

# DESERT CITIES HOA COUNCIL

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## Recap of Meeting March 19, 2015

### HOA Members Represented

Aldea	La Pasada
Canyon Sands	Los Pueblos
Canyon View Estates #7	Mira Vista
Cathedral Canyon #1	Montage at Mission Hills
Cathedral Canyon #2	Mountain Villas
Cathedral Canyon #5	Parc La Quinta
Cathedral Canyon #12	Rio del Sol – Las Casitas
Cathedral Canyon #17	Sun City Palm Desert
Cathedral Springs	Versailles
First Palm Springs Villa Alejo	Villa Alejo
Legal Counsel – Jennifer James – Affordable HOA Legal Services	

**Speakers Present** – Mary Howell, Chair, Senior Communities Practice Group  
Epsten Grinnell & Howell, Attorneys at Law

**Welcome:** Mike Traidman, Chair

**Treasurer’s Report** – To be distributed

**Guest Speaker** – Mary Howell, Chair, Senior Communities Practice Group  
Epsten Grinnell & Howell, Attorneys at Law  
“Recent Cases and Statutory Amendments for HOAs – 2015”

Mike Traidman welcomed Mary Howell.

Mary began with the observation that Sacramento has been of a homeowner’s rights campaign for a long time. The original Davis-Stirling Act was 10 pages long. It outlined how to form HOAs. Since that time the legislature has changed the Act to describe how HOAs should govern. The legislature is not our friend.

Mary distributed a syllabus containing recent court cases and new laws that impact HOAs. The syllabus is copied here and augmented with notes from her presentation.

## Recent Court Cases

### ASSESSMENT RECOVERY

*Huntington Continental Town House Ass'n. v. Miner* (2014) \_ Cal.App.4th \_ (2014 DJDAR 13919): Association obligated to accept partial payments after foreclosure has commenced.

Notes: Now knowledgeable and unscrupulous owners are able “play the system” and forestall foreclosure by keeping the assessments owed just under \$1,800.

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*Hanson v. JQD dba Pro Solutions, Inc.* 2014 U.S. Dist. LEXIS 94742: Collection agency's attempt to collect its fees, interests and late charges, on homeowner account assigned by association, which fees were never charged to the association, violates the Davis-Stirling Act and the Fair Debt Collection Act.

Notes: Cannot assign homeowner debt to a collection agency until they no longer own the property. Collection agency may not charge fees to homeowner that wouldn't be charged to the HOA.

NEVADA SUPER-LIEN FORECLOSURE CASE: *SFR Investments Pool1, LLC v. U.S. Bank et al.* (2014): Nevada's Supreme Court upholds its super-lien law to (1) confirm that foreclosure of association's junior lien extinguishes bank's lien, and (2) allow such foreclosure to proceed nonjudicially.

Notes: This is the way the law SHOULD be in California. After 9 months the lien amount becomes a Super-Lien – superior to all other liens (even the first trust deed). The HOA gets paid first from the proceeds of a sale.

### ATTORNEY-CLIENT PRIVILEGE

*Seahaus La Jolla Owners Ass'n. v. Superior Court* (2014) 224 Cal.App.4th 754: Association attorney's communications to homeowners regarding construction defect litigation are privileged.

### CONSTRUCTION DEFECTS

*Beacon Residential Community Ass'n. v. Skidmore, Owings & Merrill* (2014) 59 Cal.4th 568: Principal architect owes a duty of care to future homeowners in the design of a residential building, even when the architects do not actually build the project or exercise ultimate control over construction.

### FIDUCIARY DUTY; ANTI-SLAPP MOTION

*Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722: Developer- directors breach fiduciary obligation to association by failing to correct association's mistaken belief that it was responsible for repair of trails.

Notes: Scope of fiduciary duty of Directors: 1. Duty of care – do inquiry to discover the facts and use good business judgement. 2. Duty of Loyalty – Make decisions in the best interest of the HOA, even if unfavorable to themselves.

### TRANSFER FEES

*Fowler v. M&C Association Management Services, Inc.* (2013) 220 Cal.App.4th 1152: Fees charged for processing paperwork, filing documents and updating records were not a "transfer fee" governed by Civil Code §1098.5, and were therefore proper.

