

To: All homeowners in the Devon Hills Community

From: The Devon Hills Community Association

Re: A Planned Unit Development Q & A

We have found that there are many times homeowners have questions and are not able to find the answers as quickly as they would like. The following information should prove to be helpful in answering any questions you may have in regards to our home owner association. You can scroll down the pages until you find a Q & A that has the pertinent information.

### **What is a planned unit development?**

Projects with only detached homes are almost always planned developments. The most significant difference between condominium projects and planned developments is the distinct nature of the individually owned and group owned portions of the property. The individually owned portion of a planned unit development is called the lot and typically consists of a piece of land and everything on it. The common area in a planned development is usually streets, open space, and recreational facilities. (Condominium projects) and planned unit developments differ with respect to the form of joint ownership of common area. Title to at least some portion of the common area in a condominium must be held by the owners in percentage shares, and, in most condominiums, title to all of the common area is held this way. By contrast, title to the common area in a planned development is almost always held by the homeowners association.

### **What is the subdivision map plan?**

The terms “subdivision map” as well as the less common terms “final map” and “parcel map”, describe types of drawings that illustrate how a property is divided into units or lots. These drawings show the exact location and boundaries of each unit or lot, and of the common area. They are prepared by licensed land surveyors, reviewed by government agencies, and recorded with the county at the time a condominium project or planned development is formed. Once recorded, the drawings become connected to every deed and mortgage on every unit or lot within the property, and this connection makes changing the map or plan very difficult.

### **Why are the governing documents binding?**

The law provides that the use of real estate can be restricted when a document describing the restrictions is recorded with the county where the property is located. The restrictions “run with the land”, meaning they apply to each owner who acquires the property after the restrictions are recorded. The map or plan, and the CC&Rs, are different types of recorded restrictions which “run with the land”, and that is why they bind each owner of a unit or lot. The Articles, Bylaws, and Rules are not recorded, but derive their binding power from the recorded CC&Rs. With the Articles and Bylaws, this binding power arises because the CC&Rs makes each owner a member of the homeowners association, and the law makes each member of the association subject to the association’s Articles and Bylaws. With the Rules, the binding power arises because the CC&Rs specifically empower the association to enact additional binding restrictions.

### **What if a provision of the governing documents conflicts with law?**

The resolution of a conflict between the governing documents and the law depends the intent of the governmental body that enacted the law. Where the apparently conflicting law contains a phrase like

“notwithstanding the provisions of the Declaration” or “notwithstanding anything to the contrary in the governing documents” in its text, the intent to override is clear and the law controls. Where the apparently conflicting law contains a phrase like “unless otherwise provided in the Declaration” or “subject to the provisions of the governing documents” in its text, the intent not to override is clear and the governing document provision controls. Where the apparently conflicting law contains no clear indication of whether it is intended to supersede conflicting provisions in governing documents, intent must be determined from the language and context of the law, and from historical records of its enactment. Consult an attorney in these cases.

### **What is in the Declaration of Covenants, Conditions and Restrictions (sometimes called simply the “Declaration” or the “CC”)?**

CC&Rs describe the rights and obligations of the homeowners association and of each owner. CC&Rs are recorded with the county recorder of the county where the property is located, and automatically bind anyone who becomes an owner of the property after the CC&Rs are recorded. CC&Rs vary widely in content and length, but usually cover the following topics:

- The boundaries of the common area and of each unit or lot;
- The owner usage restrictions, typically including occupancy limitations, pet regulations, and alteration controls;
- The maintenance responsibilities of the association and the individual owners;
- The allocation of association operating costs among the owners, and the mechanism for collecting owner payments;
- The insurance requirements for the association and each owner;
- The dispute resolution procedure; and
- The rights and protection of mortgage lenders.

CC&Rs are required for all condominiums and planned developments. They are prepared by the developer’s attorney, reviewed by a government agency (unless the project has fewer than five units or lots), and recorded with the county at the time a condominium project or planned development is formed.

