



# BEVEN & BROCK

## NEWS & VIEWS

### for Homeowner Associations

October 2021

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## Parting Words From A Board Member

By David Brock, PCAM

As an HOA management company, we always value and appreciate board members who serve their associations well, and are always sorry to see them leave. Recently, one of our Presidents sold his unit and sent an email to all of the owners. With his permission, we share his words with you. This message may be more appropriate for owners who do not get involved in the association, and for some board members who agree to serve but allow other board members to do most of the work.



**Here are his “parting words”:**

*I urge you to be more involved in the community. I understand that we’re all busy and that it’s easy to play ostrich (I did it for years!). But it’s un-neighborly to let other owners take on all the Association’s headaches. Please participate in meetings, ask questions, and when something doesn’t look right, speak up!*

*If you participate, it will be a happier community. Not only will you have peace of mind, but your property values will ultimately reflect the care you*

*“Parting Words From A Board Member”: continued on page 3.*

## The “Balcony Inspection” Law

Michael T. Kennedy, Jr.

### I. Background

Commonly known as the “Balcony Inspection” law, SB326 (now Civil Code § 5551) was passed in response to several notable structural failures due to unseen deterioration from water intrusion, most notably a tragedy where an apartment balcony collapsed in Berkeley. The 13 people on that balcony fell 40 feet to the sidewalk below and 6 of them were killed. That building was only 7 years old, and an investigation revealed that defective construction had allowed water to become trapped between the cantilevered joists supporting the deck and the plywood underlying the walking surface, rotting the joists.



There has been a visual inspection requirement, conducted as part of the reserve study update, since the 1980’s. That inspection must be conducted every 3 years and, while it must be “reasonably competent and diligent”, it is visual only and usually conducted by the reserve specialist. Structural damage to structural members is almost always invisible behind stucco, siding, or other exterior surfaces, however.

In response to the Berkeley tragedy and similar incidents, this new inspection requirement took effect this year, requiring a more comprehensive inspection every

3rd reserve study update.

### II. The Inspection

Every 9 years (or after the first 6 years for a new project) in every residential condominium building with 3 or more units, there must be an inspection of “Exterior Elevated Elements” by a licensed architect or structural engineer. “Exterior Elevated Elements” are anything with a walking surface at least 6 feet off the ground that extend from the exterior wall of the building that are supported by wood or wood-based products,

together with their railings and associated waterproofing system. The inspection must include the load-bearing structural components themselves, such as joists, beams, and other structural supports. The statute specifically includes flashing, membranes, coatings and sealants that protect structural components from damage caused by water exposure.

The inspection must be conducted by a licensed architect or structural engineer, and it is the inspector who determines how many locations to inspect. Architects and engineers experienced in the type of forensic investigations conducted during construction defect claims will have the most relevant experience for this type of investigation and

*“The “Balcony Inspection” Law”:  
continued on page 2.*

report.

The inspector generates a randomized list of each type of Exterior Elevated Element. The sample size must be a "statistically significant sample" which gives the inspector a 95% confidence level that what they inspected is representative of 100% of the whole. The sample size is likely to vary from project to project; the more decks, the smaller the sample size to achieve the 95% confidence level. There will also be variation based on the configuration of the project; Southern facing elevations are more weather exposed than Northern facing elevations, and top floor balconies are more exposed than those on lower floors, which are often partially shielded by the balcony above. There is also a qualitative component in addition to the quantitative aspect, because the inspector may increase the number of inspection locations if they find that water has passed into the system, creating the potential for damage.

The inspection is visual only, but must allow of inspection of the structural components themselves, not just exterior surfaces. The statute allows for the least intrusive method, but the inspection will involve removal of/cutting into

exterior surfaces to expose structural components. Deck membranes may be covered by concrete, and joists may be hidden behind stucco or siding.

Because of the necessity of exposing internal structural components, the inspector will necessarily require the assistance of a contractor to provide access, and then to patch back exterior surfaces after testing. Contractors may also be able to install inspection hatches, removable vents, and other features to make future inspections more efficient. There is a misconception that the contractor involved in the testing cannot be the same contractor that performs repairs as recommended by the inspector, but that is not true; for apartments the inspection may be conducted by a general contractor, but the same contractor cannot perform repairs. That law does not apply to condominiums, however.

### **III The Report**

The architect or engineer prepares a report of the inspections, which identifies the load bearing components and associated waterproofing, their current physical condition, and whether that current condition presents an "immediate threat to the health and safety of the residents." This type of testing and report will be very similar to the investigations done and reports prepared in construction defect claims.

