2019 - 2020 EDITION

NEW LEGISLATION FOR 2020 AND 2019 CASES HANDBOOK

FIORE RACOBS & POWERS

A PROFESSIONAL LAW CORPORATION

THE RECOGNIZED AUTHORITY IN COMMUNITY ASSOCIATION LAW

NEW LEGISLATION FOR 2020
& 2019 CASES

PRESENTED BY

FIORE RACOBS & POWERS

A PROFESSIONAL LAW CORPORATION

NEW LEGISLATION

A. Amendments and additions to the Davis-Stirling Common Interest Development Act, Civil Code Section 4000, *et seq*. ("Act")

NOTES:

1. SB 323 (Wieckowski) Elections - Amends Civil Code Sections 5100, 5105, 5110, 5115, 5125, 5145, and 5200, and adds Civil Code Section 5910.1

Legislation implements changes to:

- Nomination for election of directors
- Permitting election by acclamation in very limited circumstances
- Disqualification of candidates
- Candidate qualifications
- Inspectors of election
- Association Election Materials
- Denial of ballots
- Distribution of election rules
- Member rights to inspect/copy records (e-mail addresses)

© 2019 FIORE, RACOBS & POWERS, A PLC

- Internal dispute resolution
- Amendment of election rules

Nominations

- New requirement – association must provide general notice of the procedure and deadline for submitting a nomination at least 30 days before any deadline for submitting a nomination. Individual notice required where member has requested it.

Election by Acclamation

- Permitting only for associations with 6,000 or more members, and then in limited circumstances (See also SB 754)

Disqualification of Candidates

- The statute imposes a requirement that an "association shall disqualify a person from nomination as a candidate for not being a member of the association at the time of the nomination"
- There is an exception permitting a developer to nominate a non-member candidate for election to the Board
- When title is held by a legal entity that is not a natural person, that legal entity may appoint a natural person to be a member for purposes of being a candidate for election to the Board

Candidate Qualifications

- Statute describes four "optional" qualifications that can be imposed on candidates via the Bylaws or Election Rules
  - Being delinquent in the payment of a regular or special assessment (but only if directors are also required to be current in the payment of regular or special assessments)

NOTES:

© 2019 Fiore, Racobs & Powers, A PLC

- Joint owner is already serving on the Board or is a candidate for election to the Board
- Being a member less than one year
- A past criminal conviction which prevents the association from purchasing fidelity bond coverage or terminates the association's existing fidelity bond coverage as required by Section 5806

Inspector(s) of Election

- New duties and standards
- Using the manager or management company is no longer option, nor can the association's CPA serve as the Inspector
- Required to make corrections to the "voter list" and "candidate registration list" within two business days of report of any error in either list to the association. Can no longer be an entity under contract with the association

Association Election Materials

- Statute describes "association election materials" as consisting of a candidate registration list and a voter list. The election rules will now need to require retention of these association election materials
- The voter list shall include the name, voting power and either the physical address of the voter's separate interest, the parcel number, or both
- The mailing address for the ballot must also be listed if it differs from the physical address or if the voting list only discloses parcel numbers instead of physical addresses
- Candidate registration list – new document/ concept. Associations will now need to provide, via general notice, the list of candidate names that will appear on the ballot at least 30 days before the ballots are distributed

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

- The association must permit members to inspect candidate registration list and the voter list at least 30 days before the ballots are distributed

Denial of Ballots

- Statute prohibits denial of a ballot to a member for any reason other than not being a member at the time when ballots are distributed

- Member voting rights can no longer be suspended for assessment delinquencies

- Prohibit denial of a ballot to a person with general power of attorney for a member

- Require the ballot of a person with general power of attorney for a member to be counted if returned in a timely manner

Distribution of Election Rules

- The election rules must now require the inspector(s) of elections to deliver, or cause to be delivered, at least 30 days before an election, to each member, the ballot or ballots and a copy of the election rules

- In lieu of distributing the actual election rules, these can be posted to a website and the address/link to that website would then need to be added, in at least 12 point font, along with the statement "The rules governing this election may be found here:"

Member Rights to Inspect/Copy (E-mail addresses)

- Statute adds "e-mail addresses" to the description of the membership list that every member has a right to inspect/copy for a proper purpose