### **What is in the Articles of Incorporation and the Bylaws?**

The Articles of Incorporation or “Articles” are usually short and often contain only the name of the homeowners association, the name of the association’s initial agent for the service of process (the person authorized to receive legal notices), and a statement that the association is a nonprofit mutual benefit corporation. Sometimes the Articles also include language about voting, directors, amendments, and dissolution of the association. Articles are required only when an association is incorporated. (Unincorporated associations sometimes have Articles of Association, but these are not required.) . Articles are prepared by the developer’s attorney, reviewed by a government agency (unless the project has fewer than five units or lots), and filed with the secretary of state. For additional information, see Corporations Code §§7130-7132.

The Bylaws describe the mechanics of association decision making and management. Bylaws vary widely in content and length, but usually include the following:

- Numbers and selection methods for officers and directors;
- Notice, meeting and voting procedures for owner and board decisions; and
- Association record keeping and reporting requirements.

Although Bylaws are common for both incorporated and unincorporated associations, they are required only for certain incorporated associations. Bylaws are prepared by the developer's attorney and reviewed by a government agency (unless the project has fewer than five units or lots) at the time a condominium project or planned development is formed. But unlike Articles and CC&Rs, Bylaws are not recorded or filed with any government agency, and this makes them easier to change

### **How do the HOA Rules relate to the other governing documents?**

The CC&Rs usually empower the homeowners association to adopt Rules, and give the Rules the same binding power as the other governing documents. The Rules often provide usage restrictions relating to alterations, signage, waste disposal, parking, pets, and recreational facilities. Where the same topics are discussed in the CC&Rs, the Rules may add to or explain the CC&Rs but cannot conflict with them. Association Rules are usually enacted after some of the units or lots have been sold and the owners have taken control of the association. They are not subject to any governmental review and do not need to be filed or recorded with any governmental agency

### **What if a provision of the governing documents seems unreasonable or unfair?**

Provisions of governing documents are upheld unless they are arbitrary, impose burdens on some residents that substantially outweigh their benefits to other residents, or violate fundamental public policy. Consult an attorney if a provision of the governing documents does not seem to meet these standards

### **Who owns the common area?**

Title to common area can be held by the homeowners association or by the owners in percentage shares as "tenants in common". The decision is made by the developer at the time the governing documents are prepared, and is very difficult to change later. To determine who owns the common area in an association, refer to the CC&Rs. The method of common area ownership has no significant consequences in a properly insured association.

### **Must an owner provide the HOA with access to his/her home?**

Most CC&Rs state that the homeowners association has the right to enter any unit or lot whenever necessary to fulfill the association's duties. Among the duties that would justify entry is common area maintenance, and verification of an owner's compliance with owner maintenance requirements and alteration restrictions, and pet rules. Often, the CC&Rs will require that the association provide advance notice of the entry except in an emergency. When the CC&Rs are silent on these issues, both the right of entry, and the requirement for advance notice, would be implied.

### **Do HOA decisions need to adhere to any standards?**

Each homeowners association decision must adhere to the following standards:

- It must be within the scope of the association's authority under the governing documents and the law;
- It must be based upon a reasonable investigation;
- It must be intended to serve the best interests of the association and the owners as a group;

- It must be made in good faith; and
- It must be reasonable in light of the information available at the time the decision is made.

Additional standards may apply for specific types of decisions such as owner discipline or alteration approvals. Where the association has formally established policies or procedures, they must be

uniformly applied and followed. But the fact that the association has permitted or approved a certain activity or alteration by a particular owner at one time does not mean that the association must permit or approve that same activity by the same or a different owner at a later time.

### **How can an owner change or challenge an HOA decision?**

The owner should begin by attempting to discuss the matter with the president, a director, committee chair or property manager. If this attempt does not yield satisfactory results, the owner should attend a board meeting or call an owner meeting to discuss the problem with the other owners. If the owner wishes to pursue the matter further, he/she should consult an attorney. See Civil Code §1357.100 et. seq. regarding each owner's right to challenge new or changed Rules, and Civil Code §1378 (regarding appeals of alteration approval decisions.)

