

DESERT CITIES HOA COUNCIL

Recap of Meeting July 17, 2014

HOA Members Represented

Cathedral Canyon #1

Montage at Mission Hills

Cathedral Canyon #8

Rio del Sol – Las Casitas

Cathedral Canyon #17

Sun City Palm Desert

Cathedral Canyon #18

Cathedral Springs

Legal Counsel: Jennifer James, Attorney at Law – Affordable HOA Legal Services

Speaker Present – Jessyca Frederick, Desert Horticultural Society & Water Wise Now
Jennifer James, Attorney at Law – Affordable HOA Legal Services

Welcome: Al Hallinan, Chair

Treasurer's Report – To be distributed

Guest Speaker – Jessyca Frederick, Desert Horticultural Society & Water Wise Now
The Desert Horticultural Society is an organization of professionals and residents from a number of disciplines brought together to promote desert landscaping. They have two primary motivations:

- Water conservation
- Landscapes that support local wildlife

She handed out a brochure from the organization "We Promote Desert gardening through education and community outreach." It describes the event they participate in annually:

- April – Desert Garden Tour with over 800 visitors
- Mid-October – Desert Garden Community Day at The Living Desert with workshops and lectures on desert gardening by local experts.

Membership is \$10 per year. For membership details and to join go to deserthorticulturalsociety.org

Jessyca the put on her other hat, that of her firm Water Wise Now. She and a colleague started the firm to promote water conservation. Her colleague is a landscape architect. They prepared a PowerPoint presentation "Urban Water Use in the Coachella Valley" on current topics in water use for Coachella Valley HOAs and homeowners.

What HOAs CAN'T do right now...

Davis-Stirling Act – cannot prohibit or create conditions that essentially prohibit the use of low water using plants as a group, guidelines or informal policies which can penalize or fine homeowners who don't keep their grass green.

Pending Legislation – prevent CID or HOA from prohibiting replacement of turf with low water landscape plants through architectural or landscape guidelines or policies AB2014.

Governor Executive Order – HOAs cannot prohibit compliance with water saving measures contained in directives or any conservation measure adopted by a public entity or water company.

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Top Water Waste Sources in HOAs

- Run-off (can be mediated)
 - Community areas
 - Individual homes
- Seasonal occupants
 - Don't know when maintenance issues arise
 - Rely on landscapers, not always competent
- Scheduling & Controllers
 - Different issues for seasonal occupants and year round occupants
 - Over seeding in fall – sometimes water cycles do not get reset

How to manage run-off

- Sprinkle heads with check valve – Rainbird SAM Series – only need one at lowest point
- Cycle-soak irrigation with controllers – irrigate multiple times for short periods, rather than one time for long period
- High tech efficient nozzles – Hunter MP Rotator nozzles reduce usage by 30%
- Pressure regulation – in line regulator approximately \$10 reduces pressure to 40psi
- Wind sensor – shuts down system when wind exceeds 3mph, Hunter Wind-Click about \$80

Turf buy back

All programs require approval before beginning

Approval process usually includes a visit from water official or submission of photos of existing yard

<http://bit.ly/CVTurfBuyBackPrograms>

Desert Water Agency

<http://www.dwa.org/Controller>

<http://www.dwa.org/Toilet-Rebate-Program>

<http://www.dwa.org/Homeowner-Association-Water-Use>

Coachella Valley Water District

<http://www.cvwd.org/conservation/rebaites.php>

Other Agencies

<http://www.cvwatercounts.com>

Upcoming Mandatory Restrictions

- No local enforcement, but
- \$10,000 per day for water districts that do not save water
- Effective August 1: Water Supply Storage Alert – prohibits washing of driveways and other hard surfaces, causing excess run-off, washing vehicles without shut off hose nozzle, using potable water in fountains or water features unless water is recirculated, serving water where food is sol unless requested.

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Coachella Valley Water District restrictions

- No irrigation 6:00 AM to 6:00 PM
- Irrigation limited to 3 times per week
- No run-off from irrigation

More information from state available at

<http://www.water.ca.gov/urbanwatermanagement/uwmp2010>

Guest Speaker – Jennifer James, Attorney at Law – Affordable HOA Legal Services
Jennifer provided summaries of recent court decisions affecting HOAs:

Collection of Assessments

1. *Diamond v Superior Court* (June 18, 2013) 217 CA4th 1172

HOA that did not strictly comply with Davis-Stirling notice requirements could not enforce assessment lien by judicial foreclosure.

The Association levied a special assessment to cover the cost of a necessary roofing repair project. After Owner failed to pay a special assessment by the due date, the HOA recorded an assessment lien on her townhouse and sued for judicial foreclosure. Owner sought summary judgment, claiming that the HOA could not foreclose because it had not complied with the pre-lien and pre-foreclosure notice requirements under the Davis-Stirling Common Interest Development Act. The trial court denied the summary judgment motion, finding that the HOA had substantially complied with the notice requirements.

