of the Board, she stated that they can't afford legal action, nor can they afford to take over the home payments. Can they use delinquencies of other homeowners as an excuse to raise our dues, or should they have to perform all necessary means before asking for this increase?

ANSWER: Association boards are required to adopt budgets sufficient to meet the anticipated expenses for the coming year. Particularly these days, it is prudent to budget for projected uncollectible assessments. However, this does not give associations carte blanche to simply ignore the unpaid assessments and spread the cost among those members who do meet their assessment obligations to the community.

A basic board function is to take reasonable steps to collect assessments. The law gives associations a powerful tool in the form of a lien that, if proper steps and notifications are taken, can be placed upon a member's unit or lot. The filing of a lien is not itself expensive, nor does it necessarily require an attorney. Many management firms are also proficient in the technical requirements, and place liens for their associations. Other collection companies and law firms have various fee schedules, and not all charge up front costs.

Kelly G. Richardson *is co-founder and Partner of Richardson / Ober / DeNichilo. In practice since 1983, Kelly is known as a devoted and successful trial attorney and advisor to real estate professionals, property and business owners, and common interest developments. In 2006 he was the 16th California attorney admitted into the College of Community Association Lawyers (CCAL). In 2016, he was the international President of CAI and served on its Board for seven years. For 13 years, he has authored a syndicated column on homeowner association legal issues, currently appearing in approximately 14 publications.*

The Balcony Bill… Is Your HOA Prepared?

By Les Weinberg, RS, MBA & Scott Clements, RS, PRA, CMI
Reserve Studies, Inc.

Last year's California State legislative session included multiple new laws for HOA's. Often overlooked or misunderstood is SB 326 - Elevated Elements Inspection, also known as "The Balcony Bill", and the financial impact it will have on homeowners.

Brief History

Not long ago, there was a tragic accident in Berkeley, CA. A group of people were standing on a balcony when the wooden structural supports failed and the deck collapsed, falling some 30 feet to the street below. Six people were killed and seven others severely injured. In response to that, the California legislature enacted new laws which require that wood framed elevated elements (balconies, decks, stairs, walkways) that protrude from the main structure be inspected by a licensed architect or engineer to ensure the structural elements are sound, and that any railings serving the areas are secure.

What it Includes

At a minimum, detailed inspection of load bearing components and associated waterproofing or building envelope systems is required…including flashing, membranes, coatings, and sealants that protect the load bearing components from exposure to moisture. In addition, intrusive investigation: i.e. cutting away stucco or siding to access the structural elements may be necessary. The report must include a list of the elements for which the HOA has maintenance and repair responsibility, recommendations for repair or replacement of the systems identified, and the expected remaining useful life of those components. The findings of the report are to be included in the association's reserve study, per the requirements listed in section 5551 of the California Civil Code (also known as the Davis-Stirling Act). Note, this applies to wood framed elements only, those constructed of steel, masonry, concrete, or a combination thereof, are not included in the inspection requirements.

Timelines

The **initial** elevated elements inspections **must be conducted and included in the association's reserve study by January 1, 2025,** and **again** no less than every nine years thereafter in coordination with the reserve study inspection pursuant to Section 5550 (or six years from date of completion for buildings constructed after January 1, 2020). Therefore, HOA's should budget to have the elevated elements inspections performed no later than during the 2024 fiscal year. Reserve studies for any fiscal year beyond 2020 should include a line item for the statutory mandated elevated elements inspection in the appropriate years.

Estimated Costs

The costs of these elevated elements inspections are expected to vary widely, based on the type of construction, the accessibility of the elements (such as the need for extension ladders or scaffolding), associated materials that must be reviewed, any destructive work that may be necessary, and restoration costs of the destructive work. Currently inspection costs have been ranging in the $800-1,200 per deck inspected, or a rough average of $500 per unit (i.e. not all units may have decks, or decks that require inspection). Providers are required to inspect a "Statistically Significant Sample", which means a sufficient number of units inspected to provide 95 percent confidence that the results from the sample are reflective of the whole, with a margin of error of no greater than plus or minus 5 percent." In user-friendly terms this means multiple areas of every property will need to be evaluated, and a mid-size HOA of 150 units should anticipate **inspection** fees in the $75,000 – 150,000 range. Note, this does not include the costs of **remediation** should that be determined necessary based on the inspection.

Impact on Reserves

Some good news: Elevated elements inspections, as well as any remediation costs, are considered reserve expenditures. However, these added liabilities will result in a reduction of the percent funded and have the potential to accelerate the need for substantial increases to the reserve contributions. If reserves are poorly funded, there may be a need for a special assessment(s) as well.

