FAQs
(frequently asked questions)

Managing Small Condominium HOAs

2/1/14 Edition by
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This article is provided as a resource for understanding how condominium Homeowner Associations ("HOAs"), operate under the laws of the State of California, as those laws are understood on the publication date. This article focuses on very small HOAs, with as few as two units. While state regulations are generally the same for all sizes of condominium HOAs, small HOAs, which typically are self-managed and where the occupants live in close proximity, face unique challenges. San Francisco has a large population of small condominium properties, owing to a preference for low-density, detached housing and City rules prohibiting condominium conversion of any buildings with more than six dwelling units. Updated versions of this article may appear on the firm's website at www.g3mh.com.

Breaking News

Effective January 1, 2014, the California State Legislature has *updated, modified and re-numbered the entire Davis-Stirling Act,* the governing authority for all California condominium Homeowner Associations, making this an ideal time for all HOAs to review their governing documents (CC&Rs, Bylaws, Rules, etc.) and update these documents so that they reflect the current status of the state's rules on how HOAs must operate. In most cases, when governing documents conflict with the Davis-Stirling Act, it is the *state laws* which prevail.

Effective January 1, 2013, carbon monoxide detectors are required in every unit with a gas burning furnace, stove, water heater, wood burning stove, fireplace or attached garage.

Previous changes to the Davis-Stirling Act ban HOAs from prohibiting the rental of a condominium unit unless the prohibition was in effect before the owner acquired title to his or her unit. The Act now also prohibits HOAs from objecting to the installation of solar energy systems or electric vehicle charging stations.

Condominium HOAs are now allowed to conduct business via teleconference, under rules requiring at least one physical location where owners can attend in person. However, HOAs are prohibited from conducting non-emergency meetings via email or text messages. Meeting and other notices can be sent by electronic transmittal, but only with the prior consent of the recipient.

HOAs must now give an estimate of the fee for providing a prospective buyer with copies of CC&Rs and other required HOA disclosures. Additionally, at a buyer's request, the HOA must provide 12 months of approved minutes of its general meetings.

Further details on these topics may be found within.

What is a Condominium?

A condominium consists of an individually owned "Unit", including the space within the walls, floors and ceilings of a dwelling, plus shared ownership of the remainder of the property, known as "Common Areas". Owners share common repair and insurance expenses, but pay separately their individual mortgages, property taxes and utilities. Relationships among owners are governed by state laws and other rules set forth in a document called the "Covenants, Conditions and Restrictions," or "CC&Rs".

What Laws Govern California Condominiums?

All California condominiums operate under the Davis-Stirling Common Interest Development Act (Civil Code §4000, et seq.). Each individual condominium Homeowners Association ("HOA") also operates under procedures defined in its recorded CC&Rs; sometimes these procedures are augmented by "Bylaws" and "Rules", which are not recorded. Condominiums organized with an ***in***corporated HOA are also subject to relevant provisions of the Calif. Corporations Code, one of several reasons why small condo HOAs frequently organize as unincorporated associations.

How Are Condominium Laws Enforced?

The provisions of condominium CC&Rs and Bylaws, and indeed of the governing Davis-Stirling Act itself, are not enforced by the State on its own initiative – there are no "condo police." Individual homeowners and HOAs are obliged to take action to enforce the rules. Over the years, courts have interpreted and refined condominium law, publishing precedents and procedures to assist judges and arbitrators when they are called upon to adjudicate disputes among condominium owners. In California, a **"Business Judgment Rule"** generally prevails, encouraging courts and arbitrators to uphold the majority decisions of the HOA's members or directors regarding the maintenance, control and management of a condominium development, ***even if a reasonable person might have acted differently.*** The sole requirement is that the HOA's actions be taken (i) in good faith, (ii) in the best interests of the association, and (iii) upon reasonable investigation (*Lamden v. La Jolla Shores* (1999) 21 Cal.4th 249). Some enforcement mechanisms are relatively straightforward and effective, such as in the case of failure to pay HOA dues, where the principal enforcement mechanism is a "lien" – a legal claim against the owner's unit, forcing the owner to pay up. Other enforcement mechanisms, particularly when coexistence rules are violated, are more convoluted and are much more difficult to enforce. In such cases, a disputing owner may be forced either to seek a "Political Solution", or simply to move elsewhere.

What is the "Political Solution"?