The court of appeal issued a peremptory writ of mandate directing the trial court to grant summary judgment for Owner. Under the plain language of the statutes and their legislative history, the notice requirements set forth in the Code must be strictly construed and are mandatory. **Substantial compliance does not suffice to protect the homeowner's interest.** Because the HOA failed to strictly comply with all of the mandatory notice requirements, the assessment lien was not valid and could not be enforced in a judicial foreclosure action.

The Association failed to strictly comply with the following statutory procedural requirements:

1. DEADLINE FOR NOTICE OF RECORDED ASSESSMENT LIEN

The first of the Association's critical mistakes involved the Association's failure to issue timely notice to the homeowner after the recordation of the assessment lien. Per Code, **"a: copy of the recorded notice of delinquent assessment shall be mailed by certified mail to every person whose name is shown as an owner of the separate interest ... no later than 10 calendar days after recordation."** As the Association failed to send notice until approximately 28 days after the recording of the lien, the court found that the Association had failed to comply with this statutory requirement.

II. NOTICE OF RIGHT TO REQUEST DISPUTE RESOLUTION

The owner requested alternative dispute resolution ("ADR"), but the Association

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responded by arguing that the owner was entitled to either (1) meet and confer or (2) participate in ADR, but not both. Having already conducted a meet and confer in accordance with the Association's governing documents, the Association subsequently denied the owner's request for ADR. The court ruled against the Association and noted that **the Code entitles owners to both (1) the Association's meet and confer policy, and (2) participate in ADR with a neutral third party prior to the initiation of foreclosure proceedings.** The court found that the Association's denial of the owner's right to participate in both dispute resolution procedures constituted a significant departure from the strict requirements of the Code.

III. VOTE TO FORECLOSE MUST BE RECORDED IN NEXT MEETING MINUTES
The Board in *Diamond* also failed to properly record the vote of the Board to approve the foreclosure in the minutes of the next Board meeting. **The Code requires that the decision of the Board to initiate foreclosure of a delinquent assessment lien must be approved by the vote of a majority of the Board in executive session, and such approval must be recorded in the minutes of the next meeting.** The Association argued that its failure to abide by the Code was of no consequence since the owner was aware that the foreclosure would be filed. Once again, the court found against the Association--reiterating that the mandatory language of the statute permitted no deviations from its procedural requirements.

IV. NOTICE OF DECISION TO FORECLOSE ON ASSESSMENT LIEN
Per Code, an HOA seeking to collect a delinquent assessment through judicial or non-judicial foreclosure must serve the owner of the separate interest with notice of the Board's vote to foreclose prior to the filing of the foreclosure action. In *Diamond*, the Association claimed that it had met the burden imposed by the Code by personally serving the Owner with the summons and complaint for the judicial foreclosure action. In finding against the Association, the court held that the notice requirement was a condition precedent to the filing of the foreclosure action. As the summons and complaint were delivered to the Owner *after* the filing of the foreclosure action, the court determined that the Association had once again deviated from the requirements the Code, and that this deviation was fatal to the Association's judicial foreclosure action.

2. **Huntington Continental v. J.M. Trust** (Cal. App. Sup. Ct.; January 13, 2014) (222 Cal. App. 4th Supp. 13.)

HOA must accept partial payments from homeowner to reduce the homeowner's delinquent assessment account.

The Appellate Division of the Orange County Superior Court held that the Davis-Stirling Act compels associations to accept partial payments from homeowners to reduce the amount of the homeowner's unpaid assessments. Often times associations reject partial payments from homeowners once the account is turned over to collections, so Associations are concerned that this decision will allow homeowners to avoid foreclosure by keeping their delinquent account under the \$1,800 Civil Code requirement.

There are differing legal opinions regarding the applicability of this case. Some attorneys believe that this decision is only applicable to judicial foreclosures and still

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advise their association clients to deny acceptance of partial payments once the nonjudicial foreclosure procedure has commenced. Other attorneys take a more conservative approach and warn their clients to accept partial payments across the board.

While this case may be cited as persuasive authority, it is important to note that this case is only binding in Orange County at this time. Therefore, it is still the board's decision whether to accept partial payments in other counties. It makes sense to accept money owed and offered by a homeowner, when the association needs that money, as long as it can continue to pursue the remainder of the debt in an action for money damages.

Elections

1. **Wittenberg v Beach walk Homeowners Assn. (2013) 217 CA4th 654**

HOA violated equal-access to association media requirements when board members engaged in advocacy in favor of bylaw amendment while denying other members equal access to HOA media.

