SEPT 2013

BEVEN & BROCK

NEWS AND VIEWS

for Homeowners Associations

BEVEN & BROCK FREE HOA SEMINAR

Tuesday, October 15, 2013

The Davis-Stirling law has been reorganized and changes have been made to the law which take effect on January 1, 2014. We are honored to have two top HOA lawyers speak this evening and address the changes that will impact your Association. The evening is free, and includes the opportunity to meet new vendors for your association, win one of a number of door prize drawings, enjoy a great dessert and coffee, as well as learn how to be better equipped as a Board member.

Topics to be covered will include:

- Revamped and Rewired for 2014 "ANNUAL BUDGET DISCLOSURE" Packages
- Learn about new governance REQUIREMENTS, POWERS & LIMITATIONS affecting HOA Boards.
- Director CONFLICTS OF INTEREST: What are they? Who decides?
- Just when you got it right…. changes to MEETING NOTICE requirements
- Grant of EXCLUSIVE EASEMENTS - Board authority and changes
- NOTICE REQUIREMENT CHANGES - What are they?
- What are the changes regarding " Reimbursement (Damage) Assessments" ?
- Can Board Members VOTE on any issue?
- AMENDING your documents – How? Who should do it? Who approves the changes?

SPEAKERS:

- Ms. Sandra Gottlieb, Managing Partner of SwedelsonGottlieb; www.lawforhoas.com
- Mr. Brian Moreno, Senior Associate with Richardson Harman Ober PC; www.rhopc.com

Doors Open at 6:30 pm - Seminar Begins at 7:00 pm
Come early to visit the sponsor tables and sign up for the raffles

Reservation Required
Call 626.795.3282 ext. 886 or email: HOASeminars@bevenandbrock.com

BEVEN & BROCK
Property Management

HOW TO CONDUCT AN ENFORCEMENT HEARING!

By David C. Swedelson

Some community associations have no rules, and rarely any CC&R violations or problems. Others seem to have lots of issues and problems. Often we see board members that are reluctant to enforce the association's governing documents because they're afraid to deal with the homeowner. The purpose of this article is to show you how easy it can be to conduct an enforcement hearing with the end result being that the board will be in a position to decide whether to take legal action or impose a fine.

This article assumes that the association has given appropriate notice of a violation and hearing to the homeowner as required by Civil Code Section 1365. If there is any documentation that helps prove the violation, or the damages the association incurred, it is a good idea to send that with the notice of the hearing. If the hearing is related to damage the homeowner is alleged to have caused to the common area, then by all means provide the homeowner with copies of all repair invoices, reports, and related documents. The more information regarding the alleged violation you give the homeowner in advance of the hearing will mean less time you will need to address the issues at the hearing itself.

Being on the Board of Directors at an association requires board members to often change hats. The Board of Directors is charged with the responsibility of creating the rules and enforcing the rules. When the board is enforcing the rules and holding a hearing, it is acting as what attorneys call the "trier of fact".

This means that you are considering the evidence and making a decision. The board should conduct a hearing much like a judge would hold a hearing in small claims court. It can be informal, but the board acts as the "judge", and should control the courtroom much like a judge would. This means that the hearing is not up for discussion or debate. The Board is simply making an opportunity for the homeowner who's being charged with a violation to present their evidence as to why they are not responsible.

But this is also the opportunity for the association to present its evidence. So while the association is in effect the jury, it is also the prosecutor. In the past I've heard many a homeowner complain that their board has a conflict of interest because it's both prosecuting the claim and making the decision. But there are many examples of regulatory agencies or bodies that make allegations or hold hearings and make decisions regarding the evidence. The important thing to know is that the board must keep an open mind.

Many board members are reluctant to participate in hearings because they don't like the acrimony; they don't want to be yelled at by the homeowner. And no board member should be yelled at. It's important that the commencement of a hearing, that the board lays down the ground rules. The board member chairing the hearing, whether it's the president or someone else that's been delegated to handle that job, should advise the homeowner that the hearing is being conducted to determine if there has been a violation and whether any penalty or punishment should be doled out to the homeowner as a result of same. The homeowner should be told the hearing is neither a debate nor discussion. At that point, it would be appropriate for the chair of the hearing to present the association's case and evidence. Usually this will be a short description of what the alleged violation is.

As I suggested above, hopefully the homeowner has received the invoices or the documents that are relevant to the case against them. If not, at the beginning they should be given those documents and provided opportunity to review them.

If the board itself does not have percipient knowledge of the violation, it's important that the homeowner or resident that brought the violation to the board's attention,

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RESERVE FUNDING: CONFRONTING THE TRUTH!

By Robert M. Nordlund; PE, RS

In the process of preparing over 30,000 Reserve Studies for Associations across the country over a period of 26 years, there are two Board member sentiments we hear most frequently expressed: "We can't afford the Reserve Funding Plan" and "We'll worry about that next year". Unfortunately, regardless of how much you may think these statements are true, it doesn't make it so.

