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2016/2017 LEGISLATIVE UPDATE AND CASE LAW REVIEW

The following is a digest of the legislation and case law that we believe will likely have the greatest and most immediate impact upon the day-to-day operations of California community associations. Unless otherwise noted, the statutes take effect on January 1, 2017.

LEGISLATIVE SUMMARY

SB 918 NOTICE TO OWNERS: OWNER OBLIGATION TO PROVIDE INFORMATION

Effective January 1, 2017, new *Civil Code* §4041 requires owners within a California Common Interest Development to provide their associations with written notice of the following:

(a) The address **or addresses** to which notices from the association are to be delivered;

(b) An **alternative or** secondary address to which notices from the association are to be delivered;

(c) The name and address of the owner's legal representative, if any, including any person with power of attorney or other person who can be contacted in the event of the owner's extended absence from the separate interest; and

(d) Whether the separate interest is owner-occupied, is rented out, if the **parcel** is developed but vacant, or if the parcel is undeveloped land.

Pursuant to §4041, all associations must solicit the annual disclosure from each owner and must update the association's records at least 30 days prior to making the association's Annual Budget Report disclosure in accordance with *Civil Code* §5300 (which is required to be distributed 30 to 90 days before the end of the association's fiscal year).

The §4041 owner disclosures will provide some benefit to associations, particularly in legal enforcement scenarios where owners commonly assert that improper addresses were utilized for statutory or other important notices.

Section 4041 does not define the term "solicit." However, a plain, and seemingly reasonable, reading of the term in this context would appear to require only an annual written request of owners that they provide the referenced information to the association. Further, although not required by §4041, it would seem that associations would be well served by providing the same request during any escrow processes to obtain new owner information.

On the other hand, some associations may wish to adopt a standard owner request/response form that solicits the referenced information. A standard response form may make the process of updating the association's records less burdensome. Further, such a form could be utilized to address additional issues and solicit additional information.

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LEGISLATIVE SUMMARY (CONTINUED)

SB 918 NOTICE TO OWNERS: OWNER OBLIGATION TO PROVIDE INFORMATION (CONTINUED)

Examples could include a section that allows the responding owner to "opt out" of the potential disclosure of the information to other association members pursuant to *Civil Code* §5220, and requests for additional information which could include phone numbers or email addresses. However, if such additional information is sought, that portion of the form should clearly indicate that providing that additional information is optional.

Section 4041 provides that if an owner fails to provide the required information, then the owner's on-site property address will automatically become the address to which association notices are delivered. In practice this could become challenging. It is common for owners to request that association notices be mailed to addresses other than their on-site property addresses (common alternative addresses include primary residence addresses, rental agent/manager addresses, business addresses of the owner, etc.). It is also common for those requests to remain in place for many years. Section 4041 now appears to require that such owners renew such requests annually through a §4041 response to prevent the address for notice from automatically reverting to the owners' on-site addresses. This could prove problematic (particularly in the assessment collection context) and could warrant, in certain circumstances, an association continuing to utilize a known off-site mailing address (in addition to the on-site address) when faced with an owner non-response.

It appears that in most circumstances, an association will be well served by adopting a policy regarding the required §4041 solicitation as well as the handling of the owner responses. Among other things, the policy can establish a specific timeframe for the association's annual solicitation and for the owners' required responses. Importantly, the policy can also establish the specific date upon which an owner non-response will trigger the above-referenced automatic switch to the owner's on-site mailing address.

Finally, §4041 will almost certainly increase costs for most associations due to increased "additional copy" requirements and clerical time in processing §4041 response forms. Pursuant to existing *Civil Code* §4040(b), any owner who provides the association with proper notice of a secondary address is entitled to have an "additional copy" of certain association notices (including the annual budget report, policy statement and certain collection-related documents) delivered to that secondary address. Further, as referenced above, if owners provide a secondary address on the solicitation required by §4041, it establishes that it is an address to which notices **"are to be delivered."** As such, to the extent that owners provide a response to §4041 sub-section (b), the number of "additional copies" that the association will be required to mail will increase (with associations bearing the related expense).

LEGISLATIVE SUMMARY (CONTINUED)

AB 2362 PESTICIDE NOTICE: UNLICENSED PEST CONTROL OPERATORS

Effective January 1, 2017, new *Civil Code* §4777 will require associations or their authorized agents to provide notice to owners (and, if applicable, tenants) of the associations' intent to apply pesticides within the common interest development by persons other than licensed pest control operators.

The required written notices are similar to those of licensed pest control operators and are required to include the type of pest targeted, the name and brand of the pesticide to be used, a specified statutory health and safety statement and the approximate date, time and frequency of the application (with a mandatory notice that it is subject to change).