When an HOA's board of directors sought to amend the bylaws, the amendment initially failed. The board announced that it would continue to hold elections until the amendment passed. The board told members to vote for the amendment in the HOA newsletter but refused to publish an article opposing the amendment, did not allow members access to the HOA website or bulletin board, refused a homeowner's request to use a common area for a rally, and charged another homeowner a rental fee for use of a common area. The amendment passed the third time an election was held.

Plaintiffs sued to invalidate the result of the election. Per Code, if an HOA allows any "candidate or member" to advocate a point of view using HOA media, such as a newsletter or website, the HOA must give members with opposing viewpoints equal access to the same media. Per Code, an HOA must allow free access to common areas for purposes reasonably related to an election. The trial court ruled that the HOA had not violated the Code, concluding that the equal-access provision does not apply to a board's use of its own media to endorse a candidate or viewpoint.

The court of appeal reversed, holding that the HOA violated the Code when its board members engaged in advocacy in favor of the amendment while denying other members equal access to HOA media. Board members are to be treated like any other HOA member for this purpose.

The HOA also violated the Code by denying free access to common areas during the campaign, even though these incidents took place before the first and second elections. In these circumstances, in which the board held multiple, successive elections until the amendment passed, the campaign to pass the amendments encompassed all three elections.

2. **Friars Village HOA v. Hansing (2013)**

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Court upholds use of HOA election rules for Director qualifications

HOAs have been traditionally required to formally amend their Bylaws in order to establish, clarify or expand qualifications for members seeking to serve on the HOA's Board of Directors. This generally requires the approval of the membership and a formal vote which, as many Boards and industry professionals understand, often acts as a significant hurdle to achieving the HOA's goals.

However, as a result of *Friars Village Homeowners Association v. Hansing (2013)* ("Friars Village"), it appears that a less onerous mechanism for enacting new director qualifications may now be available. Friars Village dealt with a lawsuit brought by an HOA member challenging the validity of an HOA election rule that prevented any member from seeking a position on the Board if that member was related by blood or marriage to any current Board member or other candidate for the Board. The Court ultimately ruled for the HOA, finding that the election rule was both reasonable and rationally related to the proper conduct and business affairs of the HOA. This decision may establish a basis for adopting director qualifications through the implementation of reasonable election rules rather than through formal amendments to the Bylaws.

2013-2014 Legislative Committee Hot Bills

Maintenance & Repairs: (Gordon) AB 968 provides that beginning January 1, 2016, unless otherwise provided in the declaration, the association is responsible for maintaining, repairing, and replacing the common area, the owner of each separate interest is responsible for maintaining, repairing, and replacing the separate interest, and the owner of the separate interest is responsible for maintaining the exclusive use common area appurtenant to the separate interest while the association is responsible for repairing and replacing the exclusive use common area. Status: Senate - 6/23/14 ordered to 3rd reading

Dispute Resolution: (Chau) AB 1738 would additionally require the resolution or agreement under an association's procedure for resolving disputes between an association and a member to be in writing and signed by both parties. The bill would authorize a member and an association to be assisted by an attorney or another person in explaining their positions at their own cost. The bill would additionally require the procedure to provide either party the right to have an attorney or another person participate when meeting and conferring provided at their own cost. This bill would require an agreement reached under the alternative procedure that binds the parties and is judicially enforceable to be in writing and signed by both parties, as specified. Status: Senate - 6/23/14 ordered to 3rd reading

Earthquake Insurance: (Cooley; AB 2064). Existing law prohibits a policy of residential property insurance from being issued or delivered or initially renewed in this state unless the named insured is offered coverage for loss or damage caused by an earthquake, as provided, and, if the offer of earthquake coverage is accepted, requires the insurer to provide certain disclosures based on whether the policy was issued by the California

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Earthquake Authority (CEA). Existing law created the CEA, to be administered under the authority of the Insurance Commissioner, and authorized it to transact insurance in this state as necessary to sell policies of basic residential earthquake insurance in the manner provided. The CEA has no authority to transact any other type of insurance business. The CEA's operating expenses are capped at 3 of its premium income. AB 2064 would revise and recast these provisions by revising the disclosure language an insurer is required to use in offering earthquake coverage and making the contents of that disclosure language dependent upon whether the insurer is a member of the CEA or not and by requiring insureds to be provided with specified disclosures with regard to coverage of losses, the CEA's liability limitations, and premiums concurrent with the issuance or renewal by the CEA of a residential earthquake insurance policy. The bill would require a participating insurer, at least once each year, to provide each of its residential property insured with marketing documents produced at the CEA's expense. The bill would make these provisions operative on January 1, 2016. This bill would increase the cap on the CEA's operating expenses to not more than 6 of its premium income, and exclude certain expenses and costs from being classified as operating expenses. Status: 6/24/14 re-referred to Committee on Appropriations

Water Conservation:

