

# Homeowners Associations

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## Introduction

Common interest developments such as condominiums, planned developments (PUDs), stock cooperatives and community apartment projects present unique problems for REALTORS®. A thorough knowledge of the relevant laws affecting homeowners' associations and property owners in residential common interest developments is vital in order to avoid these problems. Furthermore, local laws may also have an impact on real estate transactions involving common interest developments. The purpose of this legal article is to provide REALTORS® with an overview of the law in this area. City and county ordinances will not be addressed. REALTORS® are encouraged to familiarize themselves with local requirements by contacting the local department of building and safety.

This article covers a variety of topics, including the different types of common interest developments, homeowners' associations, directors and their responsibilities and liabilities, permissible and impermissible restrictions in CC&Rs, the ability of a homeowners' associations to sue or be sued, special rules that apply when a unit in a common interest development is transferred, and other selected topics. It does not, however, discuss in detail the role of the Subdivided Lands Law or the Subdivision Map Act in the creation of new common interest developments.

Finally, this legal article is not intended to be an exhaustive discussion of all the duties and responsibilities of homeowners' associations and its' board of directors (Board). REALTORS® who serve on a Board should familiarize themselves with all the provisions of the Davis-Stirling Act (California Civil Code Sections 1350 *et seq.*)

## I. Definitions

### **Q** 1. *What is the law that governs common interest developments?*

**A** The law governing common interest developments is called the "Davis-Stirling Common Interest Development Act" (The "Act"). It is codified in California Civil Code (Cal. Civ.

Code) Sections 1350 through 1378. In addition, common interest developments organized as nonprofit mutual benefit corporations are also governed by California Corporations Code Sections (Cal. Corp. Code) 7110 through 8910. The following is a chart summarizing some of the statutory definitions found in the Act.

TYPE OF UNIT	NATURE OF OWNERSHIP
Common Interest Development	General term which includes all projects characterized by exclusive, individual rights of use or ownership in a portion of real property coupled with undivided real property rights held in common with others. Includes any of the following: community apartment project, condominium project, planned development, and stock cooperative. (Cal. Civ. Code § 1351(c).)
Community Apartment Project	Exclusive right to occupy apartment must be specified in instrument of conveyance, usually contained in grant deed; and Each owner owns an undivided interest in the entire project. Sometimes a "community apartment" is also known as an "own-your-own." (Cal. Civ. Code § 1351(d).)
Condominium Project	Title to an individual unit; and Undivided interest in the common area. (Cal. Civ. Code § 1351(f).)
Planned Development	Title to individual lot, parcel, area or space; and Either or both of the following features:  (1) Common area owned either by association or in common by owners of individual units, or  (2) Association has power to enforce assessment by a lien on owner's separate interest. (Cal. Civ. Code § 1351(k)-(l).)
Stock Cooperative	Corporation holds title to real property; and Shareholders of corporation receive right of exclusive occupancy in a portion of the property. One variety is a "limited equity housing cooperative" which is designed to provide housing to low and moderate income residents. (Cal. Civ. Code § 1351(m).)

**Q 2. What are the governing documents?**

A The governing documents are the declaration of covenants, conditions and restrictions (commonly known as the CC&Rs), bylaws, operating rules of the homeowners' association, articles of incorporation, articles of association and any other documents which govern the operation of the common interest development or its homeowners' association. (Cal. Civ. Code § 1351(j).)

**Q 3. What are the CC&Rs?**

A These are the recorded restrictions which contains, among other things, a legal description of the common interest development, the nature of the development (i.e., condominium project, stock cooperative or other type), the name of the homeowners' association, and the restrictions on the use or enjoyment of any portion of the development. The CC&Rs usually also contain the basic rights and obligations of the owners and the homeowners' association with respect to dues, assessments, maintenance, and other basic items. (Cal. Civ. Code §§ 1351, 1353.)

**Q 4. *What is a community association?***

**A** A community association is a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development. Other names for this type of association are "owners' association" or "homeowners' association" and this article will use the term "homeowners' association" or "association" interchangeably. The Civil Code requires that all common interest developments must be managed by a homeowners' association. See Part III for the duties and responsibilities of the association and its directors. (Cal. Civ. Code § 1363.)

**Q 5. *What is a condominium plan?***

**A** A condominium plan is a plan consisting of:

A description or survey map of a condominium project which refers to "monumentation on the ground";

A three dimensional description of a condominium project; and

A certificate consenting to the recordation of the condominium plan, signed and acknowledged by the record owner of fee title to that property.

(Cal. Civ. Code § 1351(e).)

**Q 6. *What is the common area?***

**A** The common area is the entire common interest development except the separate units of the individual owners. Typical examples of common areas include pools, spas, private streets and pathways, parking areas, clubhouse, guard gate and common gardens. (Cal. Civ. Code § 1351(b).)

Most CC&Rs describe what constitutes the common area, exclusive use common area (see the next question) or the separate interest (separate "unit"). In addition, the grant deed should include a more detailed description of the separate unit.

**Q 7. *What is an exclusive use common area?***

**A** An exclusive use common area is a portion of the common area designated by the CC&Rs for the exclusive use of one or more, but fewer than all, of the owners of the separate interests. It is "appurtenant" to a separate interest, which means a transfer of the owner's separate interest will

also transfer the exclusive use common area. Examples include the right to use parking spaces, a patio, or balcony, and external and internal telephone wiring. (Cal. Civ. Code § 1351(i).)

**Q 8. What are the requirements before an association can grant to a member the exclusive use of a portion of the common area?**

**A** An affirmative vote of the owners of at least 67% of the separate interests in the common interest development is required--unless the CC&Rs require a different percentage--to grant exclusive use of any portion of a common area to any member, with the following three exceptions:

(1) a reconveyance of any portion of that common area to an owner to enable the continuation of development that has been submitted to the Commissioner of the Department of Real Estate;

(2) any grant of exclusive use that is in substantial conformance with a development plan submitted to the Commissioner of the Department of Real Estate; or

(3) a grant of exclusive use to eliminate or correct engineering errors and encroachments due to errors in construction, to permit changes in development plans, to satisfy requirements of a public agency, to transfer management and maintenance burdens of an inaccessible area, and any grant of an expressly zoned industrial or commercial area.

Any measure to grant an owner exclusive use of a common area must state whether the association will receive monetary consideration and whether the association or individual owner must provide insurance coverage.

(Cal. Civ. Code § 1363.07.)

**Q 9. What does the owner of a separate interest or unit possess?**

**A** Under the Davis-Stirling Act, the term "separate interest" has the following meanings:

1) In a community apartment project, separate interest means the exclusive right to occupy an apartment.

2) In a condominium project, separate interest means an individual unit.

3) In a planned development, separate interest means a separately owned lot, parcel, area, or space.

4) In a stock cooperative, separate interest means the exclusive right to occupy a portion of the real property.

(Cal. Civ. Code § 1351(l).)

The CC&Rs and/or the grant deed will also define what constitutes the "separate interest" or "separate unit" of a particular common interest development.

## **II. Creation of Common Interest Developments**

**Q 10. How is a common interest development created?**

**A** California law requires the following for the creation of a common interest development:

- 1) The recording of a declaration of covenants, conditions and restrictions (CC&Rs);
- 2) The recording of a final subdivision map or parcel map, if mandated by the Subdivision Map Act; and
- 3) The recording of a condominium plan for a condominium project, if applicable.
- 4) In addition, compliance with the requirements of the Subdivided Lands Law and local ordinances may be necessary.

(Cal. Civ. Code § 1352.)

**Q 11. Must a homeowners' association be incorporated?**

**A** No, although most of them are. In fact, many of them are incorporated as nonprofit mutual benefit corporations. Even if an association is not incorporated in any way, however, the association automatically retains the powers of a corporation, unless the CC&Rs provide otherwise. (Cal. Civ. Code § 1363.)

**Q 12. How can CC&Rs be amended?**

**A** An amendment to the CC&Rs requires:

- 1) The approval of the percentage of owners required by the governing documents;
- 2) A writing executed either by the officer designated in the governing documents or by the association, or by the president of the association if no one is so designated, acknowledging the owners' approval of the amendment; and
- 3) Recording the document in each county in which a portion of the common interest development is located. (Some county recorders take the position that the names of the owners of property in the amendment must be the same names as those in the original recording.)

(Cal. Civ. Code § 1355, Cal. Gov't Code § 27288.1.)

However, if the CC&Rs require more than a 50 percent vote in favor of an amendment, the association, or any owner of a separate interest, may petition the superior court of a county in which the common interest subdivision is located for an order reducing the percentage of the affirmative votes necessary for an amendment. (Cal. Civ. Code § 1356; see *Peak Investments v. South Peak Homeowners Ass'n, Inc.*, 140 Cal. App. 4th 1363 (2006), for a discussion of who needs to vote in order to make this change in the CC&Rs.)