Because California judges and arbitrators are required to give great deference to the majority decisions of HOA members or directors (see above), it is clear that the California legislature expects the resolution of many disputes among condominium owners to be resolved "politically," rather than judicially; that is, rather than suing the HOA because of a disagreement with a particular HOA decision or policy, owners are encouraged to run for election or attempt to recall the current directors, to effect a change. This highlights a bias in California law towards larger HOAs, where a political remedy may actually be achievable. In very small HOAs, however, it may be impossible for a single owner to mount a successful challenge to the majority's vote – the total voting population is simply too small. In such cases, the personalities of the individual owners, more than the language of the CC&Rs or even the Davis-Stirling Act itself, will often determine how internal disputes are resolved; it is not uncommon for a dissatisfied owner to sell and move elsewhere.

Do CC&Rs get "Stale?"

Yes. The California legislature updates the Davis-Stirling Act periodically, in an effort to improve the governance of condominium HOAs, and when this happens ***the rules for all***

California condominium HOAs change in lockstep. Because of this, the language in CC&Rs which restates the Davis-Stirling Act becomes less and less reliable over time. HOAs should update their governing documents periodically, to keep them reasonably current with the changing requirements of the Davis-Stirling Act. By the time CC&Rs become more than a few years old, large sections will have been entirely superseded, impairing their usefulness as a roadmap for resolving any disputes or disagreements, or for enforcing homeowner obligations. At some point it will become painfully obvious that updates are required. It is better to take care of this ***before*** a dispute situation arises, rather than trying to deal with both the dispute and the need to update the CC&Rs simultaneously.

The California State Legislature recently ***updated, modified and re-numbered the entire Davis-Stirling Act, effective January 1, 2014,*** making this an ideal time for all HOAs to review their governing documents, and update these documents to reflect the current status of the state's rules on how HOAs operate.

What are HOA "Rules"?

"Operating Rules" are defined under the Davis-Stirling Act as any regulation adopted by the Board of Directors of a condominium homeowner association that applies to the management and operation of the association or the conduct of its business and affairs, including parking, use of Common Areas, member discipline, architectural standards, and monetary penalties. The Davis-Stirling Act has special notice (§4360) and meeting (§4365) requirements for creating or changing certain Operating Rules, including rules governing how units and Common Areas may be used, architectural or esthetic standards, discipline and penalties, and dispute resolution procedures. To be enforceable, an Operating Rule must be in writing, be within the HOA's authority, be consistent with governing law and the HOA's CC&Rs (and Bylaws, if any), be adopted by the HOA in good faith, and be ***reasonable*** (Civ. Code §4350).

What Happens when Rules Conflict with CC&Rs?

The Davis-Stirling Act establishes a mechanism for resolving conflicts between documents. To the extent any inconsistencies exist, the following hierarchy controls in descending order of importance:

- State Law (Davis-Stirling Act)
- Declaration (CC&Rs)
- Articles of Incorporation
- Bylaws
- Operating Rules

How Long Can an HOA Wait to Enforce its Rules?

Code of Civil Procedure §336 provides for a ***five-year*** statute of limitation for violations of condominium HOA rules and restrictions, including certain architectural guidelines. Further, a CC&R amendment adopted in violation of its own amending procedures is not automatically void, but merely voidable, and only if timely and successfully challenged in court (*Costa Serena Owners Coalition v. Costa Serena Architectural Committee* (2009) 175 Cal.App.4th 1175).

Can the HOA deny an Owner Access to his/her Unit to enforce HOA Rules?

No. Both under the Davis-Stirling Act and landlord-tenant laws, HOAs cannot block access to the unit to homeowners or their guests or tenants (Civ. Code §4510 & §789.3(b)(1)). However, restrictions on access to certain Common Areas, suspension of voting rights, and fines ***are*** permissible enforcement methods.

Do small HOAs have to follow the elaborate Davis-Stirling rules for voting?

For now, yes. With its large condo HOA mindset, the Davis-Stirling Act sets forth complex rules for secret balloting and verification of votes applicable to ***all*** HOAs, regardless of size. AB 968, now before the California Legislature, will if enacted into law, simplify the voting process for associations with fifteen or fewer units.

The Davis-Stirling voting rules make even less sense when applied to 2-unit HOAs. Consequently, these HOAs tend to ignore Davis-Stirling entirely when dealing with voting and decision making, adopting a requirement of unanimity for ***all*** decisions excepting only those situations where the safety or habitability of the property is at risk.