### **When the HOA needs to get legal advice in order to respond to an owner, can it charge the owner for attorney's fees?**

A homeowner's association is not entitled to recover its attorneys fees from an owner unless it prevails in a court proceeding or arbitration involving the enforcement of the governing documents

### **What records must the HOA maintain and how can owners access these records?**

The law imposes strict record keeping and reporting requirements on homeowners associations, and the governing documents often impose even more stringent requirements. Some of the records and reports must be distributed to the owners automatically on a prescribed schedule, and the remainder must be available to owners upon request. The list of items the association is required to distribute with the budget changes frequently, so the following summary should be used for general guidance only:

#### **Category (1)—Financial Information**

Budget: The association must prepare a *pro forma* operating budget each year which projects the income and expenses for the upcoming year, and the amount needed in reserve for future upkeep and eventual replacement of the major parts of the project which the association maintains.

Annual Report: The association must prepare a financial report each year which includes an income and expense statement, a balance sheet, a statement of changes in financial position, and notification of the location of the owner name and address list. If the association has collected less than \$75,000 during the year, it must notify all owners that the annual report is available upon request; if the association has collected less than \$75,000 during the year, it must retain an accountant to review the report and then automatically provide it to all owners.

## **Category (2)—Decisions**

- Meeting Minutes: The association must prepare minutes of each owner and board meeting, and provide copies of the minutes to any owner upon request. A notice that the board meeting minutes are available for review must be included with the *pro forma* operating budget each year.
- Monetary Penalties: If the association imposes monetary penalties or fees, it must provide a schedule to all owners each time a penalty or fee is established or adjusted.

## **Category (3)—Membership**

- Address List: The association must maintain a list of owner names and addresses. The list need not include telephone numbers. Owners must be notified of the location of the list as part of the annual report, and a copy of the list must be provided to owners upon request.

## **How are HOA powers distributed between the owners, the board, the committees, the officers, and the manager?**

In general, the distribution of power and authority within the homeowners association is determined by the governing documents, but the law contains some restrictions on how the governing documents can distribute this power. The law presumes that most association power and authority will be exercised by the board without the direct involvement of the owners. Where the governing documents simply give the association power to do or approve something without specifically requiring owner approval, the power can be exercised by the board without owner approval.

In practice, most governing documents also require owner approval for a variety of major decisions including changing the items which the association is responsible to maintain, changing the owners' assessment percentages, changing the unit or lot boundaries, and imposing leasing or resale restrictions.

The board has complete control over all committees, officers and managers. This means that the board decides who will serve in these capacities, and what authority they will have, subject only to restrictions in the governing documents. The board retains the power to override the decision of any committee, officer and manager

## **Who can write checks and sign contracts for the association?**

The law states that the signatures of at least two directors, or of one officer and one director, must be required for withdrawals from the association reserve account(s). Withdrawal requirements for other association accounts are usually set in the governing documents, but if they are not, the requirements can be established by the board.

The decision of whether the association should enter into a particular contract is made by the board unless the governing documents require owner approval, or unless the board has delegated the decision to an officer, committee, or manager. The law is currently unclear regarding how many officers, and which officers, must sign the contract in order for it to be valid. Until this issue is settled by the courts, it is prudent to have the contract signed by two officers: (i) the president or vice president, and (ii) the secretary or chief financial officer.

The law provides that a contract signed by an officer can be binding even if there was never a proper association decision to enter into it. To avoid liability for non-approved contracts, the board should

exercise extreme care in selecting officers, and provide written notice to all of its vendors that no contract should be considered valid unless the vendor receives a board resolution authorizing the agreement.