### **III. Homeowners' Associations**

**Q 13. *What are the powers and duties of a homeowners' association?***

**A** A homeowners' association manages the common interest development. The association, whether incorporated or unincorporated, may exercise many of the powers granted to a nonprofit mutual benefit corporation. The powers and duties are typically enumerated in the governing documents (e.g., bylaws, articles of incorporation or association, CC&Rs). (Cal. Civ. Code § 1363.)

The duties of the association are normally handled by the members of the board of directors. Some of these duties include: duty to maintain the common areas, financial planning duties, architectural control, duty to protect and insure the association assets, duty to enforce the CC&Rs, duty to collect assessments, and duty to conduct meetings. (Cal. Civ. Code § 1365.5.)

**Q 14. *What is the principal source of income for a homeowners' association?***

**A** The principal source of income for a homeowners' association is assessments levied on its members who own interests in the development. Ordinarily, the CC&Rs provide procedures for calculating and collecting regular assessments. (Cal. Civ. Code § 1366.)

**Q 15. *How are these regular assessments allocated among the association members?***

**A** The governing documents of a homeowner's association must establish a system for allocating the assessments. For example, in a condominium project, a large unit may be more expensive for the association to maintain than a small unit. Therefore, if provided in the governing documents, the owner of a larger unit may find him/herself paying a higher assessment than the owner of a smaller unit. (10 Cal. Code Regs § 2792.16(a).)

**Q 16. *May regular assessments be increased each year?***

**A** Yes. Even if the governing documents indicate otherwise, the homeowners' association may not increase the annual regular assessment by more than 20 percent over the regular assessment for the preceding fiscal year without the approval of owners constituting a quorum (more than 50 percent of the owners of the association). (Cal. Civ. Code § 1366(b).)

However, the limits stated above do not apply to defined "emergency situations." (See the next question.)

**Q 17. *What "emergency situations" would allow an association to increase assessments without complying with the restrictions specified in prior question?***

**A** "Emergency situations" are defined to be any one of the following:

An extraordinary expense required by court order;

An extraordinary expense necessary to repair or maintain the development or areas which the association is responsible for where a threat of personal safety on the property is discovered;

An extraordinary expense necessary to repair or maintain the areas under responsibility of the association which could not have been "reasonably foreseen" by the board when preparing and distributing the pro forma operating budget.

(Cal. Civ. Code § 1366(b).)

**Q 18. *May a homeowners' association levy assessments for special expenses?***

**A** Yes. An association may periodically levy special assessments to make improvements to the structure of a building (e.g., a clubhouse roof), to pay for extraordinary expenses, or to make up for a shortage in the association's reserves. The homeowners' association may not impose special assessments amounting to more than 5 percent of the association's budgeted gross expenses for that year without the approval of a majority of the owners. (Cal. Civ. Code § 1366.)

**Q 19. *Must a homeowners' association hold membership meetings?***

**A** Yes. According to regulations of the Department of Real Estate (DRE), the CC&Rs or the bylaws must provide for such meetings, at least annually. These membership meetings must be held within the development itself or as close to it as possible.

However, once the developer has sold his/her last unit and the DRE no longer is regulating the development, regular meetings must be held with the frequency and at the times and dates that are in accordance with the bylaws. In any event, a meeting must be held in any year in which directors are to be elected at a regular membership meeting. The meeting location may be at a place "within or without the state" as stated in the bylaws. If none is stated, then the meeting must be held at the corporation's principal office. (10 Cal Code Regs § 2792.17(a), Cal. Corp. Code § 7510.) Any member of an association may petition the local superior court for an order to hold a meeting if the association fails to call one within 60 days of the meeting date provided for in the governing documents. The petitioner must give the corporation adequate notice and a reasonable opportunity to be heard, however. (Cal. Corp. Code § 7510(c).)

**Q 20. *Must owners be given access to all association meetings?***

**A** No. Nearly all board of directors' meetings must be open to all unit owners. In the open meetings, all owners have the right to speak but are subject to any reasonable time limit imposed by the association. Furthermore, a member's right to access minutes from meetings may not be limited by contract or the articles or bylaws. (Cal. Corp. Code § 8313.)

The board of directors may restrict attendance only when it meets in an "executive session"--that is a session called to consider litigation, matters that relate to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, at the member's request, regarding the member's payment of assessments. However, all matters discussed in the closed meeting must be recorded in the minutes of the subsequent open meeting and made available to the unit owners. (Cal. Civ. Code § 1363.05.)

**Q 21. *Must owners have voting rights in the homeowners' association?***

**A** Yes. The governing documents (such as articles of incorporation or bylaws) must provide for member voting rights (Cal. Corp. Code § 7610).

**Q 22. Do certain elections require the use of secret ballots?**

**A** Yes. Homeowners' associations are required to use secret ballots for elections regarding assessments, selection of members of the board of directors, amendments to the governing documents, or the grant of exclusive use of common area property. The law also requires an independent third party as inspector of elections. (Cal. Civ. Code § 1363.03.)

Civil Code Section 1363.09 provides remedies for violation of the law governing the use of secret ballots.

**Q 23. What rights does a homeowners' association member or governing body member (i.e., officer or director of the association) have to inspect the books and records?**

**A**

#### **INSPECTION RIGHTS BY AN OFFICER OR DIRECTOR**

A governing body member has a right to inspect, at any reasonable time, all the books, records, and physical properties of the association. Such a member (director/officer) is not required to present a written demand for inspection. (Cal. Corp. Code § 8334, 10 Cal Code Regs § 2792.23(c)). In a 1995 case, the court held that a director did not have an absolute right of inspection and the rights of inspection must be balanced against members' "legitimate expectations of privacy." (Chantiles v. Lake Forest II Master Homeowners Ass'n (1995) 37 Cal. App. 4th 914 (the director wanted to determine who voted against him).)

#### **INSPECTION RIGHTS BY A HOMEOWNER (UNIT OWNER - aka MEMBER)**

Effective July 1, 2006, the inspection rights of members are spelled out in California Civil Code Section 1365.2. This section supersedes any contrary inspection rights described in California Corporations Code Sections 8330 and 8333 (Cal. Civ Code § 1365.2(m)). Since most homeowners' associations are also considered mutual benefit corporations, homeowners were able to look to California Corporations Code Section 8330 for the inspection rights of members of mutual benefit corporations. That is no longer the case.

The HOA must make all "association records" and "enhanced association records" (see the next question for the definitions of each) available for inspection and copying by all members or their designated representative (Cal. Civ. Code § 1365.2 (a)(2)).

The HOA records must be available for the current fiscal year and for each of the previous two fiscal years (Cal. Civ. Code § 1365.2 (i)(1)). However, minutes of member and board meetings must be made available permanently (Cal. Civ. Code § 1365.2 (i)(2)). Minutes of committee meetings (for committees with decisionmaking authority) must be permanently available on or after January 1, 2007 (Cal. Civ. Code § 1365.2 (i)(2)).

When a request is made by a member to access association records prepared during the current fiscal year, the association must respond within 10 business days (Cal. Civ. Code § 1365.2 (j)(1)). However, the HOA has 30 calendar days to provide associations records, upon request by a member, prepared during the previous two fiscal years (Cal. Civ. Code § 1365.2 (j)(2)).

HOA have various timeframes to respond to requests for particular records: For any record or statement mentioned in Section 1365 or 1368, see the timeframe in those sections (Cal. Civ. Code § 1365.2 (j)(3)); for the minutes of member and board meetings, they must be made available within 30 days of the meeting (Cal. Civ. Code § 1365.2 (j)(4)); for minutes of meetings of decisionmaking committees within 15 calendar days following approval (but only on or after January 1, 2007) (Cal. Civ. Code § 1365.2 (j)(5)); for the membership list on or before the later of 10 business days after the demand is received or after the date as of which the list is to be compiled (Cal. Civ. Code § 1365.2 (j)(6)).

The HOA may bill the requesting member for the direct and actual cost of copying and mailing the requested documents (Cal. Civ. Code § 1365.2 (b)(1) and (c)(5)). In addition, the HOA may bill the member an amount not in excess of \$10 per hour (not to exceed \$200 total per written request) for the time actually and reasonably involved in redacting the enhanced association records to protect certain confidential information and prevent identity theft (Cal. Civ. Code § 1365.2 (c)(5) and (d)). For certain records more fully described in Section 1365.2(d) the HOA may withhold (or redact) certain information.