Can Homeowners Vote via email?

Not yet. Electronic balloting was introduced to the Legislature last year as AB 1360, but although the proposal received wide-spread support, some security concerns were raised, and the bill was temporarily tabled. As a result, e-voting is ***not*** yet an authorized form of balloting for condo HOAs.

Must HOAs be Incorporated?

No. California law gives condominium owners a relatively high amount of liability protection provided the HOA carries a specified level of liability insurance (see below). The statutory liability protection may be sufficient for associations up to 10 units, but may prove inadequate for larger HOAs, which should incorporate. For smaller California HOAs, it is relatively easy for unincorporated associations to open bank accounts and obtain utilities and insurance, so the additional burdens of incorporating, although relatively light, outweigh the benefits. The smaller the HOA, the less likely it will be that a Board of Directors is needed to make decisions.

When should an HOA Board meet in "Executive Session"?

"Executive Session" meetings allow an HOA's Board of Directors to discuss matters of a private or privileged nature, including legal issues, contracts, personnel matters, foreclosures, payment of assessments and disciplinary hearings (Civ. Code §4935). Homeowners who are not Board members do not have a right to attend Executive Sessions, unless they are the subject of disciplinary actions being considered. Executive Session meetings can be held in person, via telephone or video conference, but ***not via email***, except for emergency meetings (Civ. Code §4910). Homeowners must be given notice of Executive Session meetings, regardless of anything to the contrary in the HOA's governing documents (Civ. Code §4920). Notice of an Executive Session meeting must include the agenda for the meeting, which may be brief and general in nature. Boards must keep minutes of Executive Session meetings and generally note these sessions in the minutes of the next open meeting of the Board.

Must HOAs maintain Reserves?

The Davis-Stirling Act requires that ***all*** HOAs calculate and maintain sufficient reserves to replace major Common Area building components with a "remaining useful life of less than 30 years", and to cause to be conducted ***every three years*** "a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore, or maintain … ." (Civ. Code §5550). "Diligent" means ***more*** than a cursory inspection. Inspection of "accessible" areas does not mean tearing off roofs and opening walls, but it can mean getting onto roofs, going into crawl spaces, opening electrical panels and inspecting equipment and fixtures. A "diligent" person would do all of these things. The "Assessment & Reserve Funding Disclosure Summary" which HOAs must distribute annually now includes a special statement of Interest Rate and Inflation Rate assumptions (Civ. Code §5570). Larger HOAs have this study conducted by professionals; smaller HOAs tend to handle their studies internally.

What happens when HOAs fail to maintain Reserves?

California has no "condo police" to enforce the requirements of the Davis-Stirling Act. If ***all*** of the homeowners choose to ignore the State's condo reserve rules, there are no fines or penalties. But aside from dealing with the obvious problem of how to pay for worn-out building components when one owner hasn't the funds to meet a hefty assessment call, problems can and will arise on the ***sale*** of units if the HOA has failed to maintain State-required reserves. At a minimum, full disclosure of the extent to which HOA reserves are – or are not – adequately funded, is ***mandatory*** at time of sale (Civ. Code §1100 et seq.).

Can HOAs borrow from their Reserves?

Yes. HOAs are allowed to borrow from reserves to meet short-term cash-flow problems or other expenses; such loans must be repaid within one year (Civ. Code §5515). But having the ability to raid reserves doesn't make it a wise thing to do. Reserve funds are vital to the financial health of the HOA, and failing to keep state-mandated reserves fully funded will result in deferred maintenance, deteriorating facilities, damage to common areas and owner's units, special assessments, potential litigation, and problems at time of resale.

What Reports must HOAs issue to Homeowners under the revised Davis-Stirling Act?