- The "opt-out" provision of Civil Code section 5220 still exists

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

Internal Dispute Resolution

NOTES:

- An association shall not disqualify a person from nomination if the person has not been provided the opportunity to engage in internal dispute resolution

Amendment of Election Rules

- Associations will need to amend their election and voting rules to adopt the statutory requirements and provisions

- The election rules may not be amended in the 90 day period prior to an election

Timing of Elections

Associations must hold board elections at least every four years

2. **SB 754 (Moorlach) Election by Acclamation -** Amends Section 5100 of the Civil Code, and Section 7522 of the Corporations Code

Adds a requirement that an election be held at the end of a director's term and at least once every four years. Additionally, voting by acclamation is now possible for associations that have the same number of positions open as candidates (which is a determination to be made by the inspector of elections), as long as they also:

- have 6,000 or more units

- provided individual notice of the election and the procedure for nominating candidates at least 30 days beforehand, and

- association allows all candidates to run as nominated, other than the carve-outs listed in SB 323 regarding qualifications

It also amends Section 7522 of the Corporations Code, to add voting by acclamation for CIDs that are subject to this section so long as individual notice of election and nomination procedures was provided 30

© 2019 FIORE, RACOBS & POWERS, A PLC

days prior to the election, and references the new changes to Section 5110 regarding common interest developments over 6000 units

3. **SB 326 (Hill) Common interest developments** – Amends Section 6150 of, and adds Sections 5551 and 5986 to, the Civil Code, relating to exterior elevated elements

Civil Code Section 5551 applies only to condominium associations (buildings containing 3 or more multifamily dwelling units)

Provides the following definitions:

- **Associated Waterproofing Systems**: flashing, membranes, coatings and sealants that protect the load-bearing components of exterior elevated elements from exposure to water
- **Exterior Elevated Elements**: Load-bearing components together with the associated waterproofing system
- **Load-Bearing Components**: Extend beyond the walls of the building to deliver structural loads to the building from decks, balconies, stairways, walkways, that have a walking surface elevated more than 6 feet above ground level that are designed for human occupancy or use and that are supported by wood or wood-based products
- **Statistically Significant Sample**: Sufficient number of units inspected to provide 95% confidence that results are reflective of the whole, with a margin of error no greater than plus/minus 5%
- **Visual Inspection**: Inspection through the least intrusive means method necessary to inspect load-bearing components, including visual observation only or visual observation in conjunction with other technology (moisture meters, borescopes, infrared technology)

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

Inspections

- Requires that Condominium associations shall have a reasonably competent and diligent visual inspection to be conducted at least once every nine years with the first inspection to be completed by 1/1/2025 or if the building then the first inspection shall occur no later than 6 years following the issuance of a certificate of occupancy

- Inspections must be conducted by a licensed structural engineer or architect

- Inspection must be of a random and statistically significant sample of exterior elevated elements for which the association has maintenance or repair responsibility

- Inspection shall determine whether the exterior elevated elements are in general safe condition and performing in accordance with applicable standards

- Inspector shall generate a random list of the locations of each type of exterior elevated element. The list shall include all exterior elevated elements for which the association has maintenance or repair responsibility

- If during the visual inspection, the inspector determines that water or water vapor has passed into the associated waterproofing system, thereby creating the potential for damage to the load-bearing component, the inspector may conduct further inspection. The inspector shall exercise their best professional judgment in determining the necessity, scope, and breadth of any further inspection

Report

- After the visual inspection and any additional inspection, the inspector shall issue a report which contains the following information:

    - Identification of the building components comprising the load-bearing components and associated water proofing system

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

- Current physical condition of the exterior elevated elements, and whether the condition presents an immediate threat to the health and safety of the residents

- The expected future performance and remaining useful life of the exterior elevated elements

- Recommendations for any necessary repair/ replacement of the exterior elevated elements

- The report shall be stamped/signed by the inspector, presented to the board and incorporated into the Reserve Study

- If it is determined that the exterior elevated element poses immediate threat to the safety of the occupants, the inspector shall provide a copy of the inspection report to the association and to the local code enforcement within 15 days of completion of the report

  - Upon receipt of the report, the association shall take preventative measures immediately, including preventing occupant access until repairs have been inspected.