**Q 24. What is meant by "association records" and "enhanced association records" in the previous question?**

**A**

#### **ASSOCIATION RECORDS**

According to Civil Code Section 1365.2(a)(1) association records "means all of the following":

- (A) Any financial document mentioned in Section 1365
- (B) Any financial document mentioned in Section 1368
- (C) Interim unaudited financial statements, periodic or as compiled, containing any of the following:
  - (i) Balance sheet
  - (ii) Income and expense statement
  - (iii) Budget comparison
  - (iv) General ledger
- (D) Executed contracts (not otherwise privileged under law)
- (E) Written board approval of vendor or contractor proposals or invoices
- (F) State and federal tax returns
- (G) Reserve account balances and records of payments made from reserve accounts
- (H) Agendas and minutes of meetings of the members, the board of directors and any committees appointed by the board of directors (excluding, however, those from executive sessions of the board of directors as described in Section 1363.05)

(I) Membership lists (name, property address, and mailing address) but only if the member has stated a purpose for requesting the list and the purpose is "reasonably related to the requester's interest as a member." In addition, a member may opt out of sharing his information by notifying the HOA in writing that she/he prefers to be contacted via an alternative process (as described in Corporations Code Section 8330(c))

(J) Check registers.

(Cal. Civ. Code § 1365.2 (a)(1).)

## **ENHANCED ASSOCIATION RECORDS**

Invoices

Receipts

Canceled checks for payments made by the association

Purchase orders approved by the association

Credit card statements (in the name of the association)

Statements for services rendered

Reimbursement requests submitted to the association (note: the person submitting the reimbursement request is responsible to remove all personal identification information from the request)

(Cal. Civ. Code § 1365.2 (a)(2)).

**Q 25. *May a homeowners' association discipline a member who violates a provision of a governing document?***

**A** Yes. In order to do so, however, the governing documents must include specific provisions authorizing the governing body to impose a fine, suspend common area use rights, or otherwise discipline a member for failing to abide by its provisions. Further, before actually imposing a particular penalty, such as a fine, the board of directors must adopt a schedule of fines or penalties and must distribute it personally or by first class mail to each member. (Cal. Civ. Code. § 1363(g).)

**Q 26. *May a homeowners' association impose or collect an unreasonable fee or assessment?***

**A** No. An association cannot impose or collect a fee or assessment that exceeds "the amount necessary to defray the costs" of levying (Cal. Civ. Code § 1366.1).

**Q 27. *May a homeowners' association impose late charges?***

**A** Yes. A homeowners' association may impose late charges not exceeding 10 percent of the delinquent regular or special assessment, or \$10, whichever is greater, if the assessment remains unpaid 15 days after it is due. If the CC&Rs specify a longer period of time or a lower fine for delinquent payments, the CC&Rs will apply. Associations may also recover "reasonable" collection costs, including attorney's fees.

In addition, if an assessment remains unpaid 30 days or more after the due date, the association can collect interest on "all sums," including the delinquent assessment, reasonable costs of collection and late charges, at an annual percentage rate not exceeding 12 percent. The interest rate charged is exempt from state usury limitations.

(Cal. Civ. Code § 1366(e).)

**Q 28. *Under what circumstances may a homeowners' association impose a lien on a member's interest?***

**A** An association has the authority to impose a lien on the property of a member who fails to pay regular or special assessments. However, the assessment, costs of collection, late charges, and interest do not become a lien on the owner's separate interest until the association records a notice of delinquent assessment. Penalty assessments for violation of association rules cannot become a lien. (Cal. Civ. Code § 1367.1.)

Before recording a lien, the association must provide a 30-day notice to the member by certified mail. This notice must contain various statements. The list of items can be found in Civil Code Section 1367.1.

When an association of a common interest development seeks to collect delinquent assessments (arising on or after January 1, 2006) of less than \$1,800, not including accelerated assessments and specified late charges and fees, the association must either file a civil action in small claims court or record a lien. The association is prohibited from foreclosing on this lien until the amount equals or exceeds \$1,800 or the assessments are more than 12 months delinquent. (Cal. Civ. Code § 1367.4.)

**Q 29. *What are the collection choices available to a homeowners' association if a unit owner refuses to pay assessment dues in response to a notice of delinquent assessment?***

**A** An association may elect any of the following alternatives:

A civil action (small claims or superior court) to collect the delinquent assessment;

A nonjudicial trustee sale;

A judicial foreclosure proceeding; or

Alternative Dispute Resolution (if homeowner has paid amount in dispute under protest and has requested ADR this method must be used prior to any civil action--limited to 2 times in a single year and 3 times in a five year period)

(See Cal. Civ. Code §§ 1367 (liens on or prior to 1/1/03), 1367.1 (liens after 1/1/03).)

When an association of a common interest development seeks to collect delinquent assessments (arising on or after January 1, 2006) of less than \$1,800, not including accelerated assessments and specified late charges and fees, the association must either file a civil action in small claims court or record a lien. The association is prohibited from foreclosing on this lien until the amount equals or exceeds \$1,800 or the assessments are more than 12 months delinquent. (Cal. Civ. Code § 1367.4.)

Furthermore, an association cannot place a lien on the property (nor foreclose) for delinquent monetary penalties imposed as a disciplinary measure because of a violation of the governing rules by the unit owner (Cal. Civ. Code §§ 1367(c), 1367.1(e)).

For liens recorded on or after January 1, 2006, the decision to record a lien for delinquent assessments must be made only by the board of directors of the association and may not be delegated to an agent of the association. The board must approve the decision by a majority vote of the board members in an open meeting. The board must record the vote in the minutes of that meeting. (Cal. Civ. Code § 1367.1(c)(2).)

The law also requires a specific notice to be sent to a unit owner regarding any delinquent assessments (Cal. Civ. Code § 1367.1(a)).

It is highly recommended that any counsel for an association review the statutes discussed above. There are various versions of each statute depending on when the assessments were imposed. .

**Q 30. *Must a homeowners' association board of directors oversee the financial affairs of the association?***

**A** Yes. And unless the governing documents impose more stringent standards, such overseeing by the board of directors must include a review, on at least a quarterly basis, of the following:

A current reconciliation of the association's operating accounts;

A current reconciliation of reserve accounts;

The current year's actual reserve revenues and expenses compared with the current year's budget;

The latest account statements prepared by the financial institutions in which the association has its operating and reserve accounts; and

An income and expense statement for the association's operating and reserve accounts.

The requirement of quarterly reviews of financial material does not apply in some circumstances where an association does not have a "common area."

(Cal. Civ. Code § 1365.5.)

**Q 31. *Is the homeowners' association responsible for repairing, replacing, or maintaining the common areas?***

**A** Yes. Unless provided otherwise in the CC&Rs, the homeowners' association is responsible for repairing, replacing or maintaining the common areas, other than the exclusive use common areas (Cal. Civ. Code § 1364.) The California Supreme Court has held in *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, (1999), 21 Cal. 4th 249, that when a homeowner disagrees with the association's decisions on how to handle maintenance decisions, the courts will defer to the authority and presumed expertise of a homeowner's association in making those decisions.

At least once every three years, the board of directors must conduct (or have someone conduct) a reasonably competent and diligent visual inspection of the accessible areas of the major components that the HOA is obligated to repair, replace, restore, or maintain as a part of a study of the reserve account (Cal. Civ. Code § 1365.5(e)). (See Civil Code Section 1364.5(e) for more details.)

**Q 32. *Must the homeowners' association prepare and distribute regular financial and other statements to members?***

**A** Yes.

***Pro Forma Operating Budget***

Unless the CC&Rs impose more stringent standards, the association must prepare and distribute to its members a "formal operating budget" not less than 30 days nor more than 90 days before the beginning of the fiscal year. The "pro forma operating" budget must contain all of the following information:

(1) The estimated revenue and expenses on an accrual basis;

(2) A summary of the association's reserves based on a recent review or study based only on assets held in cash or cash equivalents (which must be printed in boldface type) and include all of the following:

A) The current estimated replacement cost, estimated remaining life, and estimated useful life of each major component;

B) As of the end of the fiscal year for the study:

i) The current estimate of the amount of cash reserves necessary to repair, replace, restore or maintain the major components;

ii) The current amount of accumulated cash reserves necessary to repair, replace, restore or maintain the major components;

iii) If applicable, the amount of funds received from a damages award or settlement

C) The percentage that the current amount of accumulated cash reserves to repair the major components is of the current estimate of what such cash reserves should be.

(3) A statement as to all of the following:

(A) Whether the Board has determined to defer or not undertake repairs or replacement of any major component;

(B) Whether the Board has determined to levy any special assessments for the major components;

(C) The mechanism to fund reserves for the maintenance of major components;

(D) Whether the HOA has any outstanding loans with an original term of more than one year.

(4) A general statement addressing procedures used for the calculation and establishment of those reserves to defray future repair, replacement, or additions to those major components that the association must maintain.

(Cal. Civ. Code § 1365(a).)

A review of the financial statement must be done in accordance with "generally accepted accounting principles" by a licensee of the California State Board of Accountancy and distributed within 120 days after the close of any fiscal year in which the gross income to the association exceeds \$75,000. (Cal. Civ. Code § 1365(c).)

#### ***Summary of the Pro Forma Operating Budget (Alternative)***

Instead of the "formal operating budget," an association may instead distribute a summary of the pro forma operating budget accompanied by a written notice in at least 10-point bold type that the complete statement is available at the business office of the association or other location and copies can be made, if requested, at the association's expense. If a member requests a copy of the budget by mail the association must send it by first-class mail within 5 days after receipt.