## Owner Meetings and Decisions

### **What kind of notice is required for an owner meeting?**

Both regular and special owner meetings require a written notice to all owners. The notice must include the place, time and date of the meeting, a general description of the matters to be discussed, and, in cases where directors are to be elected, the names of those who have been nominated (if any) prior to the notice date. It may be mailed, hand delivered, or in some cases transmitted electronically. Posting the notice in the common area is not sufficient. If the notice is mailed by first class registered or certified mail, or if it is hand delivered, it must be given 10-90 days before the meeting; if it is mailed by any other method, it must be given 20-90 days before the meeting.

### **How many owners must be present for a quorum?**

The governing documents generally specify the minimum amount of owner voting power (the “quorum”) that must be present for decisions to be made at an owner meeting. In certain cases, participation through electronic means is the same as physical presence at the meeting. The law does not specify a minimum or maximum quorum requirement, but does provide that if the governing documents permit a decisions with less than a 1/3 quorum, the only matters that can be voted on while less than 1/3 of the voting power is present are those mentioned in the meeting notice. The law also provides that if the governing documents fail to specify a quorum requirement, it will automatically be set at 1/3 of the voting power.

### **What rules apply to owner meeting minutes?**

The law requires that the association prepare and maintain minutes of all owner meetings, and that these minutes be made available to owners for inspection on written demand at any reasonable time for any reasonable purpose. The governing documents usually provide that the secretary is responsible to prepare the minutes within a prescribed number of days following the meeting.

## Director Meetings

### **Who can call a board meeting?**

In general, the governing documents will prescribe the frequency of regular board meetings, but allow the board to established the exact time and place. The governing documents usually also provide that the time and place of a regular meeting can be changed, or a special meeting can be scheduled, by the chairman of the board (if any), the president, or a specified number of directors.

### **How many directors must be present for a quorum?**

The governing documents generally specify the minimum number of directors (the “quorum”) that must be present for decisions to be made at a board meeting. The law will not permit this number to be below 1/5 of the total number of directors, and also will not permit it to be below two. When the

governing documents do not specify a director quorum, a majority of directors shall be required for a quorum.

### **Are owners entitled to attend board meetings?**

Owners are entitled to attend all board meetings except executive sessions. The board is permitted to hold an executive session only to discuss litigation, contracts with non-owners, owner discipline (in which case the subject owner may attend), and personnel matters. If only part of the meeting will be an executive session, owners may attend the remainder. If the entire meeting will be an executive session, owners may not attend but are still entitled to advance notice

### **Must owners be permitted to speak at board meetings? Can their speaking time be limited?**

Owners must be permitted to speak at all board meetings except executive sessions, but the board may establish a reasonable time limit for owner speeches

## **Managers**

### **Must an HOA have a professional manager?**

Some governing documents require professional management, or state that an owner vote (or even the approval of mortgage lenders) is required to discontinue professional management. Absent these provisions, professional management is not required, but it is generally advisable, particularly for larger associations. The law allows any association to retain a professional manager.

### **What services do professional managers typically provide?**

Professional managers offer a wide variety of services to homeowners associations including accounting, budgeting, record keeping, assessment collection, bill payment, meeting coordination, and common area maintenance. Associations choose from among the services available, and enter into a contract with the manager describing the scope of work. The management contract should also include the fee, the duration of arrangement, and the circumstances under which the arrangement can be terminated early.

### **How is a professional manager selected?**

The board has the authority to select the manager and determine content of the management contract, but it may appoint a committee to make recommendations. Managers of homeowners associations are not required to be licensed but must provide an extensive disclosures to the association

### **What restrictions apply to a manager's handling of HOA funds?**

The law imposes stringent requirements on managers that handle homeowners association funds to prevent commingling and fraud.

## Budgets, Reserves, and Assessments

### **What is the difference between operating funds and reserve funds?**

The term “operating funds” describes money collected for annually recurring expenses such as insurance, management, common area utilities, and janitorial service. The term “reserve funds” describes money collected for the repair and replacement of major components of the property which the homeowners association maintains.