- Inspection reports must be maintained by the association for 2 inspection cycles as records of the association

- Local enforcement have the ability to recover their costs from the association

Impact on Associations: Must have inspection, report, establish sufficient reserves for inspection, additional inspections/tests if necessary, and repairs if necessary

Adds Civil Code Section 5986 regarding Construction Defect actions - associations must still meet requirements of Civil Code 6150 regarding member meeting and other pre-requisites place prior to filing civil action). The board shall have the authority to pursue a construction defect claim against a declarant, developer or builder ("DDB") notwithstanding provisions in the governing documents to the contrary unless the board believes the statute of limitations will

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

expire, then the board may proceed with the action. If the board includes members appointed by or affiliated with the DDB, the decision and authority to proceed with a construction defect claim shall be vested solely in the non-affiliated board members.

This section also makes invalid and unenforceable any provision in the governing documents which impose any precondition or limitation (such as a membership vote) on the board's authority to proceed with a construction defect claim against the DDB. However, if "nondeclarant affiliated members" of the association adopt a provision in the governing documents which impose limitations or preconditions on the board's authority to proceed with a construction defect claim, that provision may be valid and enforceable.

Applies to all governing documents, whether recorded before or after 1/1/20 and applies retroactively to claims initiated before 1/1/20, unless the claims have been resolved (settlement, final arbitration decision, final judgment)

Amends Civil Code Section 6150 to require prior to commencement of a construction defect action, an association must provide notice to its members of the action and sets forth what the notice must include (problem that may lead to filing an action, options to address problem, time, place of the meeting). SB 326 amends this section so that associations must provide notice of the problem that may lead to the filing of a civil action in addition to the potential impacts thereof and its members, including any financial impacts.

4. **AB-670 (Friedman) Accessory Dwelling Units** - Adds Section 4751 to the Civil Code with the intent to encourage the construction of accessory dwelling units and junior accessory dwelling units

Accessory Dwelling Units ("ADU") & Junior Accessory Dwelling Units ("JADU") are defined in Government Code Sections 65852.2 and 65852.22

NOTES:

© 2019 Fiore, Racobs & Powers, A PLC

- **ADUs** - Small structures, attached or detached, typically under 1200 square feet on the same parcel as the single family dwelling. Must have a kitchen and bathroom

- **JADUs** - A unit of no more than 500 square feet and within a single family structure. Typically a bedroom in a single-family home that has an entrance into the unit from the main home and an entrance to the outside from the JADU

The new ADU/JADU statutes apply only to planned developments, not condominium projects

An association restriction is declared void and unenforceable if it effectively prohibits or unreasonably restricts the construction of or use of an ADU or JADU.

A planned development is able to impose reasonable restrictions on ADUs and JADUs that do not:

- unreasonably increase the cost to construct

- effectively prohibit the construction of or

- extinguish the ability to otherwise construct ADUs or JADUs consistent with the provisions of Government Code Sections 65852.2 or 65852.22

Importance of this Bill and related Bills, including: This new law will apply to planned development projects, including attached projects. It is unclear what may constitute an "unreasonable restriction" on the use of an ADU or JADU.

This new law will impact garage conversions, parking, and rental restrictions, etc. Planned developments will be impacted by other new laws which will now regulate how cities and counties can treat construction of ADUs and JADUs.

5. **SB-652 (Allen) Entry doors: display of religious items: prohibitions** - Adds Civil Code Sections 1940.45 and 4706

Prohibits an association from adopting or enforcing any rule that prohibits the display of one or more religious

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

items on a dwelling's entry door or doorframe, subject to certain exceptions:

- Threatens the public health or safety
- Hinders the opening or closing of any entry door
- Violates any federal, state, or local law
- Contains graphics, language, or any display that is obscene or otherwise illegal
- Individually or in combination has a total size that is greater than 36 by 12 inches

Defines "religious item" for this purpose to mean an item displayed because of sincerely held religious beliefs. Specifies that an association may require owner to remove a religious item as necessary to perform maintenance on a door or doorframe. Association must provide individual notice regarding temporary removal and allow the item to be reinstalled after maintenance is completed.

6. **AB 991 Maintenance of the Codes** – Amends Civil Code Section 5502. This bill makes minor changes to replace "combine" with "combined" and "shall apply" with "applies." The changes are not substantive.

B. Amendments and additions to other State Laws

1. **AB 5 (Beall) Worker