Channels of Communication

Serving Ventura, Santa Barbara, San Luis Obispo and Kern Counties **FOURTH QUARTER 2021**

The Official Publication of CHANNEL ISLANDS CHAPTER community ASSOCIATIONS INSTITUTE

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CHANNEL ISLANDS CHAPTER
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The Channel Islands Chapter of Community Associations Institute is dedicated to empowering Homeowner Association members, managers and service providers through information and educational opportunities.

president's message

Chelsi Rueter, CCAM, CMCA, AMS, PCAM
Community Property Management

CHANNEL ISLANDS CHAPTER community ASSOCIATIONS INSTITUTE

Dear Members:

As we come to the end of 2021, and an end to an amazing year serving as your Chapter President, I want to say a resounding THANK YOU to everyone who contributed to our success this year. We were able to return to in-person events, provide valuable and timely educational programs, and welcome many new members to our chapter. Most of all, we were able to see each other, hug, laugh, and be social again! It was truly a year to remember – and our 40th anniversary, to top it off!

Thank you to all who attended our Holiday Happy Hour and donated toys. We were able to make a large donation to Spark of Love of Ventura County to help families in need this holiday season.

I am very grateful to my fellow board members who volunteered their time to attend meetings, chair committees, and share their skills and knowledge to improve our chapter. Our committees are also instrumental in keeping our chapter relevant, exciting, and bringing creative energy in all aspects. It takes a dedicated team, and I'm convinced we have the cream of the crop. Thank you committee members for your time and effort!

This issue of the Channels magazine includes a collage of photos over the past 40 years of our chapter. I hope you enjoy taking a walk down memory lane, or trying to see if you can recognize some of our "old-timers".

Thank you, all, for making my presidential year a fun one! Wishing you each a wonderful holiday season and the best New Year! I'm looking forward to seeing each of you in 2022.

With honor,

Chelsi Rueter

Chelsi Rueter, CCAM, CMCA, AMS, PCAM
CAI-Channel Islands Chapter President

New Legislation Impacting Community Associations

By Sandra L. Gottlieb, Esq., CCAL
SwedelsonGottlieb

As happens every year, the California legislature has adopted new laws that impact community associations. This article summarizes changes to the law from the 2020-2021 legislative session, some or all of which may apply to your California community association. Some of these new laws are effective now, and most become effective on January 1, 2022.

Electronic/Virtual Meetings - Amended/New Statutes: Civil Code Sections 4090 and 5450

The Legislature is finally catching up with what we have been forced to do throughout the pandemic. This law authorizes community associations to hold virtual or videoconference meetings when the state or local government declares an emergency which makes it impossible for associations to meet in person.

Preferred Method of Receiving Notices/Membership Opt-Out / Election Materials / Sale of Membership Lists - Amended/New Statutes: Civil Code Sections 4040, 4041, 4045, 4055, 5200, 5220, 5230, 5260, 5310 and 5320

Associations must start soliciting the members' preferred delivery methods (either email, mail, or both) and provide notice to members that they are not required to provide their email address to the association. Additionally, if the association receives a notice that an email address is no longer valid, the association shall resend the notice by mail or to a new email address identified by the member.

It also makes it expressly prohibited for the association or management to sell membership information without the member's permission.

In addition, it revises document delivery options. For general delivery, the association can post the documents to the association's website if that location is disclosed to the members in the annual policy statement. On or after January 1, 2023 individual notice must be made by the member's preferred method of delivery, or if no method is selected by traditional mail.

This new law also clarifies that associations shall maintain election materials for one year after the election date.

Uncontested Elections/Voting By Acclamation – Amended/New Statutes: Civil Code Sections 5100, 5103, 5105, 5200 and Corporations Code Section 7511

This new law authorizes all associations to utilize a vote by acclamation in uncontested elections provided that the election complies with the additional notice requirements to seek nominees.

It also cleans up confusion in the election law by requiring assistants to the inspector of election to meet the same third-party definition, requires the candidate list to include the address of the candidate, requires the candidate to comply with any payment plans entered into, clarifies that nomination procedure notice and the general notice of an

election requirements only apply to elections and recalls, and aligns the corporations code with the civil code.

Financial Security and Disbursement of Funds, Insurance - Amended/New Statutes: Civil Code Sections 5380, 5502, and 5806.

This new law reduces the minimum dollar amount for bank transfers for associations with 50 or less units to $5,000 (instead of $10,000), changes the percentage minimum of 5% to be based on estimated income for all associations, clarifies that a managing agent shall not comingle funds.

It also requires an association to carry crime insurance, employee dishonesty coverage, and fidelity bond coverage or the equivalent, with computer and fraudulent transfer endorsements, and specifically prohibits self-insurance.