The Davis-Stirling Act requires all HOAs to distribute to each member a number of documents and reports at least thirty days before the beginning of each fiscal year. These documents and reports are grouped into two categories:

ANNUAL BUDGET REPORT, including

- HOA Operating Budget
- Summary of HOA reserves
- Reserve funding plan
- If reserve repairs will not be undertaken for particular components, a justification for the decision
- Whether special assessments will be required to cover reserve items (with estimated amount, commencement date, and duration of the assessment)
- Procedures used to calculate reserves
- Disclosure of outstanding loans
- Insurance Summary

ANNUAL POLICY STATEMENT, including

- Name and address of the person designated to receive official HOA communications
- Statement that members may have notices sent to up to two different addresses
- Location, if any, for posting a general notice
- Notice of a member's option to receive general notices by individual delivery
- Notice of a member's right to receive copies of meeting minutes
- Notice of HOA's Assessments and Foreclosure policies (statutory form)
- Statement describing HOA policies in enforcing lien rights
- Statement describing the HOA's discipline policy, including a schedule of all fines
- Summary of Dispute Resolution procedures
- HOA Approval Requirements for physical changes to the property
- Mailing address for overnight payment of assessments

HOAs with gross income exceeding $75,000 must have a CPA prepare a written review of the financial condition of the association annually, which is then distributed to the owners within 120 days of the end of the HOA's fiscal year.

What Reports must HOAs file with the State?

HOAs are obliged to file Form SI-CID, "Statement of Common Interest Development Association" with the California Secretary of State. ***Un***incorporated HOAs must file this form ***every other*** July; ***in***corporated HOAs must file ***every*** July, and are also responsible for filing an annual "Statement of Information" of principal business activity, Form SI-100.

Incorporated HOAs have other filing requirements which must be followed to maintain their status as legal corporate, tax-exempt entities. The California Franchise Tax Board (FTB) can and will revoke the exempt status of a corporation once the entity is suspended. The revocation can occur for not timely filing SI-CID and SI-100 forms with the Secretary of State or corporate tax forms with the FTB. If the revocation occurs for a past tax year, the FTB will impose the annual minimum tax of $800 per year plus penalties and interest. To revive a suspended entity, the HOA must file a new (25 page!) exemption application (Form FTB3500) with the Exempt Organization Unit of the FTB, including five years of HOA financial information.

Can Notices be sent to Homeowners Electronically?

Yes. HOA documents and notices may be delivered via e-mail, or even by posting on the HOA's "official" website, but the ***HOA must first receive the owner's written consent*** (Civ. Code §4055). HOAs must keep copies of the written consents returned by owners, or keep track of those owners who have consented via e-mail, along with changes to e-mail addresses and consent revocations. HOAs must also maintain records of what has been sent out electronically, when it was sent, and to whom.

Should HOAs file Income Tax Returns?

Incorporated HOAs require a Federal Tax ID number and typically file annual Federal Income Tax returns. We have yet to identify a clear consensus as to whether or not small, ***un***incorporated HOAs should consider filing annual Federal Income Tax returns. If you decide you do wish to file, consult with your CPA or other professional tax advisor to determine which form will result in the lowest tax.

What Insurance Must HOAs Carry?

Liability Insurance. Liability coverage insures HOAs against personal injury claims by third-parties. Liability insurance may also cover claims arising out of HOA employment practices, defamation, etc. The Davis-Stirling Act favors certain minimum amounts of liability insurance, by shielding members of HOAs (up to 100 units) which carry $2,000,000 of coverage from excess claims (but see below). The Davis-Stirling Act also provides immunity from personal injury and property damage claims against volunteer directors and officers of exclusively residential associations, if their actions are performed within the scope of their duties, are in good faith, and are not willful, wanton, or grossly negligent, but ***only*** if the HOA maintains specified insurance (directors of incorporated HOAs also enjoy similar protections under Corporations Code §7231). As long as the HOA carries $500,000 in Director and Officer liability insurance, ***volunteer*** board members and officers in properties of up to 100 units will be shielded from personal liability, even if the claims exceed the coverage (Civil Code §5800). This statutory protection is lost if the officer or director is paid for his or her efforts.

Casualty Insurance. CC&Rs typically contain detailed casualty insurance requirements. This is the insurance coverage for property damage, generally including all building struc-

tures but excluding the contents and personal property within individual units. Walls, floors, and ceilings of owners' units must be insured as well, but depending on the particular CC&Rs, that coverage may be carried by the HOA, or by the individual owners, who are also responsible for, and frequently are required to carry, coverage for the contents of their own units. Casualty insurance frequently does not cover certain events, such as earthquakes or floods, so HOAs and homeowners are advised to carefully review their coverage and consider additional policies or endorsements at additional expense. There are varying opinions as to the necessity of earthquake insurance due to its high premiums and deductibles, but condominiums in earthquake prone areas should carefully weigh the costs against the high likelihood of serious earthquake events. When insurance proceeds are not sufficient to cover the cost of rebuilding, HOAs may need to levy a special assessment or borrow to cover the shortfall.

