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Community Association Law Update December, 2007

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I. INTRODUCTION:

Several bills affecting community associations were signed into law by Governor Schwarzenegger. Unless otherwise indicated, these new laws become effective January 1, 2008. Additionally, the California Courts of Appeal have made rulings in several cases, which are of particular interest to homeowners associations.

II. NEW LAWS:

A. PUBLISHING AND FOLLOWING AGENDA FOR BOARD MEETINGS - SB 528 (AANESTAD)

This bill will affect every association in California because it significantly impacts how Board meetings are conducted on and after January 1, 2008.

Background.

According to the author of SB 528, the purpose of the bill is to close a loophole in, and uphold the intent of, the Common Interest Development Open Meeting Act ("Open Meeting Act"), which is codified as Civil Code Section 1363.05. Under current law, a board of directors ("board") of a common interest development is required to provide notice of meetings to members at least four days in advance; however, current law does not require the board to provide an agenda or to follow what is on the agenda. As a result, the board may take actions without the knowledge or participation of the association's members, which arguably denies the members a meaningful opportunity to participate in the governance of their association.

In the author's view, SB 528 adds greater transparency to the Open Meeting Act by requiring that the notice of the board meeting include an agenda and by prohibiting a board of directors from taking action or discussing an item that is not included on the published agenda for such meeting. This provision is similar to the Brown Act which governs meetings of local legislative bodies.

Analysis of Bill.

1. **General Rule.** As mentioned above, SB 528 requires that the notice of all board meetings (except for executive session and emergency board meetings) contain the agenda for the meeting. Furthermore, SB 528 prohibits a board from discussing and taking action on a matter at a non-executive session or non-emergency meeting unless the matter was placed on the agenda when the board meeting was noticed, except as provided below.

2. **Exceptions.** SB 528 provides for the following exceptions:

a. **Authority to Make Statements, Respond and Request Clarifications.** The board, the association's property manager or other agent or staff of the board may still do any of the following:

- (1) Respond briefly to statements made or questions posed by a person speaking at the meeting;
- (2) Ask a question for clarification; and/or
- (3) Make a brief announcement or brief report on his or her own activities, either in response to questions posed by a member or based upon his or her initiative;

b. **Authority to Give Instructions to Property Manager.** Subject to the board's rules or procedures, the board or a member of the board may still:

- (1) Provide a reference or resource for factual information to the property manager, other agents or staff;
- (2) Request its managing agent or other agents or staff to report back to the board at a subsequent meeting concerning any matter;
- (3) Take action to direct its property manager, other agents or staff to place a matter of business on a future agenda; and/or

- (4) Direct its property manager, other agents or staff to perform administrative tasks that are necessary to carry out any of the foregoing.
- c. Authority to Take Action in Emergency Situation, Newly Discovered Item Requiring Immediate Action and Continued Item from Previous Agenda. After openly identifying the item to the members in attendance at the meeting, the board may take action on any item of business not appearing on the agenda posted and distributed to the members:
- (1) Upon a determination made by a majority of the board present at the meeting that an emergency exists. An emergency situation exists "if there are circumstances that could not have been reasonably foreseen by the board, that require immediate attention and possible action by the board, and that, of necessity, make it impracticable to provide notice" (the "Emergency Situation Exception"); or,
 - (2) Upon a determination made by the board by a vote of two-thirds of the board members present at the meeting, or, if less than two-thirds of the board is present at the meeting, by a unanimous vote of the members present, that there is a need "to take immediate action and that the need for action came to the attention of the board after the agenda was posted and distributed" (the "Immediate Action Exception"); or,
 - (3) If the item appeared on an agenda that was posted and distributed for a prior board meeting held not more than 30 calendar days ago and, at the prior meeting, action on the item was continued to the meeting at which the action is taken ("Continued Item Exception").
3. Inapplicability. SB 528's prohibition against discussing matters not on the published agenda does not apply to a resident who is not a member of the board. Residents who are not on the board can bring up matters not on the agenda, e.g., in the open forum section of the meeting.
 4. Consequences for Non-Compliance. SB 528 does not provide any specific consequences if a board were to discuss or take action on any item not included on the published agenda and not falling within the enumerated exceptions.

Presumably, a decision made in violation of SB 528 would be subject to challenge by an owner in court.

Application for Boards and Managers.

Providing "greater transparency" into the decision-making process of boards is important, and, as a practical matter, if board members are prevented from getting "side-tracked" because they cannot take action on items not included on the published agenda (except in limited circumstances), SB 528 may help serve to streamline, and, conceivably, shorten the length of board meetings. Having said that, SB 528 also has the potential to increase the organizational burden on boards and property managers, provide a source of friction between boards and property managers as they fight over who is responsible for mistakes in the agenda and serve as a source of conflict between boards and owners as they argue over whether the board is complying with SB 528.

Specifically, under SB 528, boards and property managers must put greater effort into planning their board meetings so that they can ensure that all necessary items of business are included on the published agenda. This will require, among other things, a careful review of previous minutes of meetings to ensure that unfinished business items and matters on which a board member or the property manager was required to investigate further, are "carried over" onto the next published agenda.