The report must also specify the expected useful performance and remaining useful life, recommendations for necessary repair and replacement, and must be stamped or signed by the architect or engineer. The repair is then incorporated into the Reserve Study, and is an Association record, which members may access, and which must be provided to prospective purchasers of units. The report remains in association records for 2 inspection cycles (18 years).

If an imminent life safety threat is identified, then the inspector must provide the report to the Association immediately, and must provide the report to the local code enforcement agency within 15 days. The Association must then take preventative measures immediately, including blocking resident access. Resident access cannot resume

until the local enforcement agency inspects and approves repairs.

### **IV Inspection Costs**

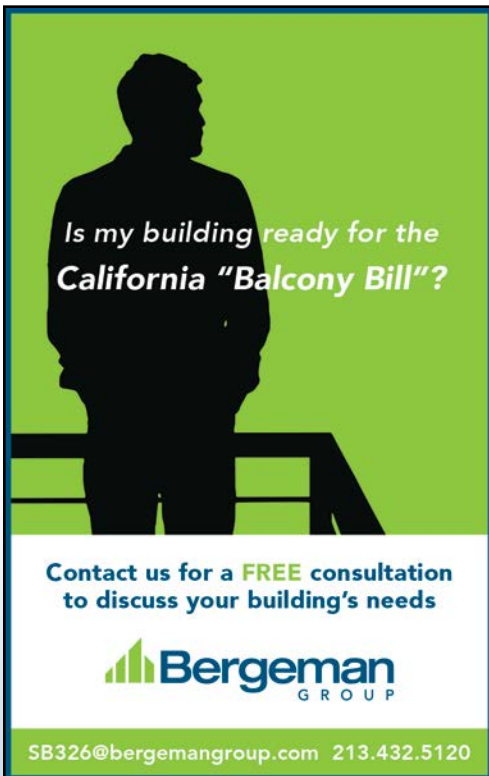
The costs for these inspections will vary widely depending on the configuration of the balconies, stair landings, breeze ways, and other components to be inspected. Decks with open joist bays and deck boards will be easy (and economical) to inspect. Decks with a walking surface covering the waterproofing, and cladding such as stucco covering the structural elements below, will require expensive destructive testing. Associations should work with inspectors and contractors as soon as possible to obtain an accurate estimate of their anticipated inspection costs; only with an accurate estimate can an Association properly set aside funds for future inspections.

Even setting aside the cost of any necessary repairs, these inspections will be a significant cost to the Association. However, as a necessary and required part of maintenance and reserve planning, the cost of the inspections themselves should be included as a reserve line item, allowing the Association to accumulate funds for future inspections. Additionally, for Associations under 10 years old, the cost of inspections and repairs can and should be passed to the builder under the Right to Repair Act process.

### **V. Best Practices**

The first inspection is due by January 1, 2025, but don't wait. As that deadline approaches, the competent inspectors and contractors will be busy conducting inspections (and resulting repairs) for other Associations. There is a relatively small pool of experienced forensic architects and engineers, and contractors experienced in this kind of testing and repair. If the inspection is done early, these business partners will be more available, and the same will be true every 9 years as the new deadline approaches.

Whether your Association is new or old (the building in the Berkeley tragedy was 7 years old), it is impossible to know what the first report will say. That report will be available to all members, and will affect property values for years. If



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continued from page 2.*

done early, there is time to perform repairs, and have a new post-repair report prepared; that later post-repair report can then be the official Civil Code 5551 report, minimizing impact on property values. Addressing repairs early will also reduce the cost of repairs (water related damage always gets worse and more expensive to repair, never better and cheaper). And, most importantly for newer Associations, any delay risks losing the ability to charge the cost of inspections and repair to the builder by letting the 10 year deadline to submit a claim run.

This new inspection requirement can have a significant impact on Association finances, but with proper (and early) planning, those costs and the impact to the Association can be controlled.

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**Michael T. Kennedy, Jr. is a Partner of Berding | Weil in the litigation department. Mr. Kennedy is a frequent speaker on this topic. He can be reached at [mkenedy@berdingweil.com](mailto:mkenedy@berdingweil.com).** ❖

*"Parting Words From A Board Member":  
continued from page 1.*

*put into your homes.*

*Finally: many of you have been wonderful friends to me over the years and I will miss you. I would be glad to stay in touch.*

By way of background, it is important to state that this board member was NOT an on-site owner. He lived locally but not on the property. In addition, he served his community in the face of a very challenging situation posed by another board member.