### **How are regular assessments or “dues” established and changed?**

Regular assessments must be based upon the funding needs projected in the budget. In general, the board is responsible for determining the amount of the regular assessments, but it can delegate this responsibility to an officer, committee, or professional manager provided the board retains final authority. Some governing documents require owner approval for changes in regular assessments. Even where the governing documents do not require owner approval, increases of 20% or more must be approved by a majority of owners. All owners must be notified of an increase in regular assessments by first-class mail 30-60 days before the increase takes effect.

### **What is a special assessment, and how is the amount and payment schedule established?**

A special assessment is an assessment for an association expense that was under-budgeted or not budgeted. It can be made payable in a single installment or in multiple installments. In general, the board has the power to impose small special assessments and to determine the payment schedule, but some governing documents require owner approval for all special assessments.

### **What is a personal reimbursement assessment and how is the amount established?**

A personal reimbursement assessment is an assessment against only one owner. The most common type of personal reimbursement assessment is one imposed to reimburse the association for a cost which is a specific owner’s individual responsibility under the governing documents. For example, if an owner or the owner’s guest or tenant damages the common area, the association could levy a personal reimbursement assessment for the repair cost. Another type of personal reimbursement assessment is one imposed as a fine or penalty. Fines and penalties can only be imposed if a schedule had been distributed to all owners in advance.

## Assessments Disputes and Collection

### **What can an owner do if he/she disagrees with the amount of an assessment?**

Under most circumstances, if an owner disagrees with the amount of an assessment, he/she can pay it under protest and then challenge the assessment through a court action or arbitration. The exact requirements for challenging an assessment in this way are described in Civil Code Section 1366.3. If the owner does not follow these procedures, or simply does not pay the assessment, he/she may lose the right to challenge it and be subject to a collection action. For additional information, see Civil Code §§1354 and 1367.



### **What happens if an owner doesn't pay an assessment?**

If an owner does not pay a regular or special assessment, he/she is subject to a variety of fees and penalties. If an owner does not pay a personal reimbursement assessment levied for any other purpose, the association must collect its funds through a judicial process. *The association is required to have a written statement of policy for collecting delinquent assessments, and to distribute that statement to all owners annually. The policy should require immediate and aggressive action every time an assessment is delinquent.* This approach avoids the awkwardness of responding to owners who request additional time to pay, and creating a perception of leniency or inconsistent treatment. Moreover, in cases where the delinquent owner has also defaulted on his/her mortgage, quick action decreases the likelihood that a mortgage foreclosure will prevent the association from collecting the unpaid assessment(s).

## **Handling Association Funds**

### **What accounting procedures are required for HOAs?**

The law requires that a homeowners association segregate its reserve funds from its operating funds and perform a quarterly financial review that includes:

- A reconciliation of the operating and reserve accounts;
- A comparison of the actual reserve revenue and expenses to the budgeted reserve revenues and expenses;
- An Analysis of the bank statements for operating and reserve accounts; and
- An Analysis of the income and expense statements for operating and reserve accounts.

Some governing documents increase the scope or frequency of this review.

The law also requires preparation and distribution of a budget and financial report each year as described under the heading "Association Reporting Requirements" above, and a reserve study every three years.

Reserve funds can be used only for repair, restoration, replacement or maintenance of the portions of the property that the association is obligated to maintain, or litigation involving these items. In some circumstances, the association can borrow reserve funds to cover operating expenses, but the reserve funds must generally be replenished within one year.

The board is responsible for fulfilling the association's accounting responsibilities, but it can delegate this responsibility to an officer, committee, or professional manager provided the board retains final authority.

### **Can an owner withdraw his/her share of HOA funds when he/she sells?**

No owner is entitled to withdraw funds from the association in connection with the sale of his/her unit or lot.

## Maintenance Obligations

### **What portions of the property are individual owners obligated to maintain?**

In most planned developments, individual owners are obligated to maintain the following elements of the property:

- All interior elements and areas of the homes;
- All portions of the plumbing, electrical, heating and air conditioning systems serving the homes;
- All foundations and structural elements of the homes (but not roofing and siding);
- All glass, screens, moving frame, and hardware of windows; and
- All doors, door frames, and door hardware; and
- All patios and decks (except exterior paint on decks).