(Continued on page 20)

Continued from page 19

Advice for HOA Boards

- Update the current reserve study to include the estimated cost of the elevated elements inspections.
- Procure bids for elevated elements inspections. Look for providers who specifically work with HOA's and have the appropriate experience and insurance coverages to undertake the scope of work necessary.
- Prepare for the inspection:
  - How and when will the elements need to be accessed?
  - Is individual unit access required? If so, which units?
  - To what extent will homeowner cooperation be needed?
  - Determine the potential impact on the daily activities of the members.
  - Communicate the procedures to the homeowners in advance and update them on a regular basis.

The requirements of these new regulations are clearly defined in the California Civil Code, and it is the responsibility of the HOA to provide the information to the membership via the reserve study and its associated funding plans. The sooner the requirements are addressed and budgeted for, the greater the ability to spread out the associated costs over a longer period of time.

Les Weinberg, RS, MBA *is a co-founder of Reserve Studies Incorporated and its Chief Financial Officer. His responsibilities include supervision of the costing, accounting, financial reporting and funding models of all work products. Additionally, he maintains oversight responsibility for the corporate office and support staff. He has over 44 years' experience in budgeting, financial modeling, taxation and audits. Les has achieved the Community Associations Institute (CAI) National designation of Reserve Specialist (RS).*

Scott Clements, RS, PRA, CMI *is Chief Executive Officer of Reserve Studies Inc. Mr. Clements has a long and distinguished career in reserve studies and building inspection and analysis. He has personally performed thousands of property inspections, including services for reserve funding analysis, property purchase, construction defect litigation support, and cost estimation. He has obtained multiple certifications in residential and commercial building inspection and reserve analysis.*

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CAI-CLAC 2020 Accomplishments

ADAPTING TO COVID-19

At the beginning of 2020, CAI-CLAC had an ambitious legislative agenda which had as a priority a focus on fixing elements of SB 323 (Elections).

When COVID-19 happened, the legislature was forced into an unscheduled recess and the legislative session was turned on its head. Most legislators trimmed their bill folders down to only a couple of bills focused on COVID-19 or economic recovery. The Capitol was closed for the most part to all but essential staff. Lobbying as we have known it for decades changed in an instant from personal meetings in the hallway to Zoom conference calls. Our agenda changed from offensive to defensive. Our focus quickly turned to AB 3182 (Rental Restrictions) which initially prohibited all rental restrictions. CAI members adjusted well and came through when asked to participate in teleconference hearings and Calls to Action. From one-on-one virtual meetings with legislators to more than 6,100 emails sent to the Governor, our response was unprecedented and quite impressive. Our grassroots advocacy resulted in a bad bill being better than it would have been had we not engaged.

On a local level, grassroots advocacy has always been extremely important to CAI-CLAC. Historically, such advocacy was accomplished through in-person meetings in Sacramento at Legislative Day at the Capitol or in-district meetings throughout the year. As in-person meetings were no longer possible, CAI-CLAC needed to develop and implement a new strategy. Our innovative CAI-CLAC members and staff swiftly responded to this challenge and the resulting virtual advocacy campaign enabled CAI-CLAC Delegates and Legislative Support Committees to maintain a high level of engagement with Legislators and their staffs, allowing our voices to be heard louder than ever in 2020. CAI-CLAC should be able to use what was learned about virtual advocacy to help its legislative efforts in 2021 and beyond.

CALIFORNIA LAW REVISION COMMISSION

The California Civil Code provides for audio or video Board meetings, but requires notice of such meetings to designate a physical location where association members may congregate to "attend" the meeting with a person designated by the board. With gatherings prohibited during the COVID-19 pandemic, homeowner associations have been legally prohibited from complying with this physical meeting location requirement. While Governor Newsom issued an Executive Order dispensing with physical presence requirements in the Brown Act for other types of public meetings, no such accommodation was made for associations. Noting one of the silver linings of the pandemic was increased homeowner attendance and participation at virtual meetings, CAI-CLAC strenuously urged Governor Newsom and the California Law Revision Commission ("CLRC") to eliminate the physical location requirement for meetings, at all times, not just during the current pandemic. The CLRC's review of this issue is ongoing.

Continued on next page

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CAI-CLAC 2020 Accomplishments (cont'd.)

AB 3040 (CHIU) – LOCAL PLANNING: REGIONAL HOUSING NEED ASSESSMENT

AS INTRODUCED: AB 3040 was amended in late July to add a new section to the Davis-Stirling Common Interest Development Act. "This bill would make void and unenforceable any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in a planned development, and any provision of a governing document, that effectively prohibits or unreasonably restricts the construction or use of up to 4 primary dwelling units on a lot zoned for at least 4 dwelling units, as specified."

POSITION: Opposed.

RESULT: This bill was not enacted, but rather was held in committee.