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### LIABILITY FOR PROVIDING ALCOHOL

*Ennabe v. Manoso* (2014) 58 Cal.4th 697: Host who provided alcohol to guests and charged admission fee may be responsible for death related to alcohol consumption at her party.

### SHORT TERM RENTALS (sent from Mary Howell March 25, 2015)

*Watts v. Oak Shores Comm. Ass'n* (2015). New case upholding an association's right to establish rules for short term rentals. In the case the rules adopted included a minimum 7-day stay, an annual fee of \$325 imposed on owners who rented their homes; a rule limiting the number of automobiles that renters were allowed to bring into the development, a garbage collection fee, and a property transfer fee (!! ) Could uphold all of the HOA's fees. An expert testified at trial, that unlike guests, who are typically present with the owners, short-term renters are never present with the owner; guests tend to be less destructive and less burdensome; short term renters require greater supervision and increase administrative expenses. The HOA had also done a study which supported the admin fee for rentals.

The court rejected owner's argument that Davis-Stirling prohibited such charges, because they (allegedly) exceeded the cost to the association. Experts testified the fees were in line with the cost to the HOA.

THE TRIAL COURT AWARDED \$1,180,646.50 TO THE ASSOCIATION IN ATTORNEY FEES TO DEFEND THE CASE (!!!!!!)

Mary recommends that HOAs amend their fine policy to make the fine for a violation equivalent to the profit the offending homeowner would make.

## New Laws for Community Associations

### DAVIS-STIRLING COMMON INTEREST DEVELOPMENT ACT

#### 1. Repairing and Replacing Exclusive Use Common Area. AB 968

Currently, Civil Code section 4775 provides that unless the declaration provides otherwise, the association is responsible for maintaining, repairing, or replacing the common area, other than the exclusive use common area, and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to the separate interest. Beginning January 1, 2017, section 4775 will provide that the owner of the separate interest is responsible for maintaining the exclusive use common area and the association is responsible for repairing and replacing the exclusive use common area.

PRACTICE TIP: Make sure the CC&Rs properly address responsibility for exclusive use common areas and amend the CC&Rs if needed.

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### 2. Internal Dispute Resolution (IDR). AB 1738

Currently, Civil Code section 5915 provides for an informal dispute resolution process between the association and members. The changes to this section require any agreement between an association and a member to be in writing and Signed by both parties. This new law also allows a member and the association to be assisted by an attorney or another person at their own cost.

**PRACTICE TIP:** Adopt your own IDR procedures that include: (1) a requirement for advance notice if the owner plans to bring an attorney so the association can also have an attorney present; (2) a confidentiality clause so that everything you say cannot be used against you; and, (3) allowing more than one board member and management to be present. If the association doesn't have IDR procedures, the association may still ask for notice of whether the member plans to bring legal counsel and reschedule if the member shows up with legal counsel without notice.

Mary suggests that HOAs change their IDR procedures to require advance notice if homeowner plans to bring someone. Boards should never meet with a homeowner's attorney without their own attorney present.

### 3. Costs to Provide Documents upon a Transfer in Title. AB 2430

Currently, Civil Code section 4528 provides the form to be used to list the association's documents and section 4530 addresses the association's obligation to provide the documents. The changes to these laws require the costs for providing the required documents to be separately stated and billed from other charges that are part of the transfer or sales transaction. The changes require a seller to be responsible for paying the association, person, or entity for providing documents on transfer of title. The seller is required to provide a prospective purchaser with certain current documents that the seller possesses free of charge. The seller is prohibited from giving a prospective purchaser the required documents bundled with other documents. The association may not charge an additional fee for providing documents electronically.

**PRACTICE TIP:** The seller, not the buyer, is responsible for paying for the costs of the documents, such as the Bylaws, CC&Rs, operating budget, rules, so get reimbursement from the seller.

### 4. Backyard Gardens. AB 2561

New Civil Code section 4750 voids any provision of a governing document that effectively prohibits or unreasonably restricts the use of a homeowner's backyard for personal agriculture. "Personal agriculture" is defined in Civil Code section 1940.10 to mean "a use of land where an individual cultivates edible plant crops for personal use or donation." Marijuana and other illegal plants are not allowed. Growing crops for sale is also not allowed nor is growing anything that isn't edible. Planting crops in the front or

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side yard is not allowed. The association may impose reasonable restrictions that do not significantly increase the cost of engaging in personal agriculture or significantly decrease its efficiency. This section applies only to yards that are designated for the exclusive use of the homeowner. The association may create rules requiring that dead plant material and weeds, with the exception of straw, mulch, compost, and other organic materials intended to encourage vegetation and retention of moisture in the soil, must be regularly cleared from the backyard.