Many people think that in order for a board member to serve they need to be an on-site resident. It is easy to feel that an off-site owner doesn't care about the community, when in fact their investment is the same as any on-site resident. Often, an investor-owner may use the excuse NOT to serve on the board because they are not living on the property. This doesn't have

to be the case, given the ability to connect today through great on-line technology. In theory, an investor owner should have the same care and concern for their investment as do on-site owners.

Secondly, while the specific situation in this community cannot be shared, it indeed was exceedingly unique and problematic. The reality is every association has difficult stories from time to time, but they don't have to color one's perspective and cause one to think that the entire experience of board service is awful. Working as a team, or a fully functioning board, does help significantly in the occasional challenging situations.

In closing, we hope the message of encouraging increasing participation in the community brings results in stronger and healthy communities. The benefits indeed outweigh the costs. ❖



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## HOA Homefront – Shorter Meetings Are BETTER

By Kelly G. Richardson, Esq. CCAL

It may not shock readers to know I have seen innumerable board meetings run far too long, exhausting volunteers and degrading the quality of the deliberations. Consider these tips to keep meetings moving forward efficiently.

Stay on topic. The Open Meeting Act only allows boards to discuss the posted agenda items, and verbal detours waste time better spent on the scheduled matters anyway. Everybody should help the chair keep the discussion on agenda. Get back on track, and discuss what the agenda announced the board would address.

Use consent calendars. Routine and non-controversial items should be in a consent calendar. All items are voted upon as a group and without discussion but any director desiring to discuss an item can remove it by asking. Use the consent calendar routinely, reserving time for items meriting discussion.

Plan your agenda and don't be too ambitious. If the agenda is too full, avoid a very long meeting by deferring some items to the next board meeting. Some items are sufficiently important that they even merit a special board meeting, but may get short shrift if the agenda is too full.

Refer major topics to a committee, manager, or consultant, who then will make a detailed written recommendation. This can help orient the board and make its deliberations more effective.

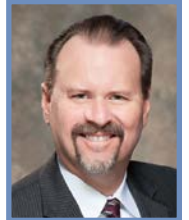
Don't discourage dissent. In a 5-member board, a 3-2 vote is as binding as 5-0. "No" votes are not bad or disloyal. Insisting on unanimity puts too much pressure on directors to agree, and lengthens discussion as the board tries to attain consensus on everything.

Call for the question. Boards often over-discuss issues – even ones on which everybody agrees. When the chair sees that the board is clearly headed in a certain direction, it is time to move toward a vote.

Be prepared. Hopefully, your board receives an agenda packet several days before the board meeting. If everyone reads their

packet beforehand, that prepared board will be more efficient.

Postpone incomplete items. If the subject isn't ready for presentation, postpone it until a meeting when sufficient information is available. Sometimes directors try to flesh out and reconstruct an item when more information is needed. Consider postponing such items until they are truly ready for consideration.



Avoid "town hall" style board meetings. Board meetings often are overly extended because the audience participates in the discussions, even though they are not legally responsible for the board's decisions and lack the information the board is provided. Allow owners to speak uninterrupted during open forum and then insist they not interrupt afterward.

Have a reasonable time limit on open forum remarks. Three minutes is very common, and if many wish to talk, reduce it to two minutes to give everyone a chance.

Don't co-manage or do committee work. Boards often become mired in details of the manager's tasks or in reconstructing committee recommendations. If the board is bogged down on a committee item, return it to the committee for further work. As to managers, set their overall instructions and allow them to execute. Micromanaging consumes a lot of board time.

Adopt meeting rules. Such rules should establish behavior standards, indicating a positive indication to members that the association places a high value on organized and fair meetings.

Strive for efficient meetings and go home sooner.

Kelly G. Richardson, Esq. is a Fellow of the College of Community Association Lawyers and Partner of Richardson Ober DeNichilo LLP, a California law firm known for community association advice. Submit questions to Kelly@rodllp.com. Past columns at www.HOAHomefront.com. All rights reserved®. ❖

# Wait! Where DID All The Money Go?

By David Brock, PCAM

It is never a good day when one suddenly realizes that they have less money than they thought. It is always a shock and disappointment when this situation happens. This unfortunate situation can occur in our personal finances as well as the Associations' finances. Unless the board stays on top of their finances, you can suddenly realize the money that you thought you had is no longer there. *How does this happen?*

The situation can be referred to as the "creep effect", and no, it has absolutely nothing to do with any particular person. It is due to the fact that it happens slowly over

time. The most common example of the "creep effect" are relatively small *over*-expenditures in areas like maintenance or utilities, as other areas of the budget are usually fixed, such as contracts and insurance. Unanticipated maintenance repairs may play a large role in money leaving your account, and it may be tempting to avoid making repairs which would escalate deferred maintenance. A board should never defer spending money on a necessary repair if there are not sufficient funds in the budget category. Repairs can become more costly if not handled in a timely fashion.