INDUSTRY IMPACT: Allowing single family lots to be rezoned for up to 4 primary dwelling units would have forced many associations to upgrade their infrastructure to accommodate additional residents at a time when they can least afford it. AB 3040 also would have created a conflict with assessment allocation provisions in many association's governing documents forcing them to amend these documents every time there is a subdivision of a lot. It also would have promulgated uncertainty rather than stability. For example, if a homeowner in a 100 lot community is permitted to subdivide and individually sell 4 separate units on one of the 100 lots, how is this sale reconciled with the governing documents? Does that Association have to record a new tract map and CC&Rs specifying that assessments are allocated by 1/103 interests or to clarify that each owner of the subdivided lot is assessed ¼ of a 1/100th interest? Thankfully, these problems and questions were averted.

SB 1120 (ATKINS, CABALLERO, RUBIO AND WIENER) – SUBDIVISIONS; TENTATIVE MAPS

AS INTRODUCED: "This bill, among other things, would require a proposed housing development containing 2 residential units within a single-family residential zone to be considered ministerially, without discretionary review or hearing, within a single-family residential zone, if the proposed housing development meets certain requirements . . . ."

POSITION: Opposed.

RESULT: Did not come up for vote on the Senate floor.

INDUSTRY IMPACT: SB 1120 did not specifically seek to invalidate deed restrictions limiting homes within a common interest development to single family use. However, there was concern as to whether association covenants could prevent a lot split in an association if otherwise approved by the local municipality pursuant to this bill. This concern is moot for the time being.

CAI-CLAC is always looking for ideas for common sense legislation to sponsor. Please send ideas/feedback to our Legislative Strategy and Research Committee at LSRC@caiclac.com.

WHAT IS CAI-CLAC?

The California Legislative Action Committee (CLAC) is a volunteer committee of the Community Associations Institute (CAI) consisting of homeowners and professionals serving community associations. CAI is the largest advocacy organization in America dedicated to monitoring legislation, educating elected state lawmakers, and protecting the interests of those living in community associations in California.

ABOUT THE ORGANIZATION

- Is a non-profit, non-partisan committee comprised of two Delegates and one Liaison from each of the eight CAI California chapters.
- Represents 13 million homeowners and property owners in more than 50,000 associations throughout California.
- Is comprised of association homeowners, board members and the professional business partners that serve them.
- Is NOT a PAC (Political Action Committee) and makes no financial campaign contributions.
- Depends solely on the donations of community associations, their boards of directors and those who serve association members.

CAI-CLAC'S MISSION

To safeguard and improve the community association lifestyle and property values by advocating a reasonable balance between state statutory requirements and the ability and authority of individual homeowners to govern themselves through their community associations.

NATHAN MCGUIRE, ESQ. | ADAMS STIRLING, PLC CAI-CLAC 2020 CHAIR

Nathan McGuire is in charge of Adams Stirling's Northern California offices and serves as general counsel for community associations throughout the state. He has served as a delegate and in various positions on CAI-CLAC's Executive Committee for the last decade, including Legislative Co-Chair, Vice Chair, and Chair for the 2018-2020 term. He was named by Super Lawyers Magazine as a "California Rising Star" every year from 2012-2018 and received an AV Preeminent Peer Review designation from Martindale-Hubbel.

LOUIE A. BROWN, JR. | CAI-CLAC ADVOCATE

Louie A. Brown, Jr., is a partner with Kahn, Soares & Conway, LLP. He manages the firm's Government Relations Group representing clients before the California State Legislature and various state administrative agencies.

Louie specializes in providing clients with expert advice in maneuvering through California's complex legislative and administrative process. He has written numerous laws and played key roles in many of the Legislature's major accomplishments and budget negotiations over the last decade.

Louie earned his Bachelor of Science Degree from California Polytechnic State University in San Luis Obispo, California and his Juris Doctor from the McGeorge School of Law.

Louie and his wife, Kymberlee, reside in Elk Grove with their three children.

2021 Upcoming Events

JANUARY

26 Chapter Webinar

FEBRUARY

11 Managers' Webinar

23 Chapter Webinar

MARCH

4 Board Leadership Webinar, Session 1

11 Board Leadership Webinar, Session 2

18 Board Leadership Webinar, Session 3

23 Chapter Webinar

25 Board Leadership Webinar, Session 4

From the Chapter's Executive Director

Dear Members,

Wow! 2020 has been quite the year. Our chapter has adapted in many ways this year and I am grateful for our members in the way they have remained engaged and supportive of our chapter. The photo below is from our January 2020 chapter luncheon where we made a toast, celebrating the milestone of 900 Chapter Members. I look at this photo and am reminded of what a great community of people we have in this chapter. These are strong leaders in communities and businesses who truly make our chapter outstanding. I look forward to the day when we can all gather together, in person, and make a toast to all of us, as we not only adapted, but endured a most unique time in all of our lives.