- **No Fines During Drought:** (Campos) AB 2100 would prohibit an association from imposing a fine or assessment against a member of a separate interest for reducing or eliminating watering of vegetation or lawns during any period for which the Governor has declared a state of emergency, or a local government has declared a local emergency, due to drought. This bill would declare that it is to take effect immediately as an urgency statute. Status: Enrolled July 8, 2014 & presented to Governor on July 11, 2014.
- **Drought Resistant Landscaping:** (Gonzalez) AB 2104 would provide that a provision of the governing documents or of the architectural or landscaping guidelines or policies shall be void and unenforceable if it prohibits, or includes conditions that have the effect of prohibiting, low water-using plants as a group or as a replacement of existing turf, or if the provision has the effect of prohibiting or restricting compliance with a local water-efficient landscape ordinance or water conservation measure. Status: Senate - 6/12/14 ordered to 3rd reading

Solar Energy: (Muratsuchi) AB 2188 would require a city, county, or city and county to adopt, on or before September 30, 2015, in consultation with specified public entities an ordinance that creates an expedited, streamlined permitting process for small residential rooftop solar energy systems, as specified. The bill would additionally require a city, county, or city and county to inspect a small residential rooftop solar energy system eligible for expedited review in a timely manner, as specified. The bill would prohibit a city, county, or city and county from conditioning the approval of any solar energy system permit on approval of that system by an association that manages a common interest development. The bill would require a solar energy system for heating water to be certified by an accredited listing agency, as defined. Because the bill would impose new duties upon local governments and local agencies, it would

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impose a state-mandated local program. Status: Senate -7/1/14 referred to Committee on Appropriations

Transfer Disclosures: (Maienschein) AB 2430 would require the cost for providing the required documents to be separately stated and billed from other charges that are part of the transfer or sales transaction. This bill would authorize an association to collect a reasonable fee from a seller for its actual costs in providing documents under these provisions and would require a seller to be responsible for compensating an association, person, or entity for providing documents under these provisions. This bill would also require a seller to provide a prospective purchaser with certain current documents that the seller possesses free of charge. This bill would prohibit a seller from giving a prospective purchaser the required documents bundled with other documents. This bill would make conforming changes to a codified form. Status: Enrolled on July 10, 2014

Agriculture: (Bradford) AB 2561 would make void any provision of the governing documents of a common interest development that prohibits the use of a homeowner's backyard for personal agriculture or entrepreneurial agriculture or prohibits a homeowner from the off-site sale or donation of produce grown on the homeowner's property. Status: Senate – July 1, 2014 ordered to 3rd reading.

Law Enforcement on Private Streets: (Wyland) SB 298 would authorize a board of supervisors of a county, and a legislative body of a city, to contract to provide supplemental law enforcement services to a homeowners' association on an occasional or ongoing basis to enforce the Vehicle Code on a homeowners' association's privately owned and maintained road, as specified. Status: Chaptered 10/7/13

Omnibus Bill: (Committee on Transportation & Housing) SB 745 provides:

- (1) The bill would authorize delivery of documents to the homeowner's association by specified types of mail delivery, would revise requirements for a board teleconference and the form for billing disclosures, and would prohibit cancellation fees for requests for documents, as specified.
- (2) This bill would replace the reference to the National Electrical Code with the California Electrical Code.
- (3) This bill would delete the requirement that a smoke alarm incorporate an end-of-life feature, and, the authority for the State Fire Marshal to suspend its enforcement. (4) This bill would delete an obsolete provision related to eligibility for funding under the Housing and Emergency Shelter Trust Fund Act of 2002.

Status: Chaptered 8/27/13

Electronic Voting:

- **Voting via Internet:** (Ting) AB 19 would declare the intent of the Legislature to enact legislation that would require the Secretary of State to implement a pilot

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program whereby a county may enable voters to vote via the Internet. Status: Assembly –_died in Appropriations 1/31/14

- **Elections by Electronic Voting:** (Torres) AB 1360 would have allowed homeowners associations to conduct elections by electronic voting. Status: Senate - died 6/24/14

Ban on Smoking: (Levine) AB 746 would prohibit the smoking of a cigarette or other tobacco products in all areas of multifamily dwellings, except those areas designated as areas where smoking is permitted, as specified. Status: Assembly - died 1/31/14

Notice of Foreclosure: (Vidak) SB 1026 would allow an association to serve an owner or owner's representative with notice of a foreclosure action to collect delinquent assessments by posting a copy of the notice on the owner's separate interest in a manner most likely to give actual notice to the party to be served and mailing a copy of the notice, as specified. Status: Senate - died 5/1/14

Open Forum – None

Handouts (Other than mentioned above) – Flyer “Jennifer L. James Attorney Affordable HOA Law”

Next Meeting – Thursday, August 21, 2014 at the Cathedral City – City Hall

Tom Tousignant, Recorder