California Civil Code section 5500 requires that the board review financial statements monthly. One of the six functions of the *mandatory review* includes reviewing the current year's actual operating revenues and expenses compared to the current year's budget. This review must be conducted by the full board, or by at least two board members, one of whom is the Treasurer. The board does not have to meet monthly to do the review, but it must be entered into the minutes of the

next meeting and that at least two members conducted the review.

The most important statement that provides a comprehensive view of the finances is the "*Budget Comparison Report*". The report appears complicated, especially to the person who has an aversion to financial statements. However, a quick lesson taking no longer than 10-15 minutes can make this report very manageable and understandable. If this is not one of the financial statements that you receive as a board member monthly, either by your current management company or the Treasurer, you must insist on having it

provided to you.

The *Budget Comparison Report* will show how the current performance of both income and expense items compares to the budget for that point in the year. The report will provide the difference between these two figures in both a dollar and a percentage number. A review of this report will provide a great sense of where your association has overspent, is on track per budget, or performing better than budget. The board will need to determine if the "overspent" items should be a concern, and whether they indicate a potential problem. This determination may depend on the month of the year you are in is the over-expenditure likely to continue, get better, or could it be off-set by another category that is "underspent". In some software applications, this report if accessed online is color coded to help the user to easily identify problem areas.

In addition to the Budget Comparison Report, the board must also review the following:



*"Wait! Where DID All The Money Go?": continued on page 6.*

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*"Wait! Where DID All The Money Go?":  
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- a current reconciliation of the operating accounts,
- a current reconciliation of the reserve accounts,
- the latest bank statements for operating and reserve accounts,
- an income and expense statement for the association's operating and reserve accounts, and
- The check register, monthly general ledger, and delinquent assessment receivable reports.

While every HOA board must handle this function monthly, it

doesn't have to take more than 30 minutes a month once the process becomes more routine. Hopefully, your board has someone that is willing and unafraid to take on the monthly responsibility. Board members should always be able to ask for guidance from their manager, or the person responsible for preparing the statements each month.

The end result of this process is that you will never be surprised and saddened to learn that your financial status has "crept" to the point of having less money in your accounts than you thought. ❖

## 2022 Budget Preparation

By David Brock, PCAM

October is the month that HOA boards should be in process with the next year's budget and disclosure requirements, of which there are over 20. For more information on the required disclosures see our October 2019 newsletter, starting on page 3: <https://www.bevenandbrock.com/October2019.pdf>

Many association board members that it is preferable to not increase assessments. Unfortunately this thinking is not realistic as costs always increase, and the property continues to deteriorate.

As we are in an inflationary period, we would expect increases from service vendors who travel to your property and are paying increased costs for gasoline. In addition labor costs have also increased.

We have spoken to Sean Kargari, RS, with Association Reserves Inc. He indicated the following:

*"The rough quotes that we have received for a structural inspection of a balcony deck is **\$500-\$700 per deck**, which includes destructive testing and the installation of the ventilation panel at the balcony's soffit, which will allow for non-destructive testing in future years.*

*However, when you factor in walkway decks (if present), exterior staircases (if present), and the professional service fees the more*

*accurate current cost range is **\$800-\$1,100 per UNIT**. Needless to say, a very significant expense.*

*We (Association Reserves Inc.) assign zero remaining useful lives for these inspections even though they're not due until 1/1/2025 since we anticipate that there will be an intense demand crunch in 2023 & 2024, and the cost of the inspections may increase even more."*

Every property is unique, and it will be important to obtain bids that are specific to your site. Associations should expect to increase their reserve contributions if this is not already being anticipated in your reserve study.