(Cal. Civ. Code § 1365(d).)

#### ***Summary of Reserve Funding Plan (eff. 1-1-09)***

Beginning January 1, 2009, the board of directors must provide a summary of a reserve funding plan as indicated in Civil Code Section 1365.5(e)(4). (Cal. Civ. Code § 1365(b).)

#### ***Assessment and Reserve Funding Disclosure Summary***

Civil Code Section 1365.2.5 contains a statutory form that needs to be completed by the HOA/board of directors and included with the distribution of the pro forma budget.

#### ***Policies and Practices Enforcing Liens***

Furthermore, the association must annually provide, not less than 30 days nor more than 90 days immediately preceding the beginning of the fiscal year, a statement describing its policies and practices in enforcing lien rights or other remedies for default in the payment of its assessments against its members (Cal. Civ. Code § 1365(e)).

#### ***Summary of Association Insurance Policies***

The association must also provide a summary of the association's property, general liability, earthquake, flood, and fidelity insurance policies, which must be distributed not less than 30 days nor more than 90 days preceding the beginning of the association's fiscal year, that includes all of the following information about each policy:

- (A) The name of the insurer.
- (B) The type of insurance.
- (C) The policy limits of the insurance.
- (D) The amount of deductibles, if any.

The association must, as soon as reasonably practicable, notify its members by first-class mail if any of the insurance policies have lapsed, been canceled, and are not immediately renewed, restored, or replaced, or if there is a significant change, such as a reduction in coverage or limits or an increase in the deductible, as to any of those policies.

If the association receives any notice of nonrenewal of any insurance policy, the association must immediately notify its members if replacement coverage will not be in effect by the date the existing coverage will lapse. The association may meet this obligation to disclose that information by making copies of the insurance declaration page and distributing it to all of its members. The insurance summary distributed must contain, in at least 10-point boldface type, the following statement:

"This summary of the association's policies of insurance provides only certain information, as required by subdivision (e) of Section 1365 of the Civil Code, and should not be considered a substitute for the complete policy terms and conditions contained in the actual policies of insurance. Any association member may, upon request and provision of reasonable notice, review the association's insurance policies and, upon request and payment of reasonable duplication charges, obtain copies of those policies. Although the association maintains the policies of insurance specified in this summary, the association's policies of insurance may not cover your property, including personal property or, real property improvements to or around your dwelling, or personal injuries or other losses that occur within or around your dwelling. Even if a loss is covered, you may nevertheless be responsible for paying all or a portion of any deductible that applies. Association members should consult with their individual insurance broker or agent for appropriate additional coverage."

(Cal. Civ. Code § 1365(f).)

### ***Required Notice Regarding Assessments and Foreclosure***

The association must distribute the written notice below to each member of the association during the 60-day period immediately preceding the beginning of the association's fiscal year. The notice must be printed in at least 12-point type. (Cal. Civ. Code § 1365.1.) An association distributing the notice to an owner of an interest that is described in Section 11212 of the Business and Professions Code that is not otherwise exempt from this section pursuant to subdivision (a) of Section 11211.7, may delete from the notice described in subdivision (b) the portion regarding meetings and payment plans. (Cal. Civ. Code § 1365.1.)

The notice goes as follows:

#### **"NOTICE ASSESSMENTS AND FORECLOSURE**

This notice outlines some of the rights and responsibilities of owners of property in common interest developments and the associations that manage them. Please refer to the sections of the Civil Code indicated for further information. A portion of the information in this notice applies only to liens recorded on or after January 1, 2003. You may wish to consult a lawyer if you dispute an assessment.

#### **ASSESSMENTS AND FORECLOSURE**

Assessments become delinquent 15 days after they are due, unless the governing documents provide for a longer time. The failure to pay association assessments may result in the loss of an owner's property through foreclosure. Foreclosure may occur either as a result of a court action, known as judicial foreclosure or without court action, often referred to as nonjudicial foreclosure.

For liens recorded on and after January 1, 2006, an association may not use judicial or nonjudicial foreclosure to enforce that lien if the amount of the delinquent assessments or dues, exclusive of any accelerated assessments, late charges, fees, attorney's fees, interest, and costs of collection, is less than one thousand eight hundred dollars (\$1,800). For delinquent assessments or dues in excess of one thousand eight hundred dollars (\$1,800) or more than 12 months delinquent, an association may use judicial or nonjudicial foreclosure subject to the conditions set forth in Section 1367.4 of the Civil Code. When using judicial or nonjudicial foreclosure, the association records a lien on the owner's property. The owner's property may be sold to satisfy the lien if the amounts secured by the lien are not paid. (Sections 1366, 1367.1, and 1367.4 of the Civil Code)

In a judicial or nonjudicial foreclosure, the association may recover assessments, reasonable costs of collection, reasonable attorney's fees, late charges, and interest. The association may not use nonjudicial foreclosure to collect fines or penalties, except for costs to repair common areas damaged by a member or a member's guests, if the governing documents provide for this. (Sections 1366 and 1367.1 of the Civil Code)

The association must comply with the requirements of Section 1367.1 of the Civil Code when collecting delinquent assessments. If the association fails to follow these requirements, it may not record a lien on the owner's property until it has satisfied those requirements. Any additional costs that result from satisfying the requirements are the responsibility of the association. (Section 1367.1 of the Civil Code)

At least 30 days prior to recording a lien on an owner's separate interest, the association must provide the owner of record with certain documents by certified mail, including a description of its collection and lien enforcement procedures and the method of calculating the amount. It must also provide an itemized statement of the charges owed by the owner. An owner has a right to review the association's records to verify the debt. (Section 1367.1 of the Civil Code)

If a lien is recorded against an owner's property in error, the person who recorded the lien is required to record a lien release within 21 days, and to provide an owner certain documents in this regard. (Section 1367.1 of the Civil Code)

The collection practices of the association may be governed by state and federal laws regarding fair debt collection. Penalties can be imposed for debt collection practices that violate these laws.

## PAYMENTS

When an owner makes a payment, he or she may request a receipt, and the association is required to provide it. On the receipt, the association must indicate the date of payment and the person who received it. The association must inform owners of a mailing address for overnight payments. (Section 1367.1 of the Civil Code)

An owner may dispute an assessment debt by submitting a written request for dispute resolution to the association as set forth in Article 5 (commencing with Section 1368.810) of Chapter 4 of Title 6 of Division 2 of the Civil Code. In addition, an association may not initiate a foreclosure without participating in alternative dispute resolution with a neutral third party as set forth in Article 2 (commencing with Section 1369.510) of Chapter 7 of Title 6 of Division 2 of the Civil Code, if so requested by the owner. Binding arbitration shall not be available if the association intends to initiate a judicial foreclosure.

An owner is not liable for charges, interest, and costs of collection, if it is established that the assessment was paid properly on time. (Section 1367.1 of the Civil Code)

## MEETINGS AND PAYMENT PLANS

An owner of a separate interest that is not a timeshare may request the association to consider a payment plan to satisfy a delinquent assessment. The association must inform owners of the standards for payment plans, if any exist. (Section 1367.1 of the Civil Code)

The board of directors must meet with an owner who makes a proper written request for a meeting to discuss a payment plan when the owner has received a notice of a delinquent assessment. These payment plans must conform with the payment plan standards of the association, if they exist. (Section 1367.1 of the Civil Code)"

(Cal. Civ. Code § 1365.1.)

### ***Summary of ADR Requirements***

An association must provide its members an annual summary of the alternative dispute resolution (ADR) provisions covered in Civil Code Sections 1369.510 through 1369.590. The summary must include the following language:

"Failure of a member of the association to comply with the alternative dispute resolution requirements of Section 1369.520 of the Civil Code may result in the loss of your right to sue the association or another member of the association regarding enforcement of the governing documents or the applicable law."

(Cal. Civ. Code § 1369.590.)

### **Q 33. *What powers do architectural review boards possess?***

**A** The governing documents of most common interest subdivisions require an architectural committee or review board to be formed. Its goal is to maintain the appearance and value of the project by establishing architectural standards and reviewing all proposed changes in relation to those standards.

### **Q 34. *Are there any limits on an architectural review board's authority?***

**A** Architectural review boards in general have a great deal of freedom to make decisions concerning the architectural design or aesthetics of homeowners' units. However, the board may not exceed the authority provided in the governing documents. (*Clark v. Rancho Santa Fe Ass'n*, (1989) 216 Cal. App. 3d 606.)

### **Q 35. *Should a homeowners' association carry an insurance policy for its directors and officers?***

**A** Yes. Association directors and officers who fail to obtain adequate insurance may be exposed to personal liability.