The means by which the notice is required to be delivered and the required recipients vary based upon whether the pesticide application (a) is to common area or a separate interest unit/lot, and (b) will involve "broadcast application" (as defined in §4777), foggers or aerosol application. The notice can be delivered via posting in the common area, individual notice to owners and, if applicable, tenants and owners/tenants in adjacent units/lots.

Generally, the notice is required to be provided 48 hours in advance of the proposed pesticide application. However, if a pest poses an immediate threat, notice of pesticide application must be posted as soon as reasonably practicable, but no later than one hour after the pesticide is applied.

Further, upon receipt of written notification, an owner/tenant of a separate interest may agree, in writing, to an earlier application of the pesticide. Finally, prior to the receipt of written notice, an owner/tenant may agree orally to an immediate pesticide application (this is not a recommended practice absent exigent circumstances). However, in that case §4777 requires certain delivery/posting of the notice no later than the time of the pesticide application.

Very Importantly: §4777 requires that a copy of any written notices of pesticide application be "attached to the minutes of the board meeting immediately subsequent the application of the pesticide."

This legislation will undoubtedly, and for good reason, motivate many associations to utilize only licensed pest control operators. For associations that utilize their own employees to apply pesticides, the association will need to know §4777 in detail and directly assure full compliance (this is almost certainly something that your managing agent will not agree to undertake). To the extent that an association utilizes vendors who are not licensed pest control operators to apply pesticides (handymen, landscapers, etc.), the association may wish to amend/revise its vendor contract to require the vendors to comply with §4777 and to provide that the vendor will defend and hold the Association harmless from any claims, damages or other detriment arising from an actual or alleged failure to do so. However, even if such terms are added, the protection is only as good as the financial ability of the vendor and the ultimate responsibility remains with the association. Consequently, even in such a circumstance, the association should still closely monitor the vendor's compliance.

Finally, no matter how the application of pesticides by persons other than licensed pest control operators is handled by the association, a system will need to be established whereby the notice is timely provided to the association so that it can be attached to the minutes of the next board meeting. Although not required by §4777, the association should consider the addition of an agenda item for the review of the notice during the meeting.

LEGISLATIVE SUMMARY (CONTINUED)

AB 1978 WORKER PROTECTION: JANITORIAL

Effective **July 1, 2018**, *Labor Code* §§1420-1434 will be added to require persons or entities providing janitorial services to annually register with the California Labor Commissioner.

These *Labor Code* provisions will prohibit employers from providing janitorial services without the required registration (which can be revoked by the Labor Commissioner under various circumstances). The referenced registration process imposes a number of obligations upon the employer. Among them are mandatory sexual violence and harassment prevention education.

Labor Code §1432(b) provides that any person or entity (including a community association) that contracts with a janitorial services business that lacks current and valid registration will be subject to substantial civil fines of $2,000-$10,000 for a first offense and $10,000-$25,000 for subsequent violations.

Associations that contract with janitorial services providers will be able to verify the registration of the janitorial employer in a public database that will be provided by the Department of Industrial Relations in the Labor and Workforce Development Agency.

The referenced *Labor Code* provisions are not effective until 2018. However, many associations enter into one year contracts with service providers. Many contracts automatically renew under various circumstances. Consequently, well in advance of the effective date of this new law, associations should carefully evaluate the terms of any janitorial-related contract executed, extended, renewed or modified. In that process, they should consider requiring provisions (in the body of the agreement or in an addendum) that require the janitorial service provider not only to comply with the requirements of Sections 1420 to 1434 through the entire term of the agreement, but also to require that it defend and hold the Association harmless from any fines/detriment arising from a failure to do so. Associations should also consider including a right to immediately terminate the contract if, at any time on or after July 1, 2018, the service provider is indicated as not being properly registered for any reason.

HUD DISCRIMINATION RULE: NEIGHBOR-TO-NEIGHBOR DISPUTES

The Department of Housing and Urban Development (HUD) issued a rule that became effective October 14, 2016, known as the Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Practices under the Fair Housing Act.

Community associations are subject to the Federal Fair Housing Act, which prohibits discrimination in the enjoyment of housing because of race, color, religion, sex, familial status, national origin or disability. The rule, among other things, defines "hostile environment harassment" as unwelcome conduct toward a person in a protected class such that it interferes with the person's enjoyment and use of his or her residence. Harassment can be verbal, written or other conduct.

Under the rule, housing providers (which by definition includes community associations) could be held responsible for resident-on-resident discriminatory conduct if the housing provider knew, or should have known, of the discriminatory conduct and had the power to correct it.