Thank you to all of our members for your dedication to CAI-Channel Islands Chapter and this industry. I am grateful for your continued support. Thank you to our chapter board of directors, committee chairs and volunteers for your involvement and leadership in the chapter. It is a pleasure to work with so many outstanding individuals!

May you have a wonderful holiday season and I look forward to continuing to work with you in 2021!

Sincerely,
Leah Ross
Leah Ross
CAI-Channel Islands Chapter
Executive Director

Call for Chapter Committee Members

CAI-Channel Islands Chapter continues to thrive because of our dedicated volunteers and leaders! Volunteering for a chapter committee is a great way to actively serve the chapter and the industry. For more information on chapter committees and to fill out a committee member form, go to www.cai-channelislands.org/chapter-committees/ Questions? Call the chapter office at 805-658-1438 or email leah@cai-channelislands.org

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Michelle Atkinson, Ross Morgan & Company, Inc.
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Carla Campos, Farrell Smyth Inc.
Leanna Cutler, CMCA, Seabreeze Management Company, Inc.
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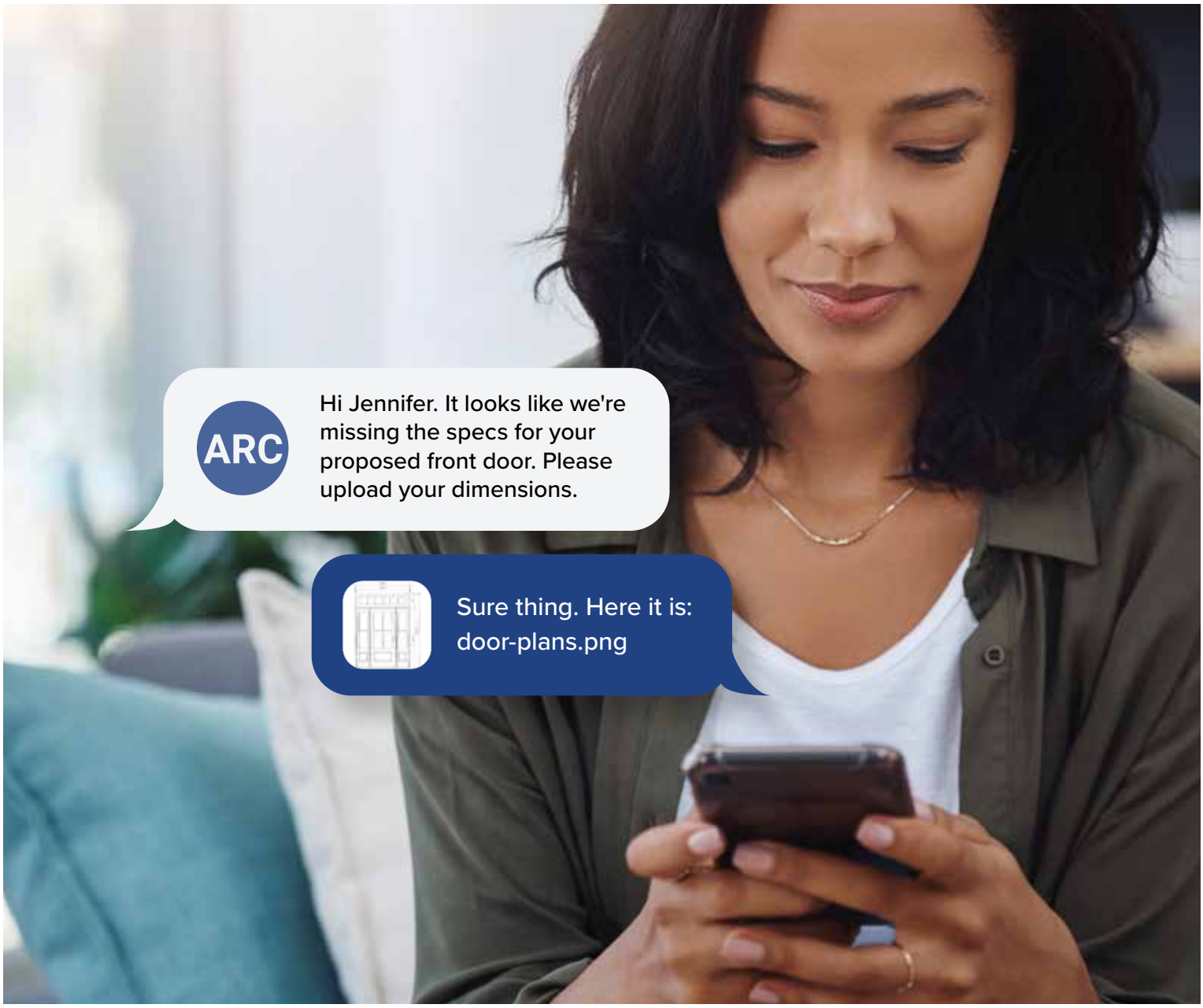

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