BEVEN & BROCK
NEWS & VIEWS
for Homeowners Associations
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HOA Bullies!

By David F. Brock

Bullying is a frequent topic in the news today, mostly in connection to schools. Certainly, while it is seldom mentioned in the media, bullies exist in almost every homeowners association, even the small associations. For some associations, this problem is very significant in that it creates legal expenses, and lowers property values.

The origin of bullies within Homeowner Associations may have roots in the context of the association relationship. To the extent that the behavior originates from within the association, whether from recent events or something that occurred many years ago, it can be addressed. It may be challenging to address, even daunting, however for the sake of a healthy association and peace in the community, it must be done.

Bullying in an association can be done by an owner, a tenant, and yes, even a board member. Living in an HOA provides great potential for a bully to operate since two issues of great importance to people are involved: homes and money. Another contributing factor is the proximity in which people live.

We will examine two types of bullies in this article: the *homeowner bully* and the *Board member bully* and provide you with effective strategies in addressing this major challenge.

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Painting: You Get What You Pay For!

Greg Lewis, Ferris Painting

There is a widely used saying that "You Get What You Pay For". Here is short story example confirming just that.

We recently received a phone call from a distressed board member of an HOA. She said they had the complex painted less than two years ago and they now need one building completely re-painted AND the paint is fading on all the trim of the rest of the buildings that face south.

The trim was a medium-brown color but the south sides now look a reddish-pink color. So I asked her why the contractor that did the painting, didn't come out to look at the problem. She said they are now out of business. The HOA originally chose them because they were the cheapest bid but now it looks like the $170,000 they paid wasn't money well spent.

The board now knows why they were the cheapest bid.....because they weren't the best bid!

Painting has value, but the quality with which it is applied can vary greatly. You usually get what you pay for. There are different levels of quality in painting and contractors, just like everything we buy from paper towels all the way up to the homes we live in.

A few questions to ask your paint contractor next time you are deciding on who to choose.

1. Explain the type of paint that will be used on each surface and why. There are different grades and types of paint so the color you choose and the surface you are painting will determine the best material to use. For example, if you are painting stucco with a medium to dark color, you will want to use a premium paint. It will cost you more but among other reasons, it will resist the sun's UV rays better and the color will last longer. If you are painting that same stucco with a light color, you don't need to spend the extra money since light colors are not as affected by the sun.
2. How many years has the contractor been in business? The longer they've been in business, the more knowledge they typically have and can solve problems and challenges that may arise on the job.
3. How many years long is my guarantee and what does it cover? Get the guarantee for all your different surfaces in writing! Guarantees can and will vary depending if you are painting stucco, wood, wrought iron, floors & decks as well as any clear coated surfaces like varnished front doors. As an example, varnished doors will have a shorter guarantee compared to painted doors, since the suns UV rays affect clear varnish much faster than it affects a painted surface. You can still keep a varnished door looking nice but if it is in the sun, you will need to recoat it every 1 to 2 years however if that same door is painted, you probably can wait 4 to 5 years before repainting.
4. Are they licensed and insured to work on your type of property? Due to the additional liability risk for damage, contractors need to carry additional, more costly, general liability insurance allowing them to work

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Reserve Studies "Undercover"

By Robert M. Nordlund, PE, RS, Association Reserves, Inc.

A long running joke in my extended family is that no one knows what I do for a living. It's even been suggested over the years that my company, Association Reserves, Inc., is simply a "cover" for my real profession as a hired assassin and that site inspections offer me and my team a convenient excuse for unhindered domestic and international travel. And so one of the challenges of writing an article about Reserve Studies is first making sure the readers have a clear understanding of exactly what a Reserve Study is!

In 1998, National Reserve Study Standards (NRSS) were published that made explaining my line of work a little easier. At the very least, NRSS established standard terminology and identified the key three results of a Reserve Study:

- **Component List** *(outlining the scope & schedule of Reserve projects)*
- **Calculation of Reserve Fund Strength** *(% Funded measure of whether current Reserve Fund has kept pace with past deterioration)*
- **Funding Plan** *(necessary to assure the timely completion of scheduled Reserve projects)*

But knowing what belongs in a Reserve Study really does very little to explain the usefulness of the Reserve Study itself. So, let me spend a few minutes outlining how four different interested parties can find tremendous value in a Reserve Study:

1. **Volunteer Board members**- should value the Reserve Study as a form of protection against decisions that might otherwise be motivated by emotions, popularity or perception. Because all Board members serve in a fiduciary capacity, they need to be able to defend and justify the "soundness" of their actions to the homeowners. A Reserve Study should provide the Board with a sense of being well-armed to make wise business judgments. Reserve Studies also transcends Board turnover by offering decision-making stability from year to year.