Are Minimum Levels of Coverage Enough?

Not always. Even though homeowners are shielded from ***direct*** liability as long as the HOA has fewer than 100 units and carries a minimum of $2 million in liability coverage (Civ. Code §5805), they may be exposed ***indirectly***. If the HOA suffers a $3 million judgment against it, the owners could all be subject to a special assessment to make up the difference between the HOA's $2 million policy and the $3 million judgment. Talk to your insurance broker to determine appropriate levels of insurance. HOAs can obtain "umbrella" coverage at a relatively low cost, and homeowners can individually purchase Loss Assessment Coverage to protect themselves in the event a loss exceeds the HOA's policy limits.

Must HOAs Disclose their Insurance Coverage?

Yes. HOAs are required to provide owners with an annual summary of the terms of all of insurance policies, including the name of the insurer, type of insurance, policy limits, deductible amounts, and a disclaimer specified in Civil Code §5300(b)(9). HOAs also must notify owners whenever a policy has lapsed, been canceled, not been renewed, been replaced, or when the policy limits have been decreased or deductibles increased. The HOA must provide a copy of the actual policies, when requested by an owner.

Are HOAs responsible for enforcing City Ordinances?

No. HOAs enforce their CC&Rs and Rules, and cities enforce their own ordinances. Unless the ordinance states otherwise, a condo HOA is ***not*** obligated nor is it authorized to be the enforcement arm of the city. If an owner violates a local anti-noise or anti-smoking ordinance, someone notifies the city and the city orders the person to cease and desist. If the HOA's CC&Rs include a provision that any violation of a city ordinance is deemed a violation of the nuisance provision of the CC&Rs, then the HOA ***can*** go after the person, but it does so as a violation of the CC&Rs – ***not*** as a violation of the city ordinance.

Can HOAs Ban Smoking?

Yes. There are several variations on smoking restrictions which are currently employed by HOAs – interior, exterior, exceptions for non-overnight guests, etc. However, San Francisco's Rent Control rules do not allow for changes in the terms of a tenancies under its jurisdiction. An HOA will ***not*** be able to enforce new no-smoking rules against a tenant if the restrictions do not already appear in the tenant's rental agreement.

Can HOAs Ban Signs & Flags?

Yes, but …. Condominium associations are ***private***, not public, entities, and therefore are not required to offer First Amendment protections of free speech and expression to their owners. Signage restrictions in an HOA's governing documents are generally enforceable,

provided they are enforced consistently and without discrimination. The sole Davis-Stirling Act exception to this rule is that HOAs ***cannot*** prohibit signs advertising the sale or rental of a unit. While these types of signs cannot be prohibited, the HOA can reasonably control the size, location, dimensions, and design of such signs. HOAs can ban the display of flags, but restrictions on displaying the United States flag in an owner's unit or private deck, yard, or balcony, are prohibited.

Can HOAs Prohibit Owners from Renting Out their Units?

Yes and no. The Davis-Stirling Act (Civ. Code §4740) exempts homeowners from rental bans adopted by their HOAs after January 1, 2012, ***unless*** they expressly agree to be bound by the prohibitions ***or*** the prohibition was in effect prior to the date the owner bought her/his unit. This means HOAs can vote to prevent ***future*** homeowners from renting out their units, but not ***current*** owners. HOAs can still regulate short-term rentals (1-6 mo. minimums, no B&Bs, etc.). Ironically, condo mortgage lenders who will not make loans in properties with "too many" rentals, can at the same time express concerns about HOA restraints on both long-term and short-term leasing.

Can HOAs restrict Sale of Units?

No. §5805 of the Davis-Stirling Act prohibits HOAs from "arbitrarily or unreasonably" restricting an owner's ability to market or sell her or his unit, or from charging any fees in connection therewith which exceed the HOA's actual costs. Nor can HOAs require owners to work only with a designated broker or agent.

Can HOAs Restrict Pets?

Yes, but all owners are allowed to keep at least ***one*** pet. "Pet" means "any domesticated bird, cat, dog or aquatic animal kept within an aquarium" (Civ. Code §4715). HOAs whose governing documents were written ***prior*** to 2001 may still prohibit all pets, but only until the first time they amend their documents. HOAs can implement and enforce reasonable rules and regulations concerning pets; however, the Davis-Stirling Act does ***not*** specifically sanction restrictions on size or weight or prohibitions against "fighting breeds".