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LEGISLATIVE SUMMARY (CONTINUED)

HUD DISCRIMINATION RULE: NEIGHBOR-TO-NEIGHBOR DISPUTES (CONTINUED)

This rule likely requires associations to become involved in certain neighbor-to-neighbor disputes within the community. If a resident who is a member of a protected class complains to the association of discriminatory conduct by another resident, the association may need to consider some level of involvement depending upon the nature/severity of the reported conduct. This involvement of the association could, in certain circumstances, include some level of legal enforcement. The rule is not clear as to what steps an association is required to take in any given circumstance. Therefore, until these issues are clarified in time (through further guidance from HUD or through future reported court cases on this subject), any association faced with issues of this nature should immediately consult its legal counsel.

SB3 MINIMUM WAGE INCREASE

Effective January 1, 2017, California *Labor Code* Sections §§245.5, 246, and 1182.12 will be amended to provide for increases in the required minimum wage. **For employers with more than 25 employees,** they provide for an immediate increase to $10.50 per hour and subsequent increases until it reaches $15 per hour in 2023. **For employers with 25 or fewer employees,** the increases will begin in 2019 and continue until it also reaches $15 per hour in 2023.

Associations with direct employees will be required to comply with the new and changing minimum wage requirements as they become effective. However, associations without direct employees will also be impacted by this legislation since virtually all associations engage a number of vendors who likely employ minimum wage level workers (landscape, general maintenance, patrol, janitorial, etc.). Associations should therefore anticipate (i.e., budget for) price increases from such vendors as their wage-related expenses increase.

AB968 REPAIR/REPLACEMENT RESPONSIBILITY: EXCLUSIVE USE COMMON AREA

Prior to January 1, 2017, *Civil Code* §4775(a) (formerly *Civil Code* §1364(a)) provided that, **unless otherwise specified in an association's governing documents**, an association is responsible for *repairing, replacing and maintaining* the common area, while owners are responsible for *maintaining* their separate interest and any exclusive use common area attached to the separate interest. The statute did not expressly allocate "repair" or "replace" obligations for the owner separate interests or exclusive use common areas.

In the decades since the initial enactment of this former version of §4775, many practitioners in the industry considered the differing responsibility descriptions to be poor drafting on the part of the legislature. As such, it was not uncommon for the industry to allocate the maintenance as well as the repair/replacement responsibility of both the separate interest and the exclusive use common area to the owners.

Effective January 1, 2017, AB968 amends *Civil Code* §4775 to address exclusive use common area and the separate interests separately. As would be expected, it now allocates separate interest maintenance, repair and replacement responsibility to the owners. However, with respect to the exclusive use common area, it allocates the maintenance

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LEGISLATIVE SUMMARY (CONTINUED)

AB 968 REPAIR/REPLACEMENT: EUCA (CONTINUED)

obligation to the owners, but allocates the repair and replacement obligation to the association. The **default** responsibility allocations of *Civil Code* §4775 are as follows:

	REPAIR	REPLACE	MAINTAIN
Common Area	Association	Association	Association
Exclusive Use Common Area	Association	Association	Owner
Separate Interest	Owner	Owner	Owner

Civil Code §4775 permits an association's governing documents to override this statutory allocation of responsibility. We recommend that each association review its maintenance matrices, current practices and governing document provisions addressing allocations of maintenance, repair and replacement responsibility for exclusive use common area to determine whether the association needs to modify its practices. If the required change is significant, a determination needs to be made whether the interests of the association are best served by: (a) changing the association's practices (and potentially adjusting the reserve contributions to address the change), or (b) proceeding with a governing document amendment that will either avoid, or further modify the maintenance, repair and/or replacement responsibility between the association and its owners.

SELECTED CASE LAW SUMMARY

PALM SPRINGS VILLAS II HOMEOWNERS ASSOCIATION V. PARTH

The association sued director Parth for breach of fiduciary duty for, among other things, unilaterally entering into contracts with vendors, terminating the management company, and signing promissory notes pledging assessments as security. Parth testified at her deposition that she was not aware that her actions violated the CC&Rs and Bylaws.

The trial court sustained Parth's summary judgment motion finding there was no triable issue of material fact on the grounds that Parth was protected by the business judgment rule (*Corporations Code* §7231) and an exculpatory clause in the CC&Rs providing that Board members shall not be liable for acts made in good faith.

The appellate court reversed the trial court because it found that there were triable issues of material fact concerning whether Parth acted with reasonable diligence and with reasonable inquiry. **The court stated that directors cannot be allowed to plead ignorance as a complete defense to claims of breach of fiduciary duty as this would be an incentive for directors to remain ignorant.**

The actions by the director in this case were extreme in that she entered into contracts without conducting any due diligence, acted unilaterally, and failed to follow express requirements of the governing documents. However, this case demonstrates that Board members are not always protected by the business judgment rule or liability protections in the governing documents.

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