### **What standards apply to owner maintenance, and what happens if an owner fails to meet them?**

The governing documents usually include a minimum standard for owner maintenance such as the statement “each owner shall maintain the elements of the property for which he/she is responsible in a condition which does not impair the value or desirability of other units or lots”. Most governing documents also provide that if an owner fails to satisfy his/her maintenance requirements, the association may do so and assess any related expense against the responsible owner as a personal reimbursement assessment. It is advisable (and required by some governing documents) that the association provide a written warning, an opportunity to correct the problem, and a board hearing, before undertaking a repair for an owner.

### **What portions of the property is the HOA obligated to maintain?**

The allocation of maintenance responsibilities between the individual owners and the association is usually determined by the governing documents, and varies widely from project to project. In most planned developments, the association is obligated to maintain the following elements of the property:

- All common area;
- All exterior surfaces of homes, including roofing, siding, trim, decks, balconies, exterior stairs, railings, window frames, and door frames;
- All fences and exterior, nonstructural walls;
- All landscaping on each lot; and
- All fire protection alarms and equipment except smoke detectors within homes.

### **Is the HOA required to perform regular inspections of the portions of the property it maintains?**

A homeowners association is required to regularly inspect the portions of the property it maintains as part of the reserve study process.

### **Who is responsible for damage cause by a negligent or intentional action or inaction?**

Each Owner is responsible for maintenance necessitated by the negligent or intentional action or inaction of his/her guests, employees and contractors, the occupants of his/her unit (including tenants), and the guests, employees and contractors of these occupants. The association is responsible for maintenance necessitated by the negligent or intentional action or inaction of its employees and contractors.

## Improvements and Alterations

### **Under what circumstances does an owner need HOA approval for an improvement or alteration?**

#### **Planned development governing documents usually require association approval for improvements and alterations which:**

- Change any common area;
- Involve the construction of new structures or additions, including fences, walls, pools, spas, balconies, patios, patio enclosures, screens, tents, awnings, window air conditioners, exterior shutters, exterior antennas, or exterior wiring;
- Change the appearance of the exterior elements of existing structures including paint, siding and roofing;
- Change the appearance of existing landscaping visible from the common area or other lots;
- Obstruct the view from another lot or from the common area; or
- Interfere with the water supply, sewage or drainage systems.

### **Can the HOA legally restrict the display of a sign by an owner?**

Since a condominium project or planned development is private property, there is no constitutional protection for freedom of expression. This means that sign restrictions and prohibitions in governing document provisions are generally valid and enforceable. The only types of signs that cannot be prohibited are signs advertising a unit or lot for sale or rental, including related signs providing directions to the property, and the owner or agents name, address and telephone number. The association may impose reasonable restrictions on the location, size, dimensions, and design of these signs. No restrictions can be imposed on the display of the U.S. flag.

### **What is the procedure for obtaining HOA approval for an improvement or alteration?**

Most governing documents contain detailed procedures for the submittal, consideration, and approval of proposed alterations and improvements.

### **What standards and principles must the HOA follow in approving or disapproving an alteration or improvement?**

Homeowners associations are granted the same wide latitude ordinarily given government agencies in their decision making. It is appropriate for a homeowners association to base its decision regarding a

proposed alteration or improvement on subjective criteria provided that the decision is:

- Based upon a reasonable investigation;
- Intended to serve the best interests of the association and the owners as a group;
- Reasonable in light of the information available at the time the decision is made;
- Fair and non-discriminatory;
- Made in good faith; and
- Within the scope of the association's authority under the governing documents and the law.

The fact that the association has permitted or approved a certain activity or alteration by a particular owner at one time does not mean that the association must permit or approve that same activity by the same or a different owner at a later time.