### **Q 36. *What other types of insurance coverage should an association have?***

**A** An association should carry a master policy covering all the common areas. Specific risks to be insured against should be discussed with the association's attorney and/or insurance broker. Coverage to consider includes: fire, theft, general hazard, flood, earthquake, public liability (injuries to persons or damage to property on the premises), and vehicle.

Association directors and officers have a fiduciary duty to insure and protect association assets. Failure of their duty to procure insurance is not typically covered by Errors and Omissions ("E&O") or Directors and Officers ("D&O") insurance.

In order for a director or officer to have the statutory protection against tort liability, the association must carry general liability insurance (covering the association and the individual directors and officers) in the following amounts (at a minimum): \$500,000 coverage if there are 100 or fewer separate units in the development or \$1,000,000 coverage if there are more than 100 separate units in the development (Cal. Civ. Code § 1365.7).

In addition, in order for the homeowners to have statutory protection against tort liabilities (accidents in the common areas), the association must carry general liability insurance in the following amounts (at a minimum): \$2,000,000 if development has 100 or fewer units and \$3,000,000 if development has more than 100 units (Cal. Civ. Code § 1365.9).

**Q 37. *Should individual unit/lot owners obtain their own insurance?***

**A** Yes. Each unit/lot owner should obtain insurance covering risks that are not covered by the association's policies. Each unit/lot owner should consider an emergency shelter rider to cover additional living expenses in the event of damage to his/her unit. In addition, the individual unit/lot owner should have coverage for his/her own "tortious" injuries to other persons or property, including the unit owner's negligence and that of members of his/her family, household, and pets. Owners should also consider fire and extended coverage for the interior and contents of their units.

**Q 38. *Should a homeowners' association and its members obtain the services of an insurance expert?***

**A** Yes. Because of the specialized nature of condominium insurance, the association should utilize the services of an experienced insurance broker.

#### **IV. Directors' Duties, Liabilities and Insurance**

**Q 39. *What are all the duties of a director of a homeowners' association?***

**A** Directors have the following duties:

Duty to Maintain the Common Areas

Financial Planning Duties

Duty of Architectural Control (if in CC&Rs)

Duty to Protect Association Assets By Procuring Insurance

Duty to Enforce CC&Rs

Duty to Assess Dues and Collection

Duty to Disclose Certain Information to Members--noduty to non-members (such as buyers or lenders)

**Q 40. What is the standard of care to determine a director's liability?**

**A** A director must perform his/her duties:

In good faith;

- In a manner believed to be in the best interests of the association; and
- 
- "With such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."
- 
- In other words, a director must exercise reasonable diligence in the discharge of his/her duties. Sometimes the standard is referred to as the "business judgment rule."

(Cal. Corp. Code § 7231(a).)

On occasion, the courts have imposed a greater duty of care on the association and its governing board equivalent to the duty of a landlord. *In Francis T. v. Village Green Owners Ass'n*, (1986) 42 Cal. 3d 490, the association was held liable for the rape of a homeowner in her unit when it had knowledge of a dangerous lighting problem (lack of sufficient lighting) and refused to do something about it in a timely manner.

In *Lamden v. La Jolla Clubdominium Homeowners Ass'n*, (1999) 21 Cal. 4th 249, the California Supreme Court held that the courts should give judicial deference to maintenance decisions made by the board of directors on behalf of the homeowners' association. This standard is equivalent to the prudent business judgment rule.

**Q 41. May a director rely on the reports or opinions of staff or outside experts when discharging his/her duties?**

**A** Yes. A director can rely on the reports or opinions of staff or outside experts when discharging his/her duties unless there are circumstances or conditions necessitating further inquiry (Cal. Corp. Code § 7231(b)).

**Q 42. Are there any limitations on the personal liability of a volunteer officer or director for injury to a third party?**

**A** Yes. Subject to the following limitations, a state statute provides immunity for injuries caused by a volunteer officer or director:

"Injury" includes, but is not limited to, bodily injury, emotional distress, wrongful death, and property damage or loss resulting from a tortious act or omission. (It does not cover a breach of contract or action based on other tort theories.);

The common interest development must be exclusively residential;

The act or omission was performed within the scope of the officer's or director's duties;

The act was performed in "good faith" and was not "willful, wanton, or grossly negligent;"

The association must maintain and have in effect at the time of the injury general liability insurance coverage for the association with specific minimum coverages (i.e., at least \$500,000 if the common interest development consists of 100 or fewer separate interests and \$1,000,000 if the development consists of more than 100 separate interests);

Any director who is an employee of the developer, an employee of a financial institution that acquired a lot or parcel through the foreclosure process, or is an owner who has more than two separate interests in the development is not covered. However, all other directors or officers who are either tenants or owners of up to two interests are protected; and

This section does not limit the liability of the association for any negligent acts or omissions.

(Cal. Civ. Code § 1365.7.)

In addition, another statute gives volunteer directors and officers of specified nonprofit organizations protection against claims of negligence within the scope of the person's duties. The organizations covered under this statute must be organized to provide charitable, educational, scientific, social or other types of public service and be exempt from federal income taxation. Some attorneys argue that because some homeowners' associations are entitled to file for a federal tax exemption, therefore directors of all such associations are protected. However, other attorneys argue that the protection coverage is not that broad. (Cal. Code Civ. Proc. § 425.15.)

Another statutory provision provides that no claims can be made against volunteer directors and officers who perform their duties in accordance with the "business judgment rule." This section is limited, however, to trade, professional and labor organizations incorporated as mutual benefit corporations and operated for fraternal, educational and other nonprofit purposes; so homeowners' associations probably aren't covered under it. In any event, it is not clear what this section adds to the general protection for director's or officer's liability already given by still another statutory provision which immunizes all directors and officers (not just volunteers) from liability based upon an alleged failure to discharge their duties. (Cal. Corp. Code §§ 7231(c), 7231.5.)

**Q 43. Are individual homeowners who are neither officers nor directors liable for injuries suffered by someone in the common area of a common interest development?**

**A** No, provided that the association carries the required statutory insurance. In 1992, the California court of appeal, in *Ruoff v. Harbor Creek Community Ass'n*, (1992) 10 Cal. App. 4th 1624, held that Civil Code Section 1365.7 shielded association officers and directors from tort liability but did not protect individual homeowners who were sued on the basis that they were owners as tenants-in-common of the common areas. Subsequently, the legislature passed Civil Code Section 1365.9 which shielded the individual homeowners from tort liability when being sued simply because of their ownership interest in the common areas. The statute provides that

the injured person must sue the association and not the individual owners. In addition, the association must maintain general liability insurance in the following amounts: \$2,000,000 for developments of 100 or fewer separate units and \$3,000,000 for developments with over 100 separate units. (Cal. Civ. Code §1365.9.)V. CC&R Restrictions

**Q 44. *May the CC&Rs or homeowners' association restrict the rental of units in a common interest development?***

**A** Maybe. There is no clear answer as to whether the CC&Rs or homeowners' association may restrict the rental of units. The prevailing California law since 1872, Civil Code Section 711, states, "Conditions restraining alienation, when repugnant to the interests created, are void." Essentially, courts have interpreted this to mean that unreasonable restrictions on the transferability of real property, whether found in CC&Rs or elsewhere, are void. Leasing of real property is a form of transfer.

One test which courts have used to determine whether a restriction is unreasonable is to weigh the justification for the restriction against the "quantum of restraint" it causes. This means that courts balance the needs and interests of both sides to determine which is more compelling.

There is a 1989 case where a California Court of Appeal upheld the CC&Rs of a publicly subsidized condominium project which did not permit the leasing of the condominium units for a period of ten years. The facts of this case are unique, however, because the project was part of a downtown redevelopment effort to provide replacement dwellings for persons of low and moderate income and the condominiums were sold far below fair market value. Since the intent of the redevelopment effort was to create a stabilized community of owner-occupied dwelling units and to avoid artificial inflation of prices caused by resales by speculators, the court's ruling in this particular case was in support of a specific public policy. (*City of Oceanside v. McKenna*, (1989) 215 Cal. App. 3d 1420.)

It's not clear that the holding would be the same if the facts were different, and as yet no court has ruled on the validity of restrictions against the rental of units in the CC&Rs of a common interest development which was not a publicly subsidized project.

**Q 45. *May the CC&Rs contain racial and other unenforceable restrictions?***

**A** No. Associations must amend any old declarations or governing documents to remove restrictions based on race, color, religion, gender, sexual orientation, marital status, natinal origin, ancestry, familial status, source of income or disability. Such amendments are effective even without the owners' approval and do not otherwise change the CC&Rs. If the unenforceable restrictions are not removed, a unit owner may sue the association. (Cal. Civ. Code § 1352.5; Cal. Gov. Code § 12955.)

**Q 46. *May the CC&Rs or homeowners' association restrict the rights of renters or nonresident owners to use the facilities in a common interest development?***

**A** Yes, under certain circumstances. In a 1992 case, a California court of appeal held that the nonresident owners (a husband, wife and two sons) of a condominium had a right to use the recreational facilities in the common area, since the occupant/tenant (82 year old senile mother of

the wife) was not able to use the facilities. (*MaJor v. Miraverde Homeowners Ass'n*, (1992) 7 Cal. App. 4th 618.)