2. **Professional Managers**- should value the Reserve Study as a planning tool. It is only by knowing exactly "where they are" that an organization can make wise and informed decisions about "where they want to go". Given the moving target nature of reserve planning (i.e., a regular pattern of reserve funding contrasted with an irregular pattern of reserve spending) it is valuable to have a reliable and consistent snapshot for the purpose of comparison and assessing progress each year. By watching the Reserve Fund Strength (% Funded) trend up or down over the years, Managers can see whether the Association is gradually under-reserving or strengthening its financial position.

3. **Homeowners**- should value the Reserve Study as an independent and accurate statement of fact regarding the current year reserve funding situation, as well as a schedule of repair & replacement projects that are slated for completion. The Reserve Study eliminates mysteries and surprises and is the place where these facts and expectations are assembled, documented, and communicated annually in one convenient location.

4. **Potential Purchasers** - should value the Reserve Study as a form of consumer protection. Because potential purchasers represent future homeowners, these buyers have a right to know the financial health of the Association, the history of repairs & replacements, and their risk of facing a Special Assessment.

You may find it interesting that I made no mention of state legislation governing HOA reserves, even though, as of this writing, 30 states have specific reserve funding laws on the books. The first reason is that I believe strongly in the inherent value of a well-executed Reserve Study. The second reason is that reserve statutes (like most legislation) were codified by politicians, regularly ignoring the wise and practical input of industry professionals. The resulting legislation often contains confusing legal jargon and sets forth requirements that are, at best, awkward and cumbersome, and at worst, without merit.

The bottom line is that Association-governed community living involves shared expenses. The Reserve Study documents the cost of common area deterioration and recommends a Funding Plan not just so that that repairs & replacements can be completed in a timely manner, but so that every homeowner pays their fair share along the way.

If I divulge any more than that I'd have to kill you!

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on HOA's. So make sure you get a certificate from your contractor naming your HOA as "additional insured". That will guarantee they have the proper insurance.

5. When you meet with each contractor, pay attention to their behavior. Did they show up on time? Are they business-like and professional? Are they confident? Did they get you the bid in a reasonable amount of time?

6. Get references of properties similar to yours in your area. Spend a little time calling the references and go see the properties. Ask about their experience with that contractor. Problems occasionally come up so ask the references if they were satisfied with the way their contractor handled their job and any issues that may have come up.

Architectural Modifications: Tools To Ensure Compliance With Architectural Rules And Procedures To Strengthen The Foundation Of Your Community

By Matt Ober, Senior Partner; Richardson Harman Ober PC

What attracts many to community association living is a developed system of architectural uniformity and aesthetics designed to preserve if not enhance property values. Owners buy in to communities with the expectation that their neighbors will comply with a community's architectural rules, or if they don't, that that the association will enforce these rules. This expectation of compliance and enforcement is supported by *Civil Code* section 4765 (c) which contains the following two -part annual association disclosure requirement:

> "An Association shall annually provide its members with notice of any requirements for association approval of physical changes to property. The notice shall describe the **types of changes that require association approval** and shall include a copy of the **procedure used** to review and approve or disapprove a proposed change."

Indeed, among an association director's duties is to preserve the value of the asset-- the property. Ignoring the standards by which a community was designed and developed is a sure way to negatively impact a community's value and perhaps breach that duty.

Although we casually refer to these rules as "architectural," we are referring to any physical modification to property (usually to the exterior) or modifications to the interior of a unit that impact the structural components of the property, or to the common area plumbing, electrical or mechanical lines.

In essence, associations have a two-prong requirement for approving physical changes to property-- substantive and procedural; both of which are important.

The first of these two disclosure requirements-- the procedure, is contained in Civil Code Section 4765 which requires that every association" provide a fair, reasonable, and expeditious procedure for making its decision [on an architectural modification.] That procedure shall be: 1) made in good faith and not be unreasonable, arbitrary or capricious 2) in writing;

and 3) provide for a right to appeal to the Board of Directors if, and only if, the Board is not comprised of the same members as the Architectural Review Committee (ARC). This procedure must include the time frame within which applications will be reviewed and approved.

The second prong, the substance, is likely buried deep within the associations CC&Rs.