**PRACTICE TIP:** Adopt rules requiring removal of dead plant material and weeds and clarifying what plantings are allowed and what is considered the "backyard."

### 5. No Elections When the Owner of Each Lot or Unit Appoints a Director. AB 569

Civil Code section 5100 requiring elections by secret written ballot does not apply when the bylaws provide that one member from every lot or unit is a director of the association.

### 6. Allowing Low Water Plants and No Fines for Failing to Water. AB 2100, AB 2104, and SB 992

Currently, Civil Code section 4735 provides that any provision of the governing documents is void and unenforceable if it prohibits, or includes conditions that have the effect of prohibiting, the use of low water-using plants as a group, or if it has the effect of prohibiting or restricting compliance with a local water-efficient landscape ordinance or water conservation measure. The new changes make it clear that rules, architectural guidelines, and policies are included as part of the governing documents. The changes also provide that a provision of the governing documents is void and unenforceable if it includes conditions that have the effect of prohibiting low water-using plants as a replacement of existing turf.

These new laws also prohibit the association from imposing a fine or assessment against a member 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 prohibition on fining took effect on July 21, 2014, as an urgency statute. This prohibition against imposing a fine or assessment does not apply to an association that uses recycled water for landscape irrigation.

These new laws also provide that a provision of the governing documents is void and unenforceable if it requires pressure washing the exterior of a separate interest and any exclusive use common area appurtenant to the separate interest during a state or local government declared drought emergency. "Pressure washing" means the use of a high-pressure hose and potable water to clean surfaces, such as buildings, vehicles, and concrete surfaces, and to remove loose paint. This prohibition on pressure washing took effect on September 18, 2014, as an urgency statute.

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PRACTICE TIP: The association cannot require watering but may require the yard to be kept neat and trimmed. Consider adopting guidelines for water-saving landscape materials and artificial turf. And, no, the association does not have to allow artificial turf. Remember, the association cannot require power washing during declared drought emergencies.

### USE OF PROPERTY

#### 7. Coachella Valley Water District: Non-Potable Water Use. AB 1896

Existing Water Code sections 32601 and 32602 and the County Water District Law govern the operations of the Coachella Valley Water District. Existing law prohibits a person or local public agency from using, within the district's service area, water from any source that is suitable for potable domestic use for non-potable uses for cemeteries, parks, highway landscaped areas, new industrial facilities, and golf course irrigation if the board of directors of the district determines that suitable non-potable water is available and other requirements are met. This new law prohibits the use of potable domestic water for landscaped common areas of residential developments maintained by a homeowner's association if the board of directors of the district determines that suitable non-potable water is available.

#### 8. Protections for Allowing Use of Property for Recreation Purposes. SB 1072

Civil Code section 846 provides that an owner of real property owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions to persons entering for a recreational purpose, with certain exceptions. This change to section 846 is expanded to include private noncommercial aviation activities as a "recreational purpose."

#### 9. Property Maintenance - Rats. SB 1167

Existing law requires a person who possesses a place that is infested with rodents to immediately exterminate and destroy the rodents. This bill amends the law to require that the person also abate conditions that are causing the infestation and also authorizes the State Department of Public Health, the county board of supervisors, or a city to abate conditions that are causing the infestation. Whenever the enforcement agency determines that there is an infestation, the enforcement agency's abatement order must include abatement of any other specified conditions that the agency determines to have caused the infestation.

PRACTICE TIP: The city or county can help if a home has a rat infestation.

#### 10. Smoking Prohibition in Family Day Care Homes. AS 1819 10.

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Currently the law prohibits tobacco smoking in a private residence that is licensed as a family day care home during its hours of operation as a family day care home. This change to the law prohibits smoking at any time, not just during the hours of operation of the home. A person who willfully or repeatedly violates a provision of the act is guilty of a misdemeanor.