Here is a link to additional resource information on the balcony inspection process and information available from companies providing inspection services:

<https://www.bevenandbrock.com/sb326-balcony-information/>

Reserve studies are required to be "updated" every year, not just every three years. The three year requirement that most are aware of is the 3 year physical inspection that must be conducted, however the other two years, the "update" is still required. Some association reserve providers offer a three-year relationship and handle the updates as well. We recommend that associations take advantage of this and reduce board member liability. ❖

# Meetings: To “Zoom” Or Not To “Zoom”!

By David Brock, PCAM

During the pandemic, most HOA boards held meetings virtually. Some chose to not have meetings at all. More and more boards now are beginning to meet

again in person, and some are choosing to remain virtual. According to Dictionary.com, the word “zoom” is defined as “to move quickly or suddenly with a loud humming or buzzing sound”. The word “zoom” has taken on a whole new meaning today. Some people love the idea of

meeting virtually and never want to go back to in-person meetings, and some of us have learned to just tolerate virtual meetings and can’t wait to meet in person.

Senate Bill 391 was introduced this year that would provide for meetings to be held via teleconference during a state of emergency in California. The hope was that in a future year the “state of emergency” criteria would be removed, and HOA boards could meet virtually regardless of a declared emergency. Recently, the proposed language of SB391 has been made more restrictive to HOA’s, as it would only permit teleconferencing procedures for a board meeting or a meeting of the members if gathering in person is unsafe or impossible because the common interest development is in an area affected by a federal, state, or local emergency.

While boards chose to meet only by teleconference methods they were technically not in compliance with the law. Civil Code section 4090 (b) requires that the notice of the meeting must identify at least one physical location where owners

can attend and hear and observe the board’s meeting with at least one board member in attendance at that location. Fortunately, there did not appear to be much resistance



to the practice of only meeting virtually during the pandemic.

For those boards that conducted business by email prior to the pandemic and for those who adopted this practice during the pandemic, they should be aware of how the law defines a meeting. Section 4090 defines what a board meeting is which does not support the practice of meeting by email. The law defines a board meeting as a “congregation, at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business that is within the authority of the board.” Clearly it is not possible to meet the requirements of a board meeting by conducting business by email. One of the primary reasons that email is not an accepted **method** for HOA boards to conduct business is that it does not afford owners (stakeholders) in the community to address the board with their concerns and to listen to the board deliberate the issues which affect them. At this point, board members will say that “no one attends the meetings

anyway so why can’t we do this by email?” Unfortunately, the law is black and white and doesn’t allow for creativity in how it is followed. The best practice is to operate as the law dictates, and do not give anyone an opportunity to challenge the board.

Finally, unless your governing bylaws require a specified frequency to meet, the law doesn’t require monthly meetings. Many smaller associations meet quarterly, however the requirement to review financial reports must be done monthly by two board members.

In summary, virtual meetings can continue if there is a physical location on or near the property where one board member is located. We would hope that some year the law will catch up with technological advances, but it does not appear that this will be anytime soon. ❖



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## HOA BOARD MEMBER EDUCATION

Education for volunteer HOA board members is essential for success as board members. Due to the ever-increasing complex and changing nature of the laws and regulations that impact common-interest-developments staying on top of these changes greatly increases a board's member ability to succeed in their role, and operate in confidence

There are several ways for board members to be educated, and Beven & Brock offers two types of training for board members.

**Upcoming events: None scheduled at this time.**

### Board Training (not currently scheduled)

Free three-hour training course for current and prospective HOA board members. A course syllabus, informational handouts, and Certificate of Completion are provided. This CAI-sanctioned class is taught by its co-creator Kelly Richardson, Esq. CCAL of Richardson Ober DeNichilo LLP, and is co-sponsored with the Community Associations Institute. Seating is limited, and reservations may be made by emailing: [BoardTraining@bevenandbrock.com](mailto:BoardTraining@bevenandbrock.com). Priority is given to current Beven & Brock managed associations due to space limitations. You may get on the waiting list and when we set new dates we can let you know.

We will provide updated class dates for 2021 when available.

### A RESOURCE AVAILABLE FOR HOA BOARDS!

Beven & Brock is pleased to announce the availability of a new resource for Homeowner Association Boards to find information on topics of interest as needed on demand. Over 135 articles have been taken from prior newsletters and gathered in one place, located at <http://www.bevenandbrock.com/topical-article-library/>. The topics are organized into categories, such as Legal, Meetings, Board, Reserves, Insurance, Community, Elections, Maintenance, Management and other subjects.

This area of the website requires a simple one-time registration, and once that is completed, you can freely access a number of articles on a variety of topics that have appeared in *HOA News and Views* over the past eight years. This resource will help HOA Board members to become educated in an easy and accessible way. The goal is to help boards make well-informed decisions in a variety of challenges that they may encounter.



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