Part of the court's rationale was that the homeowners' association could not exclude the nonresident owners from using the recreational facilities while simultaneously requiring them to pay all the fees for the common area's use and improvements. Following this same rationale, it could be argued that the court was essentially holding that someone is entitled to use the recreational facilities (i.e., either the nonresident owner or the resident/tenant) since the owner is paying for the use of the facilities. It would follow, then, that if the owner relinquishes the right to use the facilities, arguably the tenant should retain this right.

In 1995, the case of *Liebler v. Point Loma Tennis Club*, (1995) 40 Cal. App. 4th 1600, made it clear that the CC&Rs can restrict non-resident owners from using the facilities (tennis courts) if the tenants retain the right to use the facilities.

**Q 47. May the CC&Rs or homeowners' association restrict ownership of pets in a common interest development?**

**A** It depends on when an association modified any of its governing documents. Associations, who have not created or amended any governing documents on or after January 1, 2001 may completely restrict the keeping of pets within the development. (Cal. Civ. Code § 1360.5.)

However, Associations, who have created or amended any governing documents on or after January 1, 2001, may restrict, but not prohibit, the keeping of pets within the development. Owners of a separate interest may have one domesticated pet, subject to the associations's reasonable rules. New rules that limit the number of pets may not prohibit any pets that the owner already had under the previous rules. (Cal. Civ. Code § 1360.5.)

It should be noted that effective July 1, 2006, the California legislature passed Civil Code Section 1363.03 requiring all associations to "adopt rules" spelling out the election procedures indicated in that statute. When associations adopt these new rules; this will, in essence, prevent them from completely restricting pets in the association. In other words, associations must allow one domesticated pet subject to reasonable restrictions as discussed in the paragraph above.

**Q 48. May the CC&Rs contain age restrictions (i. e., no one under the age of 18 or no one under the age of 62 may live in a unit)?**

**A** Generally no, but there are exceptions. That is, under state and federal anti-discrimination statutes, it is unlawful to refuse housing to any family with children under the age of 18, including women who are pregnant, unless the housing qualifies as senior citizen housing. (42 U.S.C. § 3604.) Thus, housing providers are required to admit families with children unless the housing fits into the definition of housing for older persons. The federal Fair Housing Act defines three types of housing that meet this definition. The first type includes all housing that is provided under state and federal programs specifically for the purposes of accommodating elderly persons. (42 U.S.C. § 3607; 24 C.F.R. § 100.302.)

The second type of housing excluded from the restrictions against banning children is housing "intended for, and solely occupied by persons 62 years of age or older." No conditions are attached as long as every resident is of this age. In other words, residency by a couple, one aged 62 and the other younger, would nullify that project's designation as senior citizen housing. (42 U.S.C. § 3607; 24 C.F.R. § 100.303.) The third type is what is commonly known as a retirement

community. The threshold age is 55, and the owner or manager must meet additional requirements in order to exclude families with children from residing in the housing. To qualify, the following criteria must be met:

At least 80 percent of the units must be occupied by at least one person who has attained the age of 55. The remaining units are under no restrictions. If less than 80 percent are occupied by persons 55 or over the community can no longer bar families with children;

The owner or manager must, by publication of and adherence to policies and procedures, demonstrate an intent to provide housing for persons 55 or over;

The owner or manager must verify the age of the occupants (by reliable surveys and affidavits). (42 U.S.C. § 3607; 24 C.F.R. §§ 100.304-100.307.)

**Q 49. *May the CC&Rs or homeowners' association of a common interest development prohibit or restrict children from using the swimming pools?***

**A** No, the CC&Rs or homeowners' association cannot totally prohibit children from using the swimming pools; however, the CC&Rs or homeowners' associations may impose reasonable restrictions. As noted above, both the state Civil Rights Act and the federal Fair Housing Act prohibit "unreasonable, arbitrary or invidious discrimination" against families with children, which includes limiting the use of privileges, services or facilities to families with children. However, differential treatment of adults and children in the use of the recreational facilities based on differences in their needs may be acceptable. Case law and an Attorney General Opinion indicated that a development that had two swimming pools could restrict children from one of the two pools. (75 Ops. Cal. Atty Gen 219 (1992).)

However, a federal regulation arguably prohibits projects in which some areas are designated for families and some for adults only. (24 C.F.R. § 100.70(a).)

Therefore, any restrictions which distinguish simply on the basis of age, other than for verifiable safety reasons, may violate federal law.

**Q 50. *May the CC&Rs or homeowners' association of a common interest development restrict owners from installing solar energy systems on their roofs?***

**A** No. The CC&Rs may not prohibit the installation or use of solar energy systems whether they are to be installed on the private roof of a house in a planned development or on the common area roof of a condominium or other common interest development. However, homeowners' associations may impose reasonable restrictions on these systems. Reasonable restrictions are those which do not significantly increase the cost of the system or significantly decrease its efficiency or performance.

Whenever the CC&Rs require approval for the installation or use of solar energy systems, the application for approval must be processed and approved in the same manner as an application for approval of an architectural modification.

When the solar energy system is to be installed in a common area, the homeowners' association may require (1) a system approved by the association, (2) provisions for the maintenance, repair, or replacement of roofs or other building components, and (3) installers of solar energy systems

to indemnify or reimburse the association for loss or damage caused by the installation, maintenance, or use of the system.

(Cal. Civ. Code §§ 714, 714.1.)

**Q 51. *Is the homeowners' association subject to any sanctions if it refuses to comply with the law regarding solar energy systems?***

**A** Yes. Violations of California law regarding solar energy systems by homeowners' associations may subject the associations to actual damages not to exceed \$1,000, plus reasonable attorney's fees (which may exceed \$1,000). (Cal. Civ. Code § 714.)

**Q 52. *May the CC&Rs or the homeowners' association ban the use of a satellite dish anywhere within a planned development community?***

**A** No. The federal Telecommunications Act of 1996 has preempted this field. Satellite dish and antenna restrictions are limited by federal law. A satellite dish of one meter or less in diameter located on property under the "exclusive use or control" of the homeowner cannot be prohibited. Therefore, the association can prohibit satellite dishes on the common areas. Satellite dishes cannot be prohibited from exclusive-use common areas, but associations can reasonably regulate them (e.g., prohibit drilling in walls, enforce safety standards). Any restrictions regarding the location of the dish are invalid if the required placement would interfere with the reception. (47 C.F.R. § 1.4000.)

**Q 53. *May the CC&Rs or homeowners' association legally prevent or restrict individual owners from posting "for sale" signs?***

**A** No. Neither the CC&Rs nor the homeowners' association may totally prohibit the posting of "for sale" signs; however, they may put reasonable restrictions on their placement. Under California law, any unreasonable restraint upon the ability to transfer property is void. California also has a specific sign ordinance. Civil Code Section 713 states that an owner of real property or his/her agent may display a "for sale" sign on his/her real property or on real property owned by another (with that person's consent) in plain view of the public and of reasonable dimensions and design if the advertising involves a sale, lease, or exchange. The sign may contain:

directions to the property;

the owner's or agent's name;

the owner's or agent's address; and

the owner's or agent's phone number.

(Cal. Civ. Code §§ 712, 713.)

Furthermore, there are city ordinances which regulate the placement of signs on private property. Failure to comply may result in fines and confiscation of the signs.

Finally, a total prohibition on "for sale" signs, or "sold" signs located on private property is an unconstitutional violation of the First Amendment to the United States Constitution. (*Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977))

For additional information, see the C.A.R. legal article, [Real Estate Signs: Can They Be Regulated and to What Extent?](#)

**Q 54. *May the CC&Rs or homeowners' association put restrictions on the type of vehicles that may park in the common areas?***

**A** Maybe. Any restrictions must be reasonable and the reasonableness of a particular restriction depends upon the individual circumstances. In one case, the CC&Rs banned all trucks, campers, boats, and recreational vehicles from the common area of a condominium project. The restriction was applied to a new pickup truck used for personal transportation. The court held that this application of the restriction was unreasonable, since the parking of the truck in the carport was not aesthetically "unpleasant" to reasonable persons and did not interfere with the other owners' use and enjoyment of their property. The court stated, "One person's Bronco II is another's Rolls-Royce." (*Bernardo Villas Mgmt. Corp. v. Black*, (1987) 190 Cal. App. 3d 153.)

However, subsequent courts rejected the *Bernardo* analysis. In 1994, the Supreme Court in *Nahrstedt v. Lakeside Village Condominium Ass'n*, (1994) 8 Cal. 4th 361, placed the burden on the homeowner to prove that the restriction was unreasonable. The court in *Bernardo* had placed the burden on the association to prove that its restriction was reasonable. It is unclear if the *Bernardo* outcome would be the same or different. However, courts will permit associations to use aesthetic criteria in their decision making. (*Clark v. Rancho Santa Fe Ass'n*, (1989) 216 Cal. App. 3d 606.)