### 11. Information Regarding Inspections of Child Day Care Facilities. AS 2621

This new law requires the State Department of Social Services to post licensing information on its Internet website for child day care facilities, including, among other things, the number of citations, substantiated and inconclusive complaint inspections, and noncompliant inspections during the preceding five-year period. The bill would require the department to update this information on at least a monthly basis.

### 12. Solar Energy. AS 2188

This new law amends Civil Code section 714 and Government Code section 65850.5 to further promote and encourage the use of solar energy systems. This new law requires a city or county to adopt, on or before September 30, 2015, an ordinance that creates an expedited, streamlined permitting process for small residential rooftop solar energy systems. This new law also prohibits a city or county from conditioning the approval of any solar energy system permit on approval of that system by the association.

Existing law prohibits any provision of a governing document from effectively prohibiting or restricting the installation or use of a solar energy system but allows reasonable restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance. The new law changes the definition of the term "significantly."

For solar domestic water heating systems or solar swimming pool heating systems:

- Existing law: "Significantly" means an amount exceeding 20% of the cost of the system or decreasing the efficiency of the solar energy system by an amount exceeding 20%;
- New law: "Significantly" means an amount exceeding 10% of the cost of the system, not to exceed \$1,000, or decreasing the efficiency of the solar energy system by an amount exceeding 10%

For photovoltaic systems:

- Existing law: "Significantly" means an amount not to exceed \$2,000 over the system cost or a decrease in system efficiency of an amount exceeding 20%;
- New law: "Significantly" means an amount not to exceed \$1,000 over the system cost or a decrease in system efficiency of an amount exceeding 10%.

Existing law requires an application for approval for the installation or use of a solar energy system to be processed and approved in the same manner as an application for

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an architectural modification to the property and requires the association to notify the applicant in writing within 60 days of receipt of the application if the application is denied. This new law requires the association to notify the applicant in writing within 45 days of receipt of the application if the application is denied.

**PRACTICE TIP:** Remember to calendar the 45 day deadline when receiving an application for solar energy systems. Adopt rules to address solar panel installations.

### 13. Service of Process in a Gated Community. AB 2256

Existing Code of Civil Procedure section 415.21 requires that when a gated community is staffed by a guard or other security personnel assigned to control access to the community, existing law requires that a process server be granted access to the gated community for a reasonable period of time to perform service of process or service of a subpoena, upon identifying to the guard the person to be served. This new law removes the requirement that a process server identify the person to be served to the guard before being granted access to the gated community.

**PRACTICE TIP:** Notify any gate staff that they cannot require the identity of the person being served. The process server can be required to present their identification and qualification as a process server.

### 14.

### Fire Prevention Fees in State Responsibility Areas. AB 2048

Existing Public Resources Code sections 4211 and 4212 require the State Board of Forestry and Fire Protection to establish a fire prevention fee in an amount not to exceed \$150 to be charged on each structure, defined as a building used or intended to be used for human habitation, on a parcel that is within a state responsibility area. This new law deletes the definition of "structure" and instead uses "habitable structure," which is defined to mean a building that contains one or more dwelling units that can be occupied for residential use.

**PRACTICE TIP:** This helps condominium communities who are being charged the fee for every unit. Now they will be charged per building, the same as apartment buildings.

## CONTRACTORS, VENDORS & EMPLOYEES

### 15. Common Interest Development Managers. SB 1243

Currently, the Business and Professions Code defines "common interest development manager" and regulates the practice of common interest development managers. Those provisions were only effective until January 1, 2015, but this new law amends Section 11506 to extend the effectiveness of those provisions until January 1, 2019.

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### 16. Paid Sick Days for Employees. AB 1522

This new law enacts the Healthy Workplaces, Healthy Families Act of 2014 to provide that an employee who, on or after July 1, 2015, works in California for 30 or more days within a year from the commencement of employment is entitled to paid sick days to be accrued at a rate of no less than one hour for every 30 hours worked. An employee is entitled to use accrued sick days beginning on the 90th day of employment. The employer may limit an employee's use of paid sick days to 24 hours or 3 days in each year of employment. An employer may not discriminate or retaliate against an employee who requests paid sick days. Employers must satisfy specified posting, notice and record keeping requirements.

