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Community Association Law ♦ Construction Defect Representation

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Legal Update Newsletter

April 2011

Welcome to the latest edition of **Silldorf & Levine, LLP's Legal Update Newsletter!**

If we can provide you or your association with our Legal Reference Guide or answer a legal questions regarding community association law, please contact:

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Silldorf & Levine, LLP

California's Preeminent Construction Defect Law Firm

The Power of Adjournment

Homeowner associations are continually faced with failing to satisfy their quorum requirements for annual and special meetings. This failure persists, despite the ability for members to vote via a mail-in ballot. Failure to meet the quorum requirement forces the association to adjourn their meeting to a later date and creates a delay in decision making. Associations can utilize meeting adjournment to help with this problem.

Association bylaws often include a quorum reduction that allows for a reduced number of members to satisfy an associations' quorum requirement at the adjourned meeting. Generally, most bylaws require a minimum number of days to pass before the adjourned meeting can take place. A quorum reduction makes it more likely an association will meet their quorum requirement.

Also, according to Corporations Code § 7511(d), unless otherwise stated in the bylaws, if at the meeting where the quorum requirement was not met, the time and place of the adjourned meeting was announced, notice to members regarding the time and place of the adjourned meeting is not required. This saves an association time and money by not having to create and mail out updated notices to their members.

Although the failure to meet quorum requirements is not ideal, associations should be aware of alternative procedures that may assist in preventing such problems in the future. If you have any questions or concerns involving this issue please don't hesitate to contact our office.

Notice Requirement Prior to Filing A Construction Defect Lawsuit

Strict procedures must be followed when an association files a civil action against the developer for damage to common areas, or separate interests that the association is obligated to repair.

Under California Civil Code § 1368.5, an association must provide written notice to each member of the association that appears in the association records. The notice must specify three things: (1) that a meeting will take place to discuss problems that may lead to the filing of a civil action; (2) the options, including civil actions, that are available to address the problems; and (3) the time and place of this meeting. To be in compliance with § 1368.5, the homeowners association must give this written notice to its members no later than 30 days prior to the association's filing of the civil action.

In the event the association has reason to believe the applicable statute of limitations will expire before the filing of the civil action, the association may file the action prior to notification, and then notify their members within 30 days after filing the action.

If you have any questions or concerns involving association procedures in filing or potentially filing a construction defect lawsuit, please contact us at (858) 625-3900 and ask to speak with Christina Ciceron, Esq.

Developer vs. Homeowners Association Arbitration Provisions

Generally, an association is bound by Covenants, Conditions and Restrictions (CC&Rs). The CC&Rs are created by the developer of the common interest development. Recent case law however, has provided relief to associations such that it may not be bound by certain provisions in the CC&Rs.

In the case *Pinnacle Museum Tower Association v. Pinnacle Market Development*, the Association filed suit against the developer on behalf of its members for alleged construction defects to the common areas of the property. The developer claimed the action should be resolved through an arbitration hearing, rather than by jury trial, in accordance with the "arbitration clause" found in the CC&Rs. The Court held that the Association was not bound by the arbitration clause in the CC&Rs and had a right to a jury trial.

How did the Court come to this conclusion? In order for an association to be bound by a developer's restrictions in the CC&Rs, there must be an "actual agreement" between the parties. In the *Pinnacle* case, despite the existence of an arbitration clause in the CC&Rs, the Association could not be held to the terms because it had never agreed to the terms the developer drafted that waived the Association's right to trial by jury.

The Court also examined whether an arbitration clause waiving the right to a jury trial was unconscionable. An agreement can be unconscionable when: (1) there is inequality of bargaining power; (2) agreed upon terms are hidden within the document; and (3) a provision is unfairly one-sided. If any of these conditions are present, a provision of the CC&Rs may be unenforceable as was the case in *Pinnacle*.

If an association is considering litigation regarding developer related construction defects, it is important to review the CC&Rs for litigation procedures. Some procedures may be enforceable and some may not be enforceable. The only way to know is to get a legal opinion. Our firm will meet with you (manager and/or Board of Directors) at no cost and without obligation.

Retainer Contracts & Hourly Fee Agreements for Community Association Legal Services

Sillardorf & Levine offers a variety of general counsel legal service options for your association clients including hourly agreements and retainer contracts. We can draft a unique fee agreement to provide specialized legal needs for your association.

Our firm also represents homeowner associations in construction defect actions. We handle most construction defect matters on a contingency basis. If your association has a construction defect concern, we can provide a no cost evaluation for your association.

About Our Law Firm

Sillardorf & Levine, LLP is a full service community association law firm with offices in San Diego and Orange County. Our law practice serves all of Southern California. The attorneys at Sillardorf & Levine, LLP have combined legal experience of more than 75 years. During that time, we have successfully represented hundreds of homeowners and community associations in a variety of legal matters.

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Free Consultation

If you believe you or one of your homeowner association clients has a construction defect, our firm is available to help. Please contact our office at 1-800-811-5874 and ask to speak with Christina Ciceron, Esq. We are available for a no cost/no obligation site inspection of the property. We also provide a no cost/no obligation follow-up inspection with an expert if warranted in the law firm's opinion. Please be advised that any expert needs to be retained by or under the direction of an attorney and not independently otherwise the information of the expert is not privileged or confidential. If you are a potential client with a potential construction defect that is approaching a statutory deadline, we can prepare a FREE Calderon or SB 800 Notice to stop the running of your statute of limitations. Please call us at 1-800-811-5874. We look forward to assisting you!