On rare occasions your CC&Rs may contain a separate section dedicated to architectural compliance but that is the exception. More often than not, you have to comb through your Governing Documents to identify the limitations placed on owners who wish to make physical changes to their property. Unfortunately for a community's Board of Directors and their community managers, understanding and applying these often vague and nondescript provisions is of utmost importance in carrying out their fiduciary duty to their association's and each owner.

The importance of adhering to architectural standards cannot be overstated. This is not to say that a Board or ARC must be rigid in its application of community architectural standards. But an association must adhere to a set of standards by which all applications are reviewed and evaluated, not just today but years from now. And this standard must be communicated to the owners, and often, so that all are reminded of their obligation to obtain approval before making physical modifications to their property.

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ELECTION LAW PASSES ASSEMBLY

AB 1799 authored by Assembly Member Mayes (R - Yucca Valley), which allows election to a community association volunteer board of directors by acclamation, passed the full Assembly by a vote of 71 to four. "No Assembly Member spoke against AB 1799 on the floor of the Assembly," said Skip Daum, President of Capitol Communications Group and CAI-CLAC advocate at the state Capitol. Community Associations

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FINANCIAL SURPRISES - PART 2

In the last issue, we addressed the issue of how bad financial surprises can make for a really bad day in the life of your HOA community. The first article addressed how to avoid being surprised. However, for some associations, it is too late to take the preventative steps to avoid in the future, sadly the future has arrived.

How does an association get to the point where they are out of money?

It can happen in several ways.

- Refusing to look at monthly financial statements
- Not having, or reviewing a "budget comparison" report regularly that will indicate your performance through the year.
- Continuing to approve budgets that aren't balanced
- Approving a budget that doesn't factor in increased expenses in the past year
- Not funding reserves year after year.
- Not taking appropriate action to collect delinquent assessments, particularly in small associations.

There may be other reasons, but these six are the most common. Taking pride in the number of years since an assessment increase is unfounded and ill-advised. Boards who value not raising assessments for whatever reasons will eventually have to confront the reality of special assessments.

When an association runs out of money the options are difficult, at best. The board who must address this has a very difficult job. In the past, we have seen board members prepay their assessments to give the association some money to pay bills assuming there are no reserves to borrow against. Another option that boards utilize is to juggle bills. This is a very challenging environment to operate in and is clearly above the pay-grade of any HOA board member.

Borrowing from reserves is the first line of defense in a cash flow crunch. If the association has reserves, the Davis-Stirling law permits the board to borrow from reserves provided certain conditions are met. Boards are required to give notice of their intent to borrow reserve funds by listing it as an agenda item in its' notice of board meeting. The notice must include the reasons the reserve transfer is needed, some of the options for repayment, and whether a special assessment may be considered. If the board authorizes the transfer, the board must issue a written finding, recorded in the board's minutes, explaining the reasons for the transfer, and describing when and how the money will be repaid to the reserve fund.

Monies borrowed from the reserves must be repaid to the reserve fund within one year of the date of the initial transfer. However, the board may temporarily delay the repayment if they make a finding a finding supported by documentation that a temporary delay would be in the best interests of the Association.

If there are no reserves to borrow against, the options are far less attractive. They include an emergency special assessment or a special assessment. An "emergency special assessment" may be perceived differently by people depending on their perspective. The law provides that emergency assessments more than 5% may be imposed by a board of directors without membership approval under the following circumstances:

1. An extraordinary expense required by a court order.
2. An extraordinary expense necessary to repair or maintain the common interest development or any part of it for which the association is responsible where a threat to personal safety on the property is discovered.
3. An extraordinary expense necessary to repair or maintain the common interest development or any part of it for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the annual budget report. However, prior to the imposition or collection of an assessment under this subdivision, the board shall pass a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not, or could not, have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment.

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Financial Surprises - Part 2: continued from page 4.

The only remaining option for associations who have "hit the wall" financially is to have a special assessment that provides for the remaining current year projected deficit. If the need for the assessment does not qualify under the three exceptions above, then the special assessment must be approved by the membership in a special election. The election must be held by the election law requirements, which mandate a secret ballot. An election requires 45 to 60 days to hold, and another 30 days, after the counting of the ballots, for the assessment take effect. This is not a quick or easy process.

The essence of this problem is an issue of reactivity. Addressing issues as a board in a reactive manner is a terrible way to act as the fiduciary of the association. A "fiduciary" is one who has the confidence and trust of another to act in their best interest. As hard as it is to operate in a business-like way in your association, it is essential. Being a board member of an HOA requires a very special set of skills and abilities that require one to set aside their preferences for the association. Granted, this is not easy. And, perhaps impossible, for some.