Can HOAs Prohibit Owners from operating Day Care Centers in their Units?

No. A "day care home" is defined as one that regularly provides care, protection, and supervision for 14 or fewer children for periods of less than 24 hours per day." (Health & Safety Code §1596.78(a)). The California legislature wants to give children the same home environment as provided in a traditional home setting, and prohibits restrictions that directly or indirectly limit the acquisition, use, or occupancy of residential, single-family homes – including condos – for a family day care home for children (H&S §1597.40(c)). HOAs can, however, adopt reasonable regulations that include proper licensing, compliance with local and state laws, liability insurance, bonds, and/or affidavits signed by parents, indemnification by the day care operators, and full-time supervision of children, including in yards or recreational areas.

What Disclosures must HOAs provide to Condominium Buyers?

HOAs must provide certain documents to a prospective condo purchaser before transfer of title to the unit, along with a special form offering an estimate of its fees for providing a prospective buyer with copies of CC&Rs and other required HOA disclosures (Civ. Code §4530). The reasonable fee must be based upon the actual cost of producing and delivering the documents. Additionally, if a buyer so requests, the HOA must provide 12 months of approved minutes of its general meetings. Delivery of required HOA documents must be accompanied by a cover sheet itemizing the documents required by law and those provided. The HOA cannot charge any additional fees for electronic delivery, if the HOA maintains its documents electronically. If a document request is rescinded, no cancella-

tion fees are allowed, and if sufficient notice was given and document copying has not already taken place, the HOA must refund fees and costs collected from the prospective buyer.

What are the new rules for CO2 detectors?

Carbon monoxide (CO_2) detectors are now required in every unit with a gas burning furnace, stove, water heater, wood burning stove, fireplace ***or attached garage.*** Anything in the home that burns a fossil fuel can create carbon monoxide–a colorless, odorless gas that can be lethal. The requirements are found in Health & Safety Code §§17296, 17926.1, and 17926.2.

Are Condominium Units subject to Rent Control?

The State's Costa-Hawkins law exempts many single-family residences from local restrictions on annual rent increases, such as those found under the San Francisco Residential Rent Stabilization and Arbitration Ordinance. The landlord of a single-family residence which is subject to Costa Hawkins can increase rent annually ***without restriction***; however, other eviction limitations continue to apply. Condominiums are considered single-family residences, and Costa-Hawkins privileges will apply. However, an exception is made for ***newly converted*** units, which only escape Rent Control caps on annual rent increases ***after*** the units are sold to bona fide purchasers for value. An exception to the exception in the case of a building where all of the converted units ***but one*** have been sold, extends the benefits of Costa-Hawkins to the last remaining unsold unit after its owner has resided there for at least one year. Note that tenants who moved into their units ***before January 1, 1996***, are shielded from the Costa-Hawkins law, and retain all of their Rent Control rights; the same is true for tenants holding lifetime leases.

How do HOAs protect against the effects of Unit Foreclosures?

Unit foreclosures can have a negative impact on HOA finances, especially if the unit owner is in arrears on HOA dues and assessments. When a unit is foreclosed upon and sold at a foreclosure sale, it may be difficult for the HOA to identify the new owner. HOAs should record a blanket "Request for Notice of Sale" (Civ. Code §2924b) to receive notice of lender foreclosure sales, so that they will know who to bill for dues and assessments after the sale occurs. Lenders are now required to record foreclosure sales within 30 days (Civ. Code §2924.1), making them more accountable for the properties they acquire through foreclosure – once the sale is recorded, the lender must start paying HOA dues and assessments.

When should an HOA hire an Attorney?

While the officers, directors or managers of HOAs shouldn't need to call an attorney for routine decisions, avoiding legal counsel in certain situations can create individual liability. Even though the "Business Judgment Rule" (see above) protects ***unpaid*** HOA officers and directors when they perform their duties (i) in good faith, (ii) in a manner believed to be in the best interests of the HOA, and (iii) with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances, there will be times when, as part of a reasonable inquiry or "due diligence," HOAs can and should seek the advice of legal counsel. (Corp. Code §7231(b).) Failure to seek advice on an important legal issue that results in damage to the HOA can serve as the basis for a suit for breach of fiduciary duty. HOAs should consider seeking legal advice:

Amending Documents: Whenever CC&Rs (& Bylaws) are amended or restated, legal counsel legal should be involved in drafting and recording the changes.