ADUs and Rental Restrictions - Amended/New Statutes: Civil Code Sections 798.56, 2924.15, 4741, and 714.3; Code of Civil Procedure Section 1161.2; Government Code Sections 65589.5, 65651, 65863.10 and 65863.11; Health and Safety Code Sections 18214 and 34178.8

Confirms an associations' right to maintain reasonable restrictions for constructing ADUs and extends the rental restriction amendment compliance date to July 1, 2022. In addition, clarifies that associations may amend rental restrictions to comply with Civil Code 4741 without a membership vote, provided that the association gives 28 days' notice before approving the governing document amendment at an open meeting of the board and after considering membership comments. This amendment may delete or restate the restrictive language to be compliant, provided that no other changes are made to the governing document.

Lot Splitting - Amended/New Statutes: Government Code Sections 66452.6, 65852.21, and 66411.7

This new law requires municipalities to approve lot splitting or adding a second residence on a lot ministerially, which means over the counter. While this law does not pertain to community associations, it should be a reminder for associations to review CC&Rs for language that restricts lot splitting. Absent any, an association may want to amend its documents.

Short Term Rentals - Amended/New Statutes: Government Code Section 25132 and 36900

While this law does not directly relate to community associations, it helps define what a reasonable short term rental violation fine may be. The law raises the maximum fines that can be adopted by the legislative body of a city or county for short-term rental violations to $1,500 for the first violation, $3,000 for a second violation, and $5,000 for each additional violation within one year of the first violation; subject to a hardship waiver. Boards may want to consider increasing the amounts of their association's fining policy for violations of the association's short term rental policy.

Safe at Home Program - Amended/New Statutes: Civil Code Section 5216

This law allows a participant in the Safe at Home confidentiality program for victims of domestic violence,

(Continued on page 8)

stalking, human trafficking, elder or dependent adult abuse, and sexual assault to require the association to substitute the address designated by the Secretary of State as the Safe at Home for association communications, and to withhold or redact information that would reveal the name, community property address, or email address of the Safe at Home participant. This will apply to all lists with the member's name or address, such as the membership lists, candidate lists, voter lists, etc.

Employees - Amended/New Statutes: Government Code Sections 12945.2 and 12945.21

This new law allows employees to take a leave of absence to care for a parent-in-law of the spouse or domestic partner pursuant to Government Code 12945.2. It also requires the employee to contact the Department of Fair Employment and Housing dispute resolution division prior to filing civil litigation against an employer of 5 people or more, clarifies the procedure for obtaining a right to sue letter, including notification that mediation is required if requested by either the employee or employer.

Contracting with Minors - Amended/New Statutes: Civil Code Section 1568.5

This new law clarifies that a representation from a minor that their parents have consented shall not be consent for the purposes of contracting. Associations with agreements or waivers for use of the pool, COVID-19 waivers, or any other use agreements must ensure that a minor's parents are also consenting to the minor's agreement and signing the same document the minor is signing.

Sandra L. Gottlieb *is one of California's leading community association attorneys. She is a founding partner of the law firm of SwedelsonGottlieb, which was formed in 1987. Sandra began her practice of law in 1978 and began representing and providing legal counsel to community associations in the mid-eighties. Sandra's extensive negotiating skills have given her the ability to work with volunteer board members, associations' managing agents and opposing counsel, and provide sound counsel regarding association operational issues. Sandra is an active member of CAI and CACM.*

Disaster Strikes Again!

By Dennis Brooks
Design Build Associates

HOAs should plan to maintain their buildings or plan for the consequences associated with the lack of planning!

What do the cities of Berkeley, California and Surfside, Florida have in common? I am sure if you are involved in the HOA industry you likely know the answer to this question. They are both sites of major disasters that not only caused tremendous physical damage but also cost the lives of innocent individuals. The question is, was that property damage and loss of life avoidable? I believe that in both cases it was very avoidable.

On June 16, 2015, in Berkeley, California a balcony collapsed five stories above the ground, dumping all the occupants into the street below, severely injuring seven people and killing six. On June 24, 2021, in Surfside Florida we all know from recent news stories that a twelve story high-rise collapsed. As this article is being written there are 97 confirmed fatalities and individuals are still missing as first responders continue to work to remove the piles of rubble.