The bottom line, in financial matters, does the following:

- Review your monthly financial statements.
- Insist on a "budget comparison" report and review it regularly. For a sample budget comparison go to "http://www.bevenandbrock.com/financialstatementhelp.pdf and see page 3.
- Do not approve budgets that aren't balanced
- Do not approve a budget that doesn't factor in increased expenses from the prior year
- Fund your reserves, according to the reserve study recommendations.
- Take appropriate action to collect delinquent assessments

The work of a common-interest-development board member is not hard to understand, but harder to implement. It requires a huge mental shift in thinking to do the work, but once you have conquered that, the job is not complicated. To the many board members who have made the transition to operating as fiduciaries, congratulations. This article was not intended for you but THANK YOU for the hard work you do on behalf of your association.

Election Law Passes Assembly: continued from page 3.

Institute's California Legislative Action Committee (CAI-CLAC) has supported this bill from the beginning. It directly benefits the election process in community associations and avoids associations unnecessarily spending countless hours and hundreds or thousands of dollars conducting an election where there are fewer candidates than open board seats. With the passing of AB 1799 the situation can be corrected while maintaining the integrity of the election process. Elections of volunteer homeowners to association boards are required and the procedures for such elections are spelled out in the governing documents and applicable law. However, when there is no competition for director positions, current law still requires an election to be held, resulting in an unnecessary expense to the association. AB 1799 would amend the law to eliminate the requirement to proceed with uncontested elections, where the number of candidates does not exceed the number of positions available.

As of this printing, the vote is pending in the Senate. However, given the overwhelming vote in the Assembly, this bill has a reasonably good chance of passing, and being signed by the Governor.

Management Companies - Good, Bad, or Ugly!

By David F. Brock

Many Common Interest Developments utilize management companies to help them manage their associations citing a variety of benefits. Some associations prefer to "self-manage," with varying degrees of success. The number of associations who transition from self-management to professional management, over time, far surpasses those who move from professional management to self-management.

The success of the self-managed associations depends on a very committed board, or more likely, a very committed Board member, who is willing to take the on the job without pay. Most often the board member who carries the burden of management will get burned out, or sell their unit. There are few, if any, owners who are willing to step up and take on the duties of management.

In the world of company management options that associations have there are a wide variety of choices, which is good, because associations have different needs and budget restraints. Whether an association wants a limited accounting service, or full service, or something in-between, they are all available. The goal for every association should be to find the formula that works the best for the needs of the association.

As can be expected, the differences between management companies are vast. What are those important key distinctions that association boards should be aware of in making the decision for a management company, or perhaps in changing management companies?

First, and foremost, money. Yes, money is the root of most issues that HOA boards face, right? How does the issue of money come into the issue of screening management companies? There are several areas to be aware of regarding screening management companies. First, let's address how management companies handle YOUR money, and at the end of this article, we will look at the cost of management companies.

There are some great differences in how management companies handle your money. Of course, it is required that separate accounts be maintained for each association managed, however amazingly there are some firms that still commingle funds from several associations into one account. Another law is that only board members can sign on reserve accounts. This is not always the case.

More commonly, however, is the practice utilized by most management companies of being the only signers on the monthly disbursements. While this is not illegal, it is far from the best choice for the protection of the association's funds. It is important that the Treasurer review and approve the payable items before disbursement to the vendors.

Another important distinction that separates management companies is the issue of certification. California adopted a manager certification law about ten years ago, which amazingly does not mandate certification, but only requires that management companies disclose which of their managers are certified. What does being 'certified' mean? Certified Managers are required to take courses before taking an exam to become certified. After certification, continuing education is still required. Also, most importantly to the association, managers who are certified are more committed to the industry and will work more diligently to protect their certification. There are two organizations that certify managers. On the state level, there is the California Association of Community Managers (CACM) and on the national level, there is the Community Associations Institute (CAI). Every manager should be a member of one or the other. Each of them maintains a "code of ethics" which should be very important to you as the client. Inherent in a code of ethics is a means of discipline. Certification of Managers should not be underestimated as valuable.

It goes without also saying, that education of board members is very important since associations must be led by a volunteer board of directors who do not have training or expertise in the environment of constantly changing laws. While the management company is not the only source of education that is available, there are always educational options for board members through the Community Associations Institute (http://www.cai-glac.org), and internet sources.

The business model of the management company is an important consideration as well. Is the management company involved in other competing business interests? Some companies offer other services, such as maintenance, that may present a conflict of interest with your association. For instance, if the management company provides maintenance services, objective comparison of bids will be impossible.