### **What happens if owner makes alterations or improvements without required HOA approval?**

When an owner begins alterations or improvements without required association approval, he/she is subject to a variety of penalties under the governing documents and the law. At a minimum, the association can order the owner to immediately cease all work and restore any altered areas to their original state. If the owner does not comply, the association can perform the restoration and assess the costs against the owner. The board has the power to undertake these actions, but may delegate responsibility to an officer, committee, or professional manager provided the board retains final authority. If the association does not act, it may find it more difficult to enforce similar restrictions in the future.

## Property Insurance

### **Who is responsible for insuring the homes and the common areas for property damage?**

In planned developments, the governing documents usually require the association to insure all portions of the property which it is obligated to maintain.

### **Are there minimum requirements for the amount of property insurance that must be carried?**

The law does not require a particular amount or type of property insurance. Most governing documents include a minimum insurance requirement by stating that the limits of coverage shall not be less than the full current replacement cost of the structures. In other cases, the documents allow the board to determine the appropriate amount of insurance. Regardless of what the documents say, the board is empowered to exceed any minimum insurance requirement, and must use prudent business judgement in determining the amount and type of insurance.

### **What happens if there is not enough property insurance to cover repair costs?**

In general, when insurance proceeds are insufficient to pay repair costs, the association must levy a special assessment to cover the shortfall.

## Liability and Liability Insurance

### **Under what circumstances can HOA directors and officers be held liable for damages resulting from their service?**

The law provides that a volunteer director or officer cannot be held liable for damages resulting from his/her service to the association if he/she performs his/her duties (i) in good faith, (ii) in a manner which he/she believes to be in the best interests of the association, and (iii) with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use in similar circumstances. At the risk of oversimplifying this standard, the idea is to protect honest directors and

officers from liability for mistakes unless their actions are self-interested or unreasonable. Directors are entitled to rely on information and opinions provided by the association's officers, committees, and hired experts.

**Under what circumstances can an owner be held liable for personal injuries that occur in another home or in the common area?**

If the association is incorporated, an individual owner can never be held responsible for personal injuries that occur in another owner's home or in the common area.

**Under what circumstances can an owner be held responsible for unpaid HOA debts?**

If the association is incorporated, an individual owner can never be held responsible for its debts. If the association is unincorporated, an individual owner can be held responsible only if the debts are unrelated to construction or repair.

**Who is responsible for insuring the HOA, the owners, the directors and the officers, for liability?**

The governing documents contain detailed liability insurance requirements. These typically mandate liability insurance for the association and its directors and officers. The owners are responsible for insuring against their own liability.

## Usage Restrictions

**Can the HOA limit the type or number of people who can live in a home?**

Statutory law explicitly prohibits housing discrimination based upon sex, race, color, religion, ancestry, national origin, and disability, and the California Supreme Court, finding that this list of protected classes is "illustrative rather than restrictive", has held that discrimination against children, and against families because they have children, is also prohibited. The law against discrimination is so broad that any occupancy restriction could be interpreted as discriminatory, including limits on the maximum number of occupants in a home. The only limitations that are clearly valid and enforceable are those that track the language of local and state health codes, and those that establish a project as senior citizen housing.

**Can an owner be forced to give up his/her pet?**

Governing documents which were created or amended after January 1, 2001 must allow each owner to keep at least one pet, and cannot prohibit an owner from keeping a pet he/she already has. Beyond this basic requirement, however, pet restrictions in governing documents are valid and enforceable, and an owner in violation of the restrictions can be forced to give up his/her pet.

**Who is responsible for a tenant's compliance with the governing documents?**

An owner is responsible for his/her tenant's compliance with the governing documents, and can be fined or penalized for the tenant's violations.

## Mortgages and Liens

### **What happens to the HOA and the other owners if an owner defaults on his/her mortgage?**

When an owner defaults on his/her mortgage, the lender is entitled to undertake a foreclosure procedure that ultimately results in an auction-like sale of the defaulting owner's unit. The lender has no recourse against the association or any other owner. The purchaser at the foreclosure sale must comply with all of the provisions of the governing documents, including the obligation to pay assessments. But a foreclosure sale purchaser is not responsible for any unpaid, pre-foreclosure assessments.