There are many differences between these two disasters. For example, one building was a wood framed structure and one was a steel reinforced concrete building, and one was on the West Coast and the other was on the East Coast. However, there are also some similarities between these two disasters that we should all learn from, or we will likely be forced to tragically repeat these situations in the future. Although construction defects were found to contribute to the Berkeley balcony collapse, and there is already some speculation that construction defects may have also played a role in the Surfside collapse, there are well documented conditions at these buildings that should have raised a big red flag long before there was a loss of life. In the Berkeley case the court was told that the property management company ignored a "red flag" when students who rented the apartment complained about mushrooms growing on the balcony. In Surfside the existing documentation shows that the building had suffered from major flooding and water intrusion into the garage for years. Water staining on the columns of the building was evident along with some spalling of concrete and rusted, failing rebar, along with peeling paint from the ceiling and walls of the garage. The obvious lack of building maintenance coupled with the apparent lack of concern associated with these water intrusion issues is very troubling.

In my experience as a construction manager and consultant for over 38 years now, I can tell you that water intrusion into the structure of a building is the single greatest cause of damage and failure to any structure. A building properly designed and constructed in accordance with building codes is required to keep water out of the structure and away from critical structural components. When there is a failure of the building envelope due to improper design, poor construction or just a lack of maintenance the structure itself is put in jeopardy. If these conditions are left unabated long enough not only is the structural integrity of the building at risk but so are the occupants, as was clearly demonstrated in these two tragic cases discussed above.

I have walked through the garages of hundreds of properties, and I am always amazed at how creative the maintenance people and/or their contractors have become at creating pans, trays, plastic sheeting, and piping to catch dripping water to keep it from damaging the paint on the cars below. I would suggest here and now that if your garage ceiling has these creative contraptions installed to catch 'nuisance' water you should demand that your HOA begin a real investigation into the source of the water intrusion and immediately set in place a plan to correct the issue. A 'Band-Aid' fix to install sheet metal or a plastic pan to catch the water before it drips on the car below does nothing to prevent the ongoing damage from occurring to the structure itself.

The other issue that has come to light in the Surfside tragedy is that a prior board attempted to pass an assessment to fund the needed repairs to the building, but the membership voted it down and eventually the frustrated and exasperated board resigned. I can tell you from personal experience that it is a daunting task to assist a board of directors to pass a major special assessment. There is always opposition to such an assessment. In my experience it is not uncommon for the board and their experts to be heavily challenged, in some cases they may even be shouted down during town hall meetings and accused of impropriety. There is always someone who knows better than the board and their experts and has a brother-in-law that is a contractor who could make the repairs for less.

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Quick Hits: Election by Acclamation and Virtual Meetings

By Matthew Alan Gardner, Esq.
Richardson Ober DeNichilo LLP

After over a year of hearing us talk about associations struggling with COVID protocols, in this last legislative session we saw the California Legislature respond with some common-sense ideas for tackling time consuming and burdensome meeting requirements. One of the few bright spots this past year was in California recognizing that giving Associations some flexibility in meetings can actually improve governance and increase participation.

What is an Election by Acclamation?

When it comes to association elections under the Civil Code, an election by acclamation is the process of filling board seats without the need for officially counting all of the secret ballots to determine the results. Rather than having to mail and count secret ballots, the association is permitted to consider the election process complete and declare the seats filled. The opportunity to use the election by acclamation process occurs when the number of candidates is equal to the number of open seats.

Previously, the legislature opened this process up to larger communities of more than 6,000 or more voting owners. But the benefits of avoiding unnecessary expenses for an issue that is certain and not controversial is an obvious benefit to communities of all sizes. AB 502 stepped up to meet those needs. Now communities that struggle to get enough candidates or to otherwise get enough ballots to help them meet quorum, have a way to fulfill their obligation to fill open seats.

If your community cannot show that these conditions have been met, an election by acclamation would be improper. So before taking advantage of the new streamlined process, associations should document compliance with a few requirements under Civil Code Section 5103.

First, the association must have had a regular election using the secret ballot process within the last three (3) years. Second, when sending out the notice soliciting candidates, the association must add specific language: (a) the number of open seats; (b) the date for the deadline for nominations; (c) process for accepting nominations; (d) notice that acclamation may be used if the number of candidates is equal to the number of open seats. This information notice must be provided ninety (90) days before the end of the nomination period.

Third, a final notice between seven (7) and thirty (30) days before the end of the nomination period of the following information: (a) the number of open seats; (b) the date for the deadline for nominations; (c) process for accepting nominations; (d) the list of candidates already received and ready to go out on ballots; (e) notice that acclamation without counting ballots may be used if the number of candidates is equal to the number of open seats.

Finally, the association must have a process for acknowledging receipt of nominations and communicating status of the nomination to the candidate. Within seven (7) days of receiving the nomination, the association needs to either announce that the candidate is qualified or, if the nomination is rejected, the reason for the disqualification and the opportunity to appeal the decision.
As long as the association permits all qualified candidates an opportunity to run for election, and the above steps are followed, the board can vote to consider the qualified candidates elected by acclamation at a meeting without counting ballots. The agenda should reflect the name of each qualified candidate that will be seated by acclamation at the meeting.