If a board or property manager forgets to include on its published agenda an item that the board and/or property manager was aware of required action (and assuming that this matter was not an item that was on the previous agenda that was continued until the next meeting for action), the board will most likely have to wait to include such matter on the agenda for its next meeting because it will be very difficult to argue that the criteria for an Emergency Situation Exception or an Immediate Action Exception, discussed above, have been met if it was reasonably foreseeable that action was necessary before the agenda was published. If it is necessary to take action on the omitted agenda item sooner than the next regularly scheduled board meeting, the board would need to call a special meeting of the board and include such matter on the agenda disseminated with such notice or take action by unanimous written consent.

To help minimize "finger-pointing" between boards and property managers over items that were inadvertently omitted from a published agenda, boards may want to consider clarifying in their property management contracts who is responsible for generating and approving any agenda required by SB 528. Boards may also want to consider adopting rules and procedures for including items on the agenda and approving the agenda, e.g., authorizing the board president to give final approval for the agenda before it is published. We would also encourage boards to include on the published agenda any item that was on the published

agenda for a previous meeting that was "continued for action" until the next meeting (even though SB 528 does not require this if the next meeting is held within 30 days) in case the next meeting is, for whatever reason, re-scheduled to a date beyond 30 days.

Boards should make sure that the minutes closely "track" the published agenda and that any discussion or action taken on non-agenda items clearly reflect an authorized reason for such discussion or action, for example:

" Non-Agenda Item #1. Motion to approve sewer line clean-out. After the agenda for the December 5, 2007, board meeting was published, a back-up occurred in Unit 203. A majority of the board determined that an emergency situation exists because the back-up could not have been reasonably foreseen by the board and requires immediate attention and possible action by the board, and that, of necessity, make it impracticable to provide notice. A discussion was held regarding the plumber's recommendation to clean out the sewer-lines. The motion to approve the sewer line clean-out was made, seconded and approved by a majority of the board."

To help minimize disputes between boards and owners over whether the board is violating SB 528 by discussing or taking action on something that is not on the agenda and that does not fall within the exceptions enumerated above, boards may want to consider adopting a formal protocol for the open forum portion of board meetings so that board members have a written "script" to follow (e.g., each member has 3 minutes to speak; after receiving the member's comment, a board member may respond, ask for clarification and/or give facts, resources and instructions to the property manager to report back at a subsequent meeting on a matter, place the item on a future agenda or direct the property manager to perform administrative tasks to accomplish the foregoing, no action on member's comment may be taken except if it falls within the Emergency Situation Exception or the Immediate Action or Continued Item Exception).

B. REQUIREMENTS FOR CERTIFIED COMMON INTEREST DEVELOPMENT MANAGER DESIGNATION - AB 691 (SILVA)

Existing law requires a person to meet certain requirements in order to be called a "certified common interest development manager" and imposes other requirements with regard to common interest development managers; however, such these laws are scheduled to become inoperative and be repealed on January 1, 2008. This bill extends the operation of these provisions until January 1, 2012. It also modifies certain of the requirements to be called a "certified common interest development manager" as well as various definitions.

Boards may want to verify whether their property managers are in compliance with these new requirements.

III. PUBLISHED CASES:

A. *Heiman v. Workers Compensation Appeals Bd.* (2007) 149 Cal. App. 4th 724

An association decided to install rain gutters. The association's property manager hired an unlicensed and uninsured contractor to install the new rain gutters on the condominium building at a cost of \$1,050, and an employee of the uninsured contractor was permanently disabled on the first day of the job when the rain gutter he was working on touched a high voltage electrical wire. After a very technical examination of the California Labor Code, agency/employer/principal relationships and relevant case law, the Court found that the contractor and the property manager are jointly and severally liable and that the association is also liable for workers' compensation as the principal of the property manager.

Although this is very technical case, the Court's findings serve as a powerful reminder of how important it is to hire only licensed contractors who are properly insured to perform even the most minor improvements.

B. *Terri Haley v. Casa Del Rey Homeowners Association* 153 Cal.App. 4th 863

The association in this case is a two-story building. The lower units have small concrete patios for the owners' exclusive use. Beyond each patio is a few feet of flat common area ground that extends to an ivy-covered downward slope. Over the years, many of the first-floor owners extended their patio to include the few extra feet of common area. The association received complaints from certain owners that, among other things, this encroachment into the common area violated the association's governing documents. In response to the complaints, the association pursued a two-fold course of action: (1) the association requested that all lower unit owners voluntarily remove the encroachments, which most did; and (2) the association sought owner input as to what should be done with the small strip of common area at issue, and ultimately, the association decided to ask the owners to vote to amend the CC&Rs to authorize the association to permit encroachments into the common area subject to certain conditions. Dissatisfied with the manner in which the association decided to resolve this dispute, one of the complaining owners sued the association because she was dissatisfied that the association had chosen to amend the CC&Rs to address the alleged violation rather than to force all owners to comply with the existing CC&Rs.

The trial court ruled in favor of the association and the owner appealed. The Court of Appeal affirmed the lower court's decision. In doing so, the Court of Appeals extended the holding of *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th

249, to decisions made by a board of directors for remedying violations of their association's governing documents. In *Lamden*, the California Supreme Court adopted a rule of judicial deference to maintenance decisions made by a board of directors of an association. In extending *Lamden* to enforcement decisions, the Court of Appeals found that *Lamden* reasonably stands for the proposition that an association has discretion to select among means for remedying violations of the CC&Rs without resorting to expensive and time-consuming litigation, and the courts should defer to that discretion.

This case should give boards of directors additional protection when they make a business decision that it is not in the community's best interests to pursue litigation in certain cases.