### **What is a mechanics lien, and what happens if one is placed against a unit or lot?**

The term "mechanics lien" describes a document that can be recorded with county government by an unpaid contractor or construction materials supplier. The recording of a mechanics lien relating to a particular property effectively prevents the owner from selling or refinancing the property without either paying the bill or establishing in court that the lien is invalid. When construction is performed for an individual owner on his/her condominium unit or planned development lot, the owner's contractors and construction materials suppliers can record mechanics liens against that owner's unit or lot, but cannot record mechanics liens against the common area or against any other owner's unit or lot.

## Disputes Between An Owner and the HOA

### **What are the procedures when an owner is entitled to notice and a hearing?**

It is important for each homeowners association to adopt a written notice and hearing procedure to be used in responding to alleged violations of the governing documents. The procedure should require:

- That the board provide a written notice to the owner specifying the nature of the problem and whether the matter might result in the levy of a personal reimbursement assessment or the imposition some other sanction;
- That the notice state a time, date and place at which the owner will have an opportunity to be heard by the board, and that the notice be given to the owner at least 15 days before the hearing date;
- That at the time of the hearing, the owner who committed the alleged violation, and any other interested party, shall have an opportunity to speak for a reasonable period of time (the length of which can also be specified); and
- That at the conclusion of the hearing, the board shall determine whether the violation has occurred, and whether to take action as permitted by the governing documents, and that the board's decision shall be final.

### **What is "internal dispute resolution", and when is it required?**

Civil Code §1369.510 requires that owners who have a dispute with the Association be given the opportunity to meet and confer with a representative of the Association governing body to attempt to resolve the dispute.

### **What are mediation and arbitration, and when are they required?**

Mediation and arbitration are methods of alternative dispute resolution (“ADR”). Their purpose is to save time and money by resolving disputes without going to court. Mediation involves a neutral person who attempts to help the parties resolve their dispute through discussion and compromise. A mediator does not make rulings or decisions. Consequently, mediation is always informal and non-binding. Arbitration involves a neutral person who acts as a surrogate judge. An arbitrator considers the position of each side, and the applicable law, then makes a ruling. The parties decide in advance whether the ruling will be binding or non-binding.

### **Who pays the attorneys fees in a dispute between an owner and the HOA?**

The law provides that in any legal action brought by an owner, or by a homeowners association, to enforce the provisions of the governing documents, the prevailing party shall be entitled to recover his/her attorney’s fees and costs, provided they are reasonable.

## **Disputes Between Individual Owners**

### **Is the HOA legally required to enforce the documents?**

In general, homeowners associations have discretion whether or not to enforce the governing documents. This discretion is removed, and enforcement mandatory, in instances where the governing documents explicitly require association action. But regardless of whether enforcement is mandatory, it is usually advisable for the association in act in order to avoid future enforcement problems.

### **How can an owner act independently to enforce the documents against another owner?**

Each owner in a condominium project or planned development has the right to independently enforce the governing documents against any other owner. The mechanism for enforcement is either the court system or alternative dispute resolution depending on the nature of the violation and the dispute resolution provisions of the governing documents. Owners interested in pursuing an enforcement action should consult an attorney.

### **Are there alternative dispute resolution requirements applicable to owner disputes?**

Alternative dispute resolution requirements imposed by law, and those imposed by the governing documents, are applicable to owner disputes.

### **About the Author**

DD. Andrew Sirkin is a recognized expert in fractional ownership and other co-ownership arrangements including shared vacation homes, TICs, equity sharing, co-housing, and legal subdivisions such as condominiums. His practice areas include transaction planning, offering materials, co-ownership agreements and CC&Rs, entity formations, regulatory approvals, fractional lending and mediation. From offices in San Francisco California, Evergreen Colorado, and Paris France, he has worked on projects all over the World, including most U.S. States, as well as Italy, France, Spain, Portugal, Ireland, Argentina, Nicaragua, Costa Rica, Panama, Dominican Republic, Nicaragua, Belize

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