Do Virtual Meetings Still Need a Physical Location?

Associations that wanted to conduct any business during COVID had to find a way to learn the latest tech options through Zoom/Skype/Slack/Facebook/Webex/Google. But during this time, the Civil Code didn't even acknowledge the virtual meetings we were all hosting as legitimate options. Prior to COVID, in order to have a video/teleconference, the default position was to require a person to host the meeting in a physical location so that people could continue to attend in person. That position would clearly not work when people were under order not to gather.

The legislature enacted SB 391 to address that oversight and embrace new technology as an option. Now, when there are conditions that make in person gatherings unsafe, associations can use the new process to continue to conduct business and encourage owner participation. In order to utilize this option, associations have to check a few boxes.

First, is there a condition that makes meeting unsafe? Under Civil Code Section 5450, the association has to demonstrate that it meets one of the conditions: (a) a state of disaster or emergency declared by the federal government; (b) a state of emergency proclaimed by the governor under Section 8625 of the Government Code; or (c) A local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code.

Second, associations have to give proper notice. In addition to the other standard meeting requirements like date and time and agenda, associations have to include other important information: (a) clear technical instructions on how to participate in the meeting; (b) a telephone number and email address of a person who can provide technical assistance with the instructions before and during the meeting; (c) a reminder that owners may request individual delivery of meeting notices and the process for making that

(Continued on page 12)

request. If the emergency makes it impossible to deliver notice to the onsite address, associations are permitted to use the email or alternative address provided for contact.

Third, anyone who is entitled to attend the meeting must be given the option of participating by telephone. The association must ensure that all owners and directors have the same ability to participate as they would if the meeting were held in person, and that any votes involving directors are conducted by roll call.

Finally, boards can conduct the meetings by teleconference only as long as the purpose of the meeting does not involve counting ballots. If the association is holding an election where the secret ballot process is required, the meeting must be conducted via videoconference. The association must also make sure that participants at the videoconference can witness the counting of the ballots as they would if they had attended an in-person meeting.

Associations did notice an increase in attendance when the meetings became more accessible. As a result, some associations may continue to offer the option of virtual attendance for all meetings. However, just remember that associations cannot indefinitely rely on tele/video only conferences. Once the federal, state, or local state of emergency is ended, associations will have to resume conducting business using some physical meeting space for interested owners.

Be Well and Happy New Year!

Matthew A. Gardner *is a partner of Richardson/Ober/DeNichilo who works with community associations, homeowners, and HOA boards of directors to amend governing documents, resolve homeowner/member disputes, manage assessment delinquency matters, and provide leadership training to volunteers and community members. Mr. Gardner is an active member of CAI-Channel Islands Chapter where he serves as the Managers' Programs committee co-chair and is a frequent author for the chapter's magazine.*

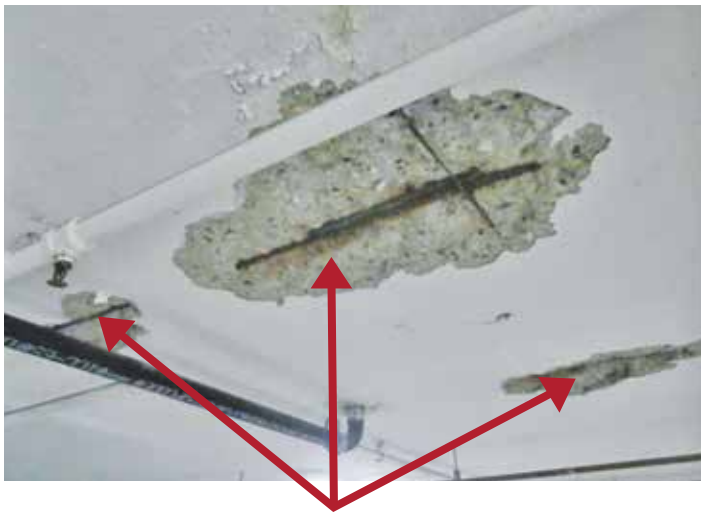
Over the years we have seen it all. However, the associations we have worked with that have had the most success completing major reconstruction projects typically have several things in common. They generally have a cohesive, determined board of directors focused on seeing the project through to completion and they do not become intimidated or deterred from that goal when opposition arises.