Architectural Disputes: Failure to enforce as well as arbitrary and capricious enforcement can lead to costly litigation. Whenever an architectural dispute arises,

legal counsel should be called to discuss how to achieve proper resolution or to position the HOA for litigation.

Assessment Collection: Setting up proper collection policies and consistently following those policies is essential to maintaining the HOA's finances and minimizing legal challenges.

Contracts: Agreements not reviewed by an attorney can have significant hidden liabilities.

Ethics: Whenever a member has a conflict of interest and refuses to recuse him or herself, call legal counsel.

Injuries: All types of injuries in the common areas involving residents, guests, employees, vendors or otherwise, should immediately be reported to insurance and to the HOA's attorney so conditions can be documented and steps taken to protect against further injury.

Lawsuit Threatened: In addition to putting the association's insurance carrier on notice of a potential claim, HOAs should talk to counsel about how best to respond to the threat so as to (i) reduce the risk that a claim is actually filed, (ii) better position the HOA to defend itself in the event one is filed, and (iii) take the matter into ADR if appropriate.

Lawsuit Served: Tendering a claim to the HOA's insurance carrier is the first order of business. Sending a copy of the complaint to the HOA's attorney is the second. Counsel needs to know of the litigation so he/she can protect the HOA's interest in the event insurance is slow to respond or declines coverage. In addition, the HOA may need guidance on how to respond to the plaintiff on issues outside of the litigated matter.

Personnel: The most common high-risk areas are when an employee is hired, disciplined or fired.

Recall Petition: Emotions run high in recall elections and issues of defamation can arise. Failure to properly handle a recall can lead to significant problems.

Request for Reasonable Accommodation: Failure to properly evaluate and respond to a request for disability accommodation can result in costly litigation.

Rules & Regulations: At least once, the HOA's rules and regulations rules should be reviewed to make sure proper fine and hearing procedures have been established and to ensure they are enforceable (and not discriminatory, such as rules against children). If enforcement issues are more than routine because of the particular individuals involved or because the issues may be more complex than normal such as with architectural issues, then legal counsel should be consulted before matters deteriorate into litigation.

Vendor Disputes: Legal counsel needs to analyze appropriate contract provisions, evaluate the alleged breach, and advise the HOA on how best to resolve the dispute.

What Sets G3MH Apart in Condominium Dispute Resolution?

EXPERIENCE:

Goldstein, Gellman, Melbostad, Harris & McSparran, LLP (G3MH) has been a respected member of San Francisco's real estate community for over thirty years. G3MH attorneys have provided guidance and drafted the legal governing documents for over 3,000 condominium associations, with a special emphasis on small HOAs. Our attorneys have reviewed and are intimately familiar with thousands of pages of condominium CC&Rs and Bylaws drafted by members of the San Francisco legal community.

LITIGATION, MEDIATION AND ARBITRATION EXPERIENCE:

No other firm in San Francisco offers G3MH's depth of experience in small condominium operations and dispute resolution. In addition to representing individual clients in meditation, arbitration and court, G3MH also offers skilled mediators to help condominium owners resolve internal disputes.

SERVICE:

Any San Francisco Realtor® can confirm that G3MH is the "go-to" firm for situations involving small condominium associations. G3MH maintains the staffing and resources to offer response times to client needs which few firms can match. G3MH's attorneys are available to offer additional guidance in CC&R amendments and updates, landlord/tenant issues, title transfer and vesting, trust and estate matters, CC&R enforcement, and all other matters related to condominium ownership and HOA operations.

About the Authors:

David R. Gellman, managing partner of G3MH, has extensive experience in condominiums, tenancy-in-commons (TICs), landlord/tenant (rent control), real estate litigation, commercial leasing, and estate planning. His companion article, "Small Condominium Dispute Resolution" can be found on the firm's website at www.g3mh.com. Mr. Gellman is an accredited instructor with the California Department of Real Estate, and frequently conducts co-ownership workshops for attorneys, real estate agents, and prospective home buyers. Mr. Gellman can be contacted via email at DGellman@g3mh.com, or by phone at 415/673-5600 ext.229.

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