### 17. Contractors. 5B 315

Changes to Business and Professions Code sections 7011.4, 7027.2, 7028, and 7110.5 make it a misdemeanor for a person to engage in the business of, or act in the capacity of, a contractor if the person is not properly licensed, or if the person's license is suspended for violations. In addition, a person who is not licensed as a contractor may advertise for construction work or a work of improvement only if the aggregate contract price is less than \$500 and the person states in the advertisement that he or she is not licensed.

**PRACTICE TIP:** Use licensed and insured contractors!

### 18. Private Security Services. AB 2220

The Private Security Services Act provides for the licensure and regulation of private patrol operators by the Bureau of Security and Investigative Services in the Department of Consumer Affairs. Existing law requires a private patrol operator employing a security guard who carries a firearm to maintain an insurance policy that provides minimum limits of insurance of \$500,000 for anyone loss due to bodily injury or death and \$500,000 for anyone loss due to injury or destruction of property. These policy limits will increase to minimum limits of insurance of \$1,000,000 for any one loss due to bodily injury, including death, or property damage, or both. If a licensee fails to maintain sufficient insurance or provide proof of insurance as required, the license shall be automatically suspended.

This new law would establish procedures, operative July 1, 2016, allowing a Private Patrol Operator (PPO) business entity to be the registered owner of a firearm. The law requires a security guard, within 48 hours of a request by the PPO, separation of employment, or revocation of the security guard's firearm qualification card, to return the assigned firearm to the PPO. The law provides that the failure of a security guard to return an assigned firearm as required is a misdemeanor.

**PRIVACY**

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### 19. Personal information: Privacy. AB 1710

An act to amend Civil Code sections 1798.81.5, 1798.82, and 1798.85 relating to personal information privacy. Existing law requires a person or business conducting business in California that owns or licenses computerized data that includes personal information to disclose a breach of the security of the system or data following discovery or notification of the security breach to any California resident whose un encrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. Existing law also requires a person or business that maintains computerized data that includes personal information that the person or business does not own, to notify the owner or licensee of the information of any breach of the security of the data immediately following discovery. Existing law requires a person or business required to issue a security breach notification to meet various requirements, including that the security breach notification provide specified information.

This new law requires, with respect to the information required to be included in the notification, if the person or business providing the notification was the source of the breach, that the person or business offer to provide appropriate identity theft prevention and mitigation services, if any, to the affected person at no cost for not less than 12 months if the breach exposed or may have exposed specified personal information.

Existing law requires a business that owns or licenses personal information about a California resident to implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure. This new law expands these provisions to businesses that own, license, or maintain personal information about a California resident.

Existing law prohibits a person or entity from publicly posting or displaying an individual's social security number or doing certain other acts that might compromise the security of an individual's social security number, unless otherwise required by federal or state law. This new law prohibits the sale, advertisement for sale, or offer to sell an individual's social security number.

**PRACTICE TIP:** If the association or management maintains social security numbers, bank account numbers or other similar information on members, that information must be protected and any breaches reported to the members.

### 20. Constructive Invasion of Privacy: Liability. AB 2306

Currently, under Civil Code section 1708.8, a person is liable for constructive invasion of privacy when a person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression, through the use of a visual or auditory enhancing device, of another person engaging in a personal or familial activity under circumstances in which the other person

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had a reasonable expectation of privacy. Existing law subjects a person who commits a constructive invasion of privacy to specified damages and civil fines.

The amended law expands a person's potential liability for constructive invasion of privacy, by removing the limitation that the person use a visual or auditory enhancing device, and would instead make the person liable when using any device to engage in the prohibited activity.

**PRACTICE TIP:** If the association has surveillance cameras, make sure residents know where they are located so residents are aware that there is no privacy in that area.

### MISCELLANEOUS

#### 21. Notaries Public. 5B 1050

Civil Code sections 1189 and 1195 and Government Code section 8202 are amended to change the form of the acknowledgments and jurats.

**PRACTICE TIP:** Make sure to update any forms with the new jurats. This would mostly apply to associations that have form license and indemnity agreements that it uses for certain changes to property by the members.

#### 22. Definition of "Director." AB 2755

Corporations Code section 5047 is amended to clarify that the meaning of "director" does not include a person who does not have the authority to vote as a member of the governing body.

**Handouts:** None

**Next Meeting** – Thursday, April 16, 2015 at the Cathedral City – City Hall

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Tom Tousignant, Recorder