It should also be noted that the Surfside HOA had funded reserves of 6.9 percent. This is extremely low and automatically forces a board into the unfavorable position of having to pass a special assessment to accomplish almost any needed repair project. Any reserve specialist will tell you with reserves that low a special assessment is inevitable. If boards and their associations would work to keep their reserve funds closer to 70 percent funded, most of the time the resources would be there to make the needed repairs and large special assessments would not be necessary or would be greatly diminished.

My takeaway from these two tragedies:

- Be proactive and inspect your buildings regularly for signs of water intrusion and distress.
- If something of concern is discovered have an expert render a written opinion.
- If there is an issue that needs to be addressed, identify the source of the issue, and fix it correctly and promptly.

Life is precious and tragedies such as these are avoidable if those responsible for the building structures pay close attention and insist on proper, timely maintenance.



The damage shown above with spalling concrete and failing rebar was evident throughout this property and their solution of choice for many years was to hang sheet metal below the ceiling to catch the water to keep it from dripping on the cars below. Prior to our involvement this same association failed to pass a major special assessment to correct these conditions, because it was too expensive.

Dennis Brooks *is the Founder and Owner of Design Build Associates, a Construction Management and Consulting Firm with offices in Los Angeles and Orange Counties.*

What can be done about a board member's inappropriate behavior at board meetings?

By Sophie Haimof, Esq., *Roseman Law, APC*

As a volunteer director on a board of a homeowner's association, I imagine one has already been exposed to wild situations, and depending on one's tenure, a director may have already grown accustomed to misbehaving homeowners. Regardless of the nature of the situation, as a director, you are legally bound to act in accordance with California law and enforce your association's governing documents consistently and fairly because a board of directors must act in the best-interest of the association. But what does a board do when the misbehaving homeowner happens to be a director who acts inappropriately during meetings, bullies other directors, uses profanity and lashes out when decisions are made contrary to his or her position? What actions can the board take to prevent such action? The following is an overview of several options the board can exercise which may be necessary for the board to implement, in order to maintain order.

Censure

A majority of the board has the ability to censure, or in other words, formally reprimand, a director for inappropriate actions. There are specific instances in which censuring a director would be appropriate, including without limitation, disruptive actions at meetings, including shouting, the use of profanity, and engaging in personal attacks against fellow directors. Censuring a director would also be appropriate in the event the director breached confidences and/or fiduciary duties, interfered with association operations, engaged in inappropriate or improper behavior toward association employees or vendors, or failed to disclose conflicts of interest.

Once a board has decided that a censure is appropriate, the board should notice a hearing for the censured director. The censure should be recorded in the meeting minutes which should distinctly reflect the reasons why the director was censured. Boards should be aware that although a censure will indicate the board's strong disapproval for the actions of the censured director, a censure will not act to remove a director from the board nor will it impair the censured director's ability to attend board meetings or participate in board discussions and decisions, unless the censured director has been recused from a particular vote. A director should recuse himself or herself from a board decision to avoid a conflict of interest or other potential breach of fiduciary duty. All board members owe an association and its membership certain fiduciary duties. One of these fiduciary duties is the duty of impartiality. The duty of impartiality requires that directors carry out their obligations in a fair and consistent manner and directors may not favor or act with partiality to any homeowner. Thus, when a director has a personal interest in the outcome of a board decision, that director must recuse himself or herself from participating in any discussions and voting on such decision.

Request for Resignation

A majority of the board can also request that a misbehaving director resign from his or her position on the board. Oftentimes, if a majority of the board decides to censure a misbehaving director, and if the director's actions warrant a request for resignation, the board will simultaneously request that the misbehaving director resign from his or her position on the board. Something the board should keep in mind is that, while the board can request that a director resign, the director is not required to resign. However, if a misbehaving director fails to resign, the board may seek removal of the director.

Removal

The board may have the ability to remove a misbehaving director; however, removal is permitted and appropriate only under specific circumstances, provided the association's by-laws allow for it. Otherwise, a director can only be removed by the courts, if: (i) the director acts fraudulently or dishonestly; or (ii) the directly grossly abuses his or her authority. However, this would require the board to bring an action against the misbehaving director. Alternatively, a misbehaving director can be removed by the vote of the membership, with or without cause, upon the calling of a special meeting to recall such director and obtaining the requisite votes necessary to approve the recall. It is important for boards to note that a recall process can be financially burdensome for an association. A misbehaving director who fails to meet the qualifications imposed by the bylaws and in place at the time of his or her election can be removed by the board. If your association's bylaws do not include qualifications for directors, the association can consider amending the bylaws to include the same.