**Q 55. *Must the CC&Rs contain a special notice when the common interest development is located in an "airport influence area"?***

**A** Yes, but only for CC&Rs recorded after January 1, 2004. An "airport influence area" is an area in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses or necessitate restrictions on those uses as determined by an airport land use commission. If the development is located in such an area, the CC&Rs must contain the following notice:

**"NOTICE OF AIRPORT IN VICINITY**

This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you."

(Cal. Civ. Code§1353.)

## **VI. Liens, Lawsuits, ADR and Liability**

**Q 56. *What is ADR and is it required by law?***

**A** ADR stands for Alternative Dispute Resolution and it includes mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decisionmaking process. The form of ADR chosen may be binding or nonbinding, with the voluntary consent of the parties. (Cal. Civ. Code § 1369.510.)

California law requires ADR prior to the filing of a civil action in superior court by a homeowner or the association regarding any dispute that would require declaratory relief, injunctive relief, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of \$5,000 and *related to the enforcement of the governing documents* (Cal. Civ. Code § 1369.520). The dispute resolution provisions include actions enforcing not just the Davis-Stirling Common Interest Development Act but also the Nonprofit Mutual Benefit Corporation Law.

ADR is not required if the member or HOA sues in small claims court (Cal. Civ. Code § 1369.520).

ADR is not required for an assessment dispute (Cal. Civ. Code § 1369.520(d)). The aggrieved person(s) must make a mandatory offer of ADR called a "Request for Resolution" stating whatever terms they want for ADR (binding or non-binding, type of arbitration or mediation, number of arbitrators, etc.). The responding party has 30 days to respond. If there is no response, then the aggrieved party may file a civil action accompanied by a Certificate of ADR Compliance indicating that the other party failed to respond (or that ADR was conducted but there was no resolution--i.e. with non-binding ADR). (Cal. Civ. Code § 1369.530.)

Failure to use the ADR procedure may be grounds for a demurrer or motion to strike (Cal. Civ. Code § 1369.560(b)). In addition, failure to respond to the Request for Resolution can impact fees and costs even if the party prevails in the civil action (Cal. Civ. Code § 1369.580).

**Q 57. *May any injured person sue the homeowners' association directly?***

**A** Yes. A homeowners' association for a common interest development can be sued in its own name as the real party in interest. The injured person need not sue the individual homeowners (Cal. Code Civ. Proc. § 383.)

**Q 58. *Does a homeowners' association have the right to sue a homeowner or anyone else in its own name without adding the individual homeowners as plaintiffs?***

**A** Yes. A homeowners' association has the legal right to sue in its own name as long the issue involves one of the following:

Enforcement of the governing documents.

Damage to the common area.

Damage to a separate interest which the association is obligated to maintain or repair.

Damage to a separate interest which arises out of, or is integrally related to, damage to the common area or separate interests that the association is obligated to maintain or repair.

(Cal. Code Civ. Proc. § 383.)

**Q 59. *May an owner of a separate interest sue another owner who violates a covenant or restriction in the CC&Rs?***

**A** Yes. Unless the CC&Rs state otherwise, the CC&Rs may be enforced by any owner of a separate interest or by the homeowners' association. In addition, the prevailing party is entitled to reasonable attorney's fees and costs. (Cal. Civ. Code § 1354.).

**Q 60. *May an owner sue the homeowners' association of a common interest development for violation of a covenant or restriction in the CC&Rs?***

**A** Yes. Unless the CC&Rs state otherwise, the CC&Rs (or any other governing document) may be enforced by any owner of a separate interest or by the homeowners' association. In addition, the prevailing party is entitled to reasonable attorney's fees and costs. (Cal. Civ. Code § 1354.) In addition, the association may be liable to a homeowner for failure to enforce the CC&Rs. (*Cohen v. Kite Hill Community Ass'n*, (1983) 142 Cal. App. 3d 642.)

**Q 61. *May the homeowners' association of a common interest development sue the owner of a separate interest who violates a covenant or restriction in the CC&Rs?***

**A** Yes. Unless the CC&Rs state otherwise, the CC&Rs (or any other governing document) may be enforced by any owner of a separate interest or by the homeowners' association. In addition, the prevailing party is entitled to reasonable attorney's fees and costs. (Cal. Civ. Code § 1354.)

**Q 62. *May a contractor or subcontractor file a mechanic's lien against the owner of a unit in a common interest development for work done on someone else's unit?***

**A** No. Unless an owner has given his/her consent to the work, a contractor or subcontractor cannot place a lien against one owner's unit for work done on someone else's unit. However, if emergency repairs are needed on the owner's own unit, then an owner will be deemed to have given his/her consent. (Cal. Civ. Code § 1369.)

**Q 63. *May a contractor or subcontractor file a mechanic's lien against the owner of a unit in a common interest development for work done on the common area?***

**A** Yes. Labor performed or services or materials furnished for the common area, if authorized by the homeowners' association, will be deemed to be performed with the express consent of each separate owner. Therefore, each owner is subject to a mechanic's lien.

However, the owner of a separate unit may remove his/her unit from a lien by payment to the lienholder (contractor/subcontractor) of the fraction of the total sum secured by the lien which is attributable to his/her separate unit. (Cal. Civ. Code § 1369.)

**Q 64. *Are there any special requirements which a homeowners' association must satisfy before it may sue the developer?***

**A** Yes. California law requires that not later than 30 days prior to the filing of any civil action by the association against the developer for alleged damage to the common areas, or separate units that the association is obligated to maintain or repair, the association must send a written notice to each homeowner indicating the following:

that a meeting will take place to discuss problems that may lead to the filing of a civil action

the options available to address the problems

the time and place of this meeting.

If the applicable statute of limitations will run, the association may give the notice within 30 days after the filing of the action. (Cal. Civ. Code § 1368.4.)

## **VII. Disclosure Obligations When Selling a Unit in a Common Interest Development**

**Q 65. *What are all the disclosure obligations when selling a unit in a condominium or other common interest development?***

**A** This issue is fully addressed in the legal article, [Condominium or Other Common Interest Development Disclosures](#).

## **VIII. Miscellaneous**

**Q 66. *May associations allow only certain real estate agents to show units?***

**A** No. Associations may not establish exclusive sales or marketing relationships with a real estate broker (Cal. Civ. Code §1368.1).

**Q 67. *May associations charge marketing fees?***

**A** Yes. However, marketing fees or assessments can be no more than the association's actual or direct cost in marketing the unit (Cal. Civ. Code §1368.1).

**Q 68. *What is a "managing agent" of a common interest development?***

**A** A "managing agent" is a person or entity, who for compensation, or, in expectation of compensation, exercises control over the assets of a common interest development. However, a "managing agent" does not include any of the following:

- a full-time employee of the association, or
- 
- any regulated financial institution operating within the normal course of its regulated business practice.

(Cal. Civ. Code §1363.1(b))

**Q 69. *Must a real estate broker or agent comply with any special requirements in order to be a managing agent for a common interest development?***

**A** Yes. A prospective managing agent of a common interest development must provide a written statement to the board of directors of the homeowners' association as soon as practicable, but not more than 90 days, before entering into a management agreement. The statement must contain the following information:

The names and business addresses of the owners or general partners of the managing agent.

If the managing agent is a corporation, the names and business addresses of the directors, officers, and shareholders holding greater than 10 percent of the shares of the corporation.

Any relevant California licenses held by the owners or general partners of the managing agent, such as architectural design, construction, engineering, real estate, or accounting--including the status of the license, and name of the licensee on the license.

Any relevant professional certifications or designations held by the owners or general partners of the managing agent, such as architectural design, construction, engineering, real property management, or accounting (e.g., certified property manager or professional association manager)--including what entity issued the certificate or designation, the status of the certificate or designation, and the name on the certificate or designation.

For any licenses currently held: what license, the valid dates, the name on license.

(Cal. Civ. Code § 1363.1(a).)

**Q 70. *What are the duties of a managing agent?***

**A** A managing agent of a common interest development who accepts or receives funds which belong to the homeowners' association must deposit all funds either into an escrow account (if applicable), into an account under the control of the association, or into a trust fund account maintained by the managing agent in a bank, savings association, or credit union in this state that is insured by the federal government. If the board of directors of the association makes a request in writing, the managing agent may deposit the association's funds into an interest-bearing account providing all of the following conditions are satisfied:

The account is in the name of the managing agent as trustee for the association or in the name of the association.

All of the funds in the account are insured by the federal government.

The managing agent must disclose to the board of directors the nature of the account, how interest is calculated and paid, whether service charges will be paid and by whom, and any notice requirements or penalties for the withdrawal of funds from the account.