"We can't afford the Reserve Funding Plan."

Most of us are accustomed to living within our own financial constraints, where there are some things we can afford and some things (like that red Ferrari!) that we can't. So we are regularly making choices about where we spend our limited cash. But there are two logical flaws to this concept of "affording" when it's applied to reserve contributions in an Association-governed community. First, common area repairs and replacements don't disappear if the Reserve Fund has been underfunded. The claim that you can't afford the Reserve Funding Plan this year only creates a tidal wave of more Reserve obligations in the future. And to compound the problem, delayed contributions generally result in delayed Reserve projects, so the issue of deferred maintenance comes into play. Most deferred Reserve projects actually get more expensive when delayed. The truth is, you can't afford not to adequately fund reserves.

The second flaw is that Boards don't really have a choice in the matter. Board members are both empowered and obligated to operate the Association. Owners or future owners might be inclined to file a lawsuit against the Board because the Special Assessment that was levied against them is actually a deficit catch-up strategy from all the years you benefitted financially by keeping Association assessments low.

The reality is that underfunding reserves is nationwide problem. More and more prospective buyers are becoming aware of this issue. The Department of Real Estate took the unprecedented step in September 2012 of issuing a Consumer Warning regarding this issue.

"We'll deal with that next year."

The problem with this next excuse is that Reserve obligations are not future events. Reserve obligations arise from very predictable deterioration that occurs every day, every week, and every month, over the course of many years. Unlike a fine wine, buildings don't improve with age, so those repair & replacement costs continue to pile up. The monetary value of that ongoing deterioration can be easily calculated and translated to an off-setting Reserve contribution rate. Reserve obligations are as real as any other bill the Association receives. Cultivating a culture of not paying your own bills is not only fiscally irresponsible, but inherently unfair.

Let me explain: Is it fair to be forced to pay for a new roof to replace one that someone else "used up"? The unwitting victims of deficit-reducing Special Assessments or bank loans necessitated by underfunding reserves may not all have enjoyed the full life of that component. Some suffer the unfortunate timing of being owners at the very end of the component's useful life. Many owners are being forced to subsidize the reserve deficit of prior owners who underpaid the cost of maintaining the Association.

It may be a hard pill to swallow, but Boards need to stop making excuses or kicking the problem down the road. You can figure out your current situation by following the Funding Plan- it's one of the key results of a Reserve Study. Not only will you then fulfill your role and responsibility as a Board member and protect yourself from liability, but you will keep your Association in good shape by being able to make timely repairs and replacements and achieve long-term homeowner satisfaction.

Robert M. Nordlund is Founder and President of Association Reserves, Inc., which is a nationally recognized leader in the Reserve Study industry. His company Association Reserves, Inc. has prepared over 30,000 reserve studies nationwide.

The website for the firm is: **www.reservestudy.com**.

HOW TO CONDUCT AN ENFORCEMENT HEARING! continued...

or who made the complaint, is present at the hearing. If, for example, the homeowner is being cited for allowing their dog to be off leash, unless the Board of Directors has actually seen the dog off leash, the complaining resident or homeowner should be present at the hearing and should present that information to all present at the hearing.

At this point you may be asking yourself why the homeowners that's been cited for a violation is entitled to the hearing and entitled to confront their accusers. It's what we call due process. Our country's constitution guarantees that citizens are entitled to due process. If the association is going to be levying or imposing a fine on a homeowner, a homeowner is entitled to due process.

After the documents have been given to the homeowner and witnesses have "testified", the chair of the hearing should then advise the homeowner that is now there opportunity to present any defense they have to the allegations that have been made against them. At that point, the homeowner will either make their own testimony and/or provide witnesses who will testify. The Board has the power and discretion to control what evidence or information is presented by the homeowner. If the homeowner is going off track, then it is important for the Chairperson to bring them back.

At the conclusion of the hearing, the Board of Directors is not required to have a discussion or debate with the homeowner but is entitled to take the matter under submission. This is why the Civil Code provides the board of directors with fifteen days to make and provide the homeowner with their decision.

It will likely be a good idea for the Board of Directors to then excuse the homeowner and all of the witnesses, and for the board to then discuss the matter and make a decision.

It's also important that the Board of Directors state the reasoning for their decision which lawyers call a "Statement of Decision." It doesn't have to be lengthy; it just has to indicate what facts and circumstances the Board of Directors took into consideration to justify their decision.

In conclusion, a due process hearing is inevitable in most associations. The process does not have to be complicated and if these guidelines are followed, you will benefit by having a streamlined process.

David C. Swedelson is a Senior Partner of SwedelsonGottlieb, a law firm that specializes in HOA legal issues. Mr. Swedelson can be reached at dcs@sghoalaw.com.