Although removing a problem director may be unreasonably difficult or impossible, a majority of the board can vote to remove that director's officer position at a duly noticed open meeting. Officers hold their office at the pleasure of the board and can be removed by the board at any time, with or without cause, upon a vote of a majority of the board. This would eliminate the problem director's officer designation (i.e. President, Secretary, Treasurer, etc.) and reassign that role to another director. Removed officers remain on the board of directors as a "Member at Large", meaning they are now a director without any particular officer designation. Although not a complete solution to the problem, many times it is the officer role which causes a director to overstep their bounds, and this action can often go a long way to reigning in a rogue director's actions.

Executive Committee

In carrying out any of the aforementioned disciplinary actions, it may become necessary to form an executive committee to exclude a misbehaving director from participating in certain discussions regarding the discipline of or litigation against such director. California law allows a majority of the board to elect to create an executive committee, consisting of at least two directors, to serve at the pleasure of the board. Only directors may be members of an executive committee. An executive committee should be formed to preserve any attorney-client privilege and confidentiality.

The board can undertake any of the foregoing options in disciplining a misbehaving director, if appropriate. But what can the board do to prevent situations like this from occurring again in the future if a misbehaving director is elected to the board? The association should review its current governing documents and if the association does not currently have an ethics policy and board member code of conduct in place, the board can consider adopting one. A code of conduct and ethics policy can be drafted to apply to both directors and committee members and can provide that directors must act in conformity with certain standards, for example, all members must treat fellow directors, homeowners, management and vendors with respect. The code of conduct and policy can also require directors to acknowledge their acceptance of the terms set forth by requiring the directors to sign a commitment pledge. It is important for associations to have the proper enforcement provisions in place in order to run efficient meetings and maintain order on the board and within the association.

Sophie Haimof *is an attorney with Roseman Law, APC. Ms. Haimof represents common interest developments in dealing with all their transactional needs, including the creation and amendment of governing documents, contract negotiations, corporate governance and compliance with the Davis-Stirling Act.*

What a DIFFERENCE 40 years makes

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SB326 and the Reserve Study

By Robert W. Browning, PCAM, RS, NV RSS #5, *Browning Reserve Group*
Ritchie Lipson, Esq., *Kasdan Turner Thomson Booth LLP*

The Governor signed SB326 August 30, 2019, and it became law January 1, 2000. The bill was introduced as a response to the Berkeley balcony collapse at Library Gardens Apartments on June 16, 2015, when thirteen students fell forty feet from a failed fifth-floor balcony, killing six and injuring seven.

The cause of collapse was determined by the California Contractors State License Board to be "Dry rot along the top of the joists which suggests long-term moisture saturation […] of Oriented Strand Board (OSB) in direct contact with the joists. Additional locations of water damage and dry rot were found on the wall OSB sheathing and the face of the doubled deck joists along the deck edge to wall interface by severely rotted structural support joists." The load of the thirteen students was found to be "well within the design limits of the balcony structure."

What Communities are Affected and What Inspections are Required?

The bill adds Section 5551 and 5986 to the California Civil Code and amends Section 6150. It applies to buildings with three or more multifamily units which contain "exterior elevated elements." The bill only applies to condominiums with three or more multifamily dwelling units. This excludes commercial and industrial condominiums.

The inspections are "of the load-bearing components and associated waterproofing elements of exterior elevated elements." The bill defines load-bearing components as "components that extend beyond the exterior walls of the building to deliver structural loads from the exterior elevated element to the building". The term "Balcony Bill" has been used since the legislation was introduced; but the definition of exterior elevated elements (EEEs) includes "decks, balconies, stairways, walkways, and their railings that have a walking surface that is elevated more than six feet above ground level, and are designed for human occupancy or use, and that are supported in whole or in substantial part by wood or wood-based products." A more appropriate name may be "Civil Code Section 5551," or the "Exterior Elevated Elements" bill.

Who is Qualified to Complete the Inspections?

Inspections can be completed by any of the following:

- Licensed Architect.
- Licensed Structural Engineer.

What is the Scope and Purpose of the Inspections?

The purpose of the inspection is to "determine whether the exterior elevated elements are in a generally safe condition and performing in accordance with applicable standards." The inspector shall perform a visual inspection in a "statically significant" random sample of locations to provide 95% percent confidence that the sample results are reflective of the whole project's condition.

A visual inspection is defined as "the least intrusive method necessary to inspect load-bearing components, including visual observation only or visual observation, in conjunction with, for example, the use of moisture meters, borescopes, or infrared technology."

However, if inspectors observe conditions that indicate water intrusion, further inspection is required; and inspectors "shall exercise their best professional judgment in determining the necessity, scope, and breadth of any further inspection."

What Type of Reporting is Required?

A written report stamped by the inspector and incorporated into the reserve study of the association must be maintained for two inspection cycles in the association records. The report is required to contain the following info:

- Identification of the load-bearing components and associated waterproofing system.
- The current physical condition of the load-bearing components and associated waterproofing system, including whether the condition presents an immediate threat to the health and safety of the residents.
- The expected future performance and remaining useful life of the load-bearing components and associated waterproofing system.
- Recommendations for any necessary repair or replacement of the load-bearing components and associated waterproofing system.

If, after inspection of any exterior elevated element, the inspector advises that the exterior elevated element poses an immediate threat to the safety of the occupants, the inspector shall provide a copy of the inspection report to the association immediately upon completion of the report, and to the local code enforcement agency within fifteen days of completion of the report.

What Type of Repairs Must be Completed?

After receipt of the report, the association shall take "preventive measures immediately", including preventing occupant access to the exterior elevated element until repairs have been inspected and approved by the local enforcement agency.

The new law further provides that the continued and ongoing maintenance and repair of the load-bearing components and associated waterproofing systems to keep them in a safe, functional, and sanitary condition shall be the responsibility of the association as required by the association's governing documents.

When are Inspections Required?

The initial inspections must be completed by January 1, 2025, and every nine years thereafter. For buildings permitted after January 1, 2020, the first inspection must be completed within six years of the certificate of occupancy.

How are Reserve Studies Impacted?

The bill requires that the findings of the report be "incorporated into the study required by Section 5550." There are no details on exactly what is mandated. But, since the inspection report must include a statement of the remaining useful life of the load bearing components and water proofing systems, it would follow that the reserve specialist will need to amend the reserve report reflecting any changes to the useful life of the elements inspected and included in the report. Depending on the financial position of the association's reserves, this could create an underfunded situation where immediate repairs are not required but the useful life of the components is less than originally planned for the reserve study.

To ensure there is time to incorporate repairs, based on the nine-year inspection cost into the reserve study, the

(Continued on page 22)

inspection should be scheduled approximately 6-18 months prior to the start of the year in which the study is being prepared.

Reserves can also be impacted because of ancillary costs related to the EEEs. For example, additional destructive testing and remediation, as well as emergency repairs, may be needed due to the inspection.

What Hasn't Changed in the Reserve Study?

The bill, as discussed, requires inspections beyond the scope that typically occurs during the reserve study inspection. The reserve study inspection is visual, and only includes accessible areas. However, it is important to remember that an association that falls under the bill should have been collecting funds for these elevated elements prior to the implementation of the legislation. This is an important point for boards to understand. The requirement in the bill for a statistically significant sampling of EEEs is new, and associations have not always planned for this level of inspection. Finally, the inspection is a valid use of reserve funds since it is directly related to the long-term maintenance of the exterior elevated elements.

Duty to Inspect?

SB326 and the Duty to Inspect: In a string of recent court decisions around the country, courts have held that associations and their boards have a duty to inspect and bring appropriate claims for the defects. They have also held that this duty arises from the basic maintenance obligation in the association's CC&Rs.

This is consistent with well-established California law. Although California appellate courts have not directly dealt with the issue of a board ignoring construction defects, it has been well established for 35 years that the board owes a fiduciary duty to HOA members, since the case of Raven's Cove Townhomes, Inc. v Knuppe Development Co. Raven's Cove was a construction defect case where the HOA also sued former board members who were employees of the builder. The 1981 appellate court held that the former board members had breached their fiduciary duty to the HOA by failing to set aside operating or reserve funds.

In California, an association owes a fiduciary duty to HOA members to maintain the common area in a safe manner; and to make a reasonable inquiry regarding maintenance issues and to enforce the CC&Rs and other governing documents. This duty, and its fiduciary nature, has been reiterated by several California courts. It is very likely that a California trial or appellate court would extend the rule first announced in Raven's Cove and find a breach of fiduciary duty by a board that does not conduct inspections, which would have uncovered construction defects or does not pursue the builder to fund repairs.

In addition, there are now four distinct requirements that exist to mandate regular inspections of the common area: (1) many CC&Rs require annual inspections of the common area by a 3rd party independent inspector, (2) the Davis-Stirling Act requires an inspection of major building components at least every three years as part of the reserve study, (3) SB326; and (4) SB800 require that associations follow maintenance requirements from the builder and product manufacturer.

The biggest concern a board should consider is the potential lack of coverage for homeowners' claims for breach of fiduciary duty for failure to investigate and bring construction defect claims. Most directors and officers insurance policies have specific exclusions for any such claims that arise from, or pertain to, construction defects.

Important Considerations and Recommendations for Managers and Boards:

- There is a significant risk to waiting as the statute permits local governments or enforcement agencies to enact an ordinance or other rule imposing requirements greater than the statute.
- Inspect early
  —to reduce and mitigate damage.
  —to avoid the last-minute rush that will occur near the deadline.
  —to allow time to bring SB800 claims for defects discovered.
- In many cases, compliance with the bill may not be clear. The association should seek the advice of its legal counsel, in addition to the architect, engineer and reserve analyst, to determine compliance with the requirements of the bill.

Robert W. Browning, PCAM, RS, NV RSS #5 *is the owner of the Browning Reserve Group (BRG). BRG has been providing reserve studies since 1999. Mr. Browning has been a member of CAI's national Board of Trustees, Chair of the California LAC, President of the CAI-CNC chapter twice, and President of CAI's Foundation for Community Association Research.*

Ritchie Lipson, Esq., *is Director of Client Relations for Kasdan Turner Thomson Booth, LLP and the past 21 years, Lipson has worked with commercial investors, municipalities, school districts, homeowner associations and residential property owners, to assist in the fair resolution of their claims for defective construction.*

2022 CHAPTER EVENTS

January

27 **Chapter Luncheon,** 11:15 am, Spanish Hills Country Club, Camarillo

February

8 **Chapter Webinar,** 11 am, Zoom

24 **Chapter Luncheon,** 11:15 am, Spanish Hills Country Club, Camarillo

March

11 **Awards Dinner,** 5 pm, Location TBA

24 **Central Coast Luncheon Program,** 11:30 am, Pismo Beach

31 **Community Faire,** 4 pm, Westlake Village

April

12 **Chapter Webinar,** 11 am, Zoom

29 **Chapter Breakfast,** 9 am, Spanish Hills Country Club, Camarillo

May

4-7 **CAI Annual Conference,** Orlando, FL

10 **Managers' Webinar,** 11 am, Zoom

26 **Chapter Luncheon,** 11:15 am, Spanish Hills Country Club, Camarillo

June

23 **Central Coast Luncheon Program,** 11:30 am, Pismo Beach

30 **Community Faire,** 4 pm, Spanish Hills Country Club, Camarillo

July **- no events –**

August

11 **Chapter Webinar,** 11 am, Zoom

25 **Chapter Luncheon,** 11 am, Spanish Hills Country Club, Camarillo

September

13, 20, 27 **Board Leadership Development Webinar Series,** 10 am, Zoom

15 **Central Coast Luncheon Program,** 11:30 am, Pismo Beach

29 **Community Faire,** 4 pm, Camarillo

October

14 **CLAC Bingo & Brews,** location TBA

27 **Chapter Luncheon,** 11:15 am, Spanish Hills Country Club, Camarillo

November

10 **Central Coast Luncheon Program,** 11:30 am, Pismo Beach

17 **Chapter Luncheon,** 11:15 am, Spanish Hills Country Club, Camarillo

December

1 **Holiday Happy Hour,** 5-7 pm, Westlake Village

15 **Chapter Luncheon,** 11:15 am, Spanish Hills Country Club, Camarillo

For more information & to register, visit www.cai-channelislands.org

Thank You!

A special thank you to **Phyllis Pazen** of Lakeside Village Association for serving on the Chapter's Board from 2018-2021. Phyllis is a dedicated volunteer who not only served on the board but also as a committee co-chair for the Chapter's Community Faire Committee for the last several years. She also assists with check-in table at our chapter events which she will continue to do as she serves as the chapter's 2022 Hospitality Committee Co-chair. She is an amazing and dedicated volunteer and we greatly appreciate all of her time and service to the chapter.

Thank you to our 2021 Chapter Board of Directors

These volunteers work behind the scenes to keep the chapter moving forward as we continue our mission in Building Better Communities! Our chapter continues to thrive because of these dedicated leaders. Thank you to our 2021 Chapter Board!

Pictured: Randy Stokes, Ruth Campbell, Sabrina French, Chelsi Rueter, Ryan Gesell, Christi Moore, Steve Roseman, & Paul Townsend
Not Pictured: Mark Poindexter, Lisa Tashjian, & Phyllis Pazen

2022

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Las Casitas Maintenance HOA • Las Posas Garden HOA • Medea Valley HOA
Moorpark Highlands • Northgate Condominium Association
Point Concepcion Owners Association • Stonebridge Owners Association
Surfside II HOA

Community Association Homeowner Leaders

Louann Leone • Madelene Young-Ellis

Community Managers

Colby Bloom, Community Property Management
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to our new members!

Community Association Homeowner Leaders

Judith Gustafson
Diana Russell
Richard Rudman, Las Pasadas Homeowners Association

Community Association Board of Directors

Hidden Pines Estates
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Community Managers

Michele Brooks, The Emmons Company
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Christina Montoya, Farrell Smyth Inc.
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