The interest earned on funds in the account do not go to the managing agent or his/her employees.

The funds in the account must be kept separate and apart from the funds belonging to the managing agent or to any other person or entity for whom the managing agent holds funds in trust, unless all of the following are met:

- 1) The managing agent commingled the funds of various associations on or before February 26, 1990, and has obtained a written agreement with the board of directors of each association that he/she will maintain a fidelity and surety bond in an amount that provides adequate protection to the associations.
- 2) The managing agent discloses in the written agreement mentioned in subparagraph (1) whether he/she is deriving benefits from the commingled account or from the financial institution where the monies are deposited.
- 3) The written agreement mentioned in subparagraph (1) must also include the name and address of the bonding companies, the amount of the bonds, and the expiration dates of the bonds.
- 4) The managing agent must disclose to the board of directors of each affected association any changes in bond coverage or bond companies within 10 days after the change.
- 5) The bonds must assure the protection of the association and provide the association at least 10 days' notice prior to cancellation.
- 6) Completed payments on behalf of the association are deposited within 24 hours or the next business day and do not remain commingled for more than 10 calendar days. In addition to keeping these accounts, the managing agent must maintain a separate record of the receipt and disposition of all funds including any interest earned on the funds.

(Cal. Civ. Code § 1363.2.)

**Q 71. *What are the requirements for a HOA manager to be a "certified common interest development manager"?***

**A** The manager must have successfully completed an educational curriculum with no less than a combined 30 hours in coursework described below and passed an examination that tests competence in common interest development management in the following areas:

(1) Instruction in California law that is related to the management of common interest developments, including, but not limited to, the following courses of study:

(A) The topics covered by the Davis-Stirling Common Interest Development Act, contained in Sections 1350 to 1376, inclusive, of the Civil Code, including, but not limited to, the types of California common interest developments, disclosure requirements pertaining to common interest developments, meeting requirements for community association boards of directors and members, financial disclosure and reporting requirements, and access to community association records.

(B) Personnel issues, including, but not limited to, general matters related to independent contractor or employee status, issues related to types of harassment, the Unruh Civil Rights Act, fair employment laws, and the Americans with Disabilities Act.

(C) Risk management as it pertains to common interest development, including, but not limited to, required insurance coverage and preventative maintenance programs.

(D) Property protection, including, but not limited to, general matters relating to hazardous materials such as asbestos, radon, and lead, the Vehicle Code, local and municipal regulations, family day care homes, energy conservation, Federal Communications Commission rules and regulations, and solar energy systems.

(E) The business affairs of community associations, including, but not limited to, necessary compliance with all required local, state, and federal laws and treaties.

(F) Basic understanding of governing documents, codes, and regulations relating to the activities and affairs of community associations and common interest developments.

(2) Instruction in general management that is related to the managerial and business skills needed for management of a common interest development, including, but not limited to, the following:

(A) Finance issues, including, but not limited to, budget preparation, management, and administration of community association financial affairs, bankruptcy laws, and assessment collection activities.

(B) Contract negotiation and administration.

(C) Supervision of common interest development employees and staff.

(D) Management of common interest development maintenance programs.

(E) Management and administration of rules, regulations, parliamentary procedures, and architectural standards pertaining to community associations and common interest developments.

(F) Management and administration of common interest development recreational programs and facilities.

(G) Management and administration of owner and resident communications.

(H) Training and strategic planning for the community association's board of directors and committees, and other activities of residents in a common interest development.

(I) Risk management as it pertains to common interest development properties, activities, and emergency preparedness.

(J) Implementation of community association policies and procedures.

(K) Ethics for common interest development managers.

(L) Professional conduct and standards of practice for common interest development managers.

(M) Current issues relating to common interest developments.

(Cal. Bus. & Prof. Code § 11502(b).)

**Q 72. *May the board of directors of a homeowners' association grant an easement on the common area property without the consent of all the homeowners?***

**A** No. (*Posey v. Leavitt*, (1991) 229 Cal. App. 3d 1236.)

**Q 73. Does a common interest development need to comply with the Americans With Disabilities Act ("ADA")?**

**A** Yes, under certain circumstances. The ADA, a federal law that prohibits discrimination against individuals with disabilities, addresses discrimination in four areas: employment (Title I), public services (Title II), public accommodations and commercial facilities (Title III), and telecommunications (Title IV). Two of these areas may apply to common interest developments. (42 U.S.C. §§ 12101-12213.)

#### **ADA, Title I (Employment)**

Some common interest developments hire employees (such as managers, secretaries, gardeners, security guards, etc.). Any private employer with 15 or more employees must comply with the ADA, Title I requirements. (42 U.S.C. §§ 12111(5).)

#### **ADA, Title III (Public Accommodations or Commercial Facilities)**

The ADA, Title III, generally does not apply to residential facilities. However, if any of the facilities are open for use by the public, then compliance with the ADA is required. For example, sometimes an owner of a unit in a common interest development (i.e., a condominium in Mammoth Lakes) will rent out his/her unit as a vacation rental. They are subject to compliance with the ADA, Title III. (42 U.S.C. §§ 12181(7)(A).)

The rental office in a private residential apartment complex is considered a place of public accommodation, and, hence, subject to the ADA, Title III.

For additional information, including agency phone numbers, regarding ADA requirements, please see the C.A.R. legal article, [Americans With Disabilities Act \(ADA\)](#).

**Q 74. May an owner in a common interest development change, renovate, or modify his/her separate interest (home or unit or apartment)?**

**A** Yes, but all improvements, changes, renovations, or modifications made to a separate interest are subject to the CC&Rs.

If the boundaries of the separate interest are contained within a building, the owner of the separate interest may do the following:

- 1) Make any improvements or alterations to the separate interest that do not impair the structural integrity or mechanical systems or lessen the support of any portions of the common interest development.
- 2) Modify the separate interest (at the owner's expense) in a condominium project to facilitate access or eliminate hazards for persons who are blind, visually handicapped, deaf, or physically disabled. Modifications may also be made to the route from the public way to the door of a ground floor unit. All modifications must not conflict with applicable building codes, must be consistent with provisions in the CC&Rs pertaining to safety and aesthetics, must not prevent reasonable

passage by other residents, and must be removed by the owner when the unit is no longer occupied by persons requiring those modifications.

The owner needs to submit his/her plans and specifications to the homeowners' association for review.

(Cal. Civ. Code § 1360.)

**Q 75. *Who is responsible for pest control in a common interest development?***

**A** In general, unless the CC&Rs provide otherwise, the homeowners' association is responsible for repairing, replacing, or maintaining the common areas, but not the "exclusive use common areas." The owner of each separate interest is responsible for maintaining his/her separate interest as well as any adjoining exclusive use common area.

In a community apartment project, condominium, or stock cooperative, unless the CC&Rs provide otherwise, the homeowners' association is responsible for pest control involving wood-destroying pests in the common areas.

In a planned development, unless the CC&Rs provide otherwise, each owner of a separate interest is responsible for pest control involving the separate interest. If the majority of the owners approve, the homeowners' association may handle pest control for the planned development and recover the cost with a special assessment.

(Cal. Civ. Code § 1364.)

**Q 76. *What type of notice must the homeowners' association give the owners of a common interest development regarding impending pest control work?***

**A** The homeowners' association must give notice of the need temporarily to vacate a separate interest to the occupants and to the owners, not less than 15 days nor more than 30 days prior to the date of the required temporary relocation.

The notice must state (1) the reason for the temporary relocation, (2) the date and time of the beginning of the treatment and termination of treatment, and (3) that the occupants will be responsible for their own accommodations during the temporary relocation.

This notice must be given to both the occupants and the owners (if different) by personal delivery or by first-class mail, postage prepaid.

(Cal. Civ. Code § 1364.)

**Q 77. *Who pays for the cost of any required relocation during pest control repair and maintenance being done by the homeowners' association?***

**A** The owner of the affected separate interest (Cal. Civ. Code § 1364).

**Q 78. What are the homeowners' association's responsibilities for installation and maintenance of telephone lines?**

A Internal and external telephone wiring designed to serve a single separate interest, but located outside the separate interest, are considered "exclusive use common areas," which means their maintenance and repair are the responsibility of the owner of the separate interest.

The owner of a separate interest who needs access to the common area in order to maintain or repair equipment located in the exclusive use common area must be given this access by the homeowners' association, but the homeowners' association does have the right of approval of any telephone wiring affecting the exterior of the common area.

Any telephone equipment inside a separate interest is the responsibility of the owner of the separate interest. Any telephone equipment in the common area is the responsibility of the homeowners' association.

(Cal. Civ. Code § 1364.)

**Q 79. Who can I call if I have questions about common interest developments or homeowners' associations?**

**A** The [Community Associations Institute](#), a national trade association for homeowners' associations, is a source of valuable practical information.

**Q 80. Where can readers obtain additional information?**

**A** This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit C.A.R. *Online* at [www.car.org](http://www.car.org).

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