Stability and duration in business represent issues of strength in the selection of a management company. Management company transitions can be challenging for the association so working with a company that has many years of experience can be important. The longer the time in business indicates that the company is around for the long term.

The size of the management company can be an important consideration for some. Some people feel that a smaller company is better, as they will give more attention. Of course, this depends on how the small company is being staffed regarding its client base. Companies that are perceived to be large may be structured to provide

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more individualized service. Also, larger companies will have capability and resources to provide for employees who are on vacation or extended medical leave. Larger companies may provide a benefit of a diversified staff that can best meet your needs. If your particular representative isn't meeting your needs, a larger company will have a better chance of finding a suitable replacement within the company.

Let's go back to the issue of costs. It is not possible to simply compare management companies on cost alone. One issue that separates management companies is how they handle additional costs. Some charge for office supplies and some do not. It is not unreasonable that there are extra costs since it is not realistic for a management company to anticipate every situation that may arise. When evaluating management companies, be sure to ask about the issue of extra costs, so that there are no surprises later.

Finally, in closing, just as management companies are not created equally, neither are boards and associations. Every association has unique challenges, owner involvement, and cost factors. If you have an owner who likes to act in the capacity of an on-site maintenance capacity, you may be able to utilize this owner instead of a management company in that capacity. If this owner is not on the board, this owner can be paid for their work. This might save the association some money.

One size doesn't fit all when it comes to finding and working with the right management company. As your needs change over time, there will be a management company that can adjust to you.

HOA Bullies!: continued from page 1.

The Homeowner Bully!

There are multiple ways that the *homeowner bully* can develop with some of the causes being real, and some perceived. The most common reasons are a) disagreement with Board actions, either with the current board or a previous one, b) a personal dislike of the Board or a particular board member, c) a sense of powerlessness, d) feelings of not being heard or understood, e) a distrust of authority and a fear of change. When one or more of these issues exist and is combined with an inability to articulate them well, some people will act or react in ways that are aggressive toward the Board or others.

What can the Board do? The two most common reactions are *flight or fight*. Some Board members will decide that they didn't sign up for this and will resign. Other Board members will choose to fight and may engage the services of an attorney. The latter approach may be very appropriate, especially, if there is a threat of physical harm. While this is an expensive solution, it may be necessary. Another reaction is to ignore the bully, and hope the problem goes away.

Ideally, the best solution may lie in the middle of these two extremes. Perhaps, the best approach is to engage in "Internal Dispute Resolution" or "IDR" between a designated Board member and the bully owner. IDR occurs when a Board member meets with the bully owner for a casual conversation in a neutral location. To be effective the conversation should involve the Board member listening to the owner and attempting to understand the source of their issues with the Board or Association. The simple act of listening has the potential of resolving disagreements. You may also find that the feelings are justified, and the Board may need to correct how they function. Perhaps, offering an apology over some past issue may help to diffuse the tension. There is no doubt that this approach, if successful, will be more effective over the long term and less costly.

The Board Member Bully!

A Board member is in a position of power and this provides a perfect opportunity for bullying to occur. This is true when the

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HOA Bullies!: continued from page 7.

Board member is inflexible and their position of service has turned into one of power. Sadly, other board members may be reluctant to stand up to the *board member bully* because in their view, it is easier to remain quiet. This is never good for the association as it can empower the *bully board member*. Unfortunately, this situation is far too common. Apathy among board members is a perfect environment for this situation to occur. If board members don't care, and allow one board member to do everything the *board member bully* can develop. It is important for all Board members to speak up, even when you want to remain passive. If you are on this kind of a board, you should speak privately to the other board members about your concerns to see if there is any support with the other board members to address this situation. Remember, your duty is to represent the best interests of the association.

There are several approaches to addressing a difficult board member and the approach will depend on the severity of the problem. If you believe that the board member is breaking the law, it would be best to consult with an HOA lawyer to consider your options, which may include removing the board member from the board. Hopefully the scenario is not this bad, and the board member will agree to either to step off the Board, if they realize the board is united or at a minimum, the board can vote to remove the board member from the office they are holding. If the President, Secretary or Treasurer is the bully, the board can vote to remove them from their office, but remain on the board. This is a common and fairly uncomplicated solution to this issue.

In summary, no board member should have absolute authority or operate as if they do. Board service is clearly a collaborative process and when the board functions as a team the Association is the ultimate winner, as they should be.

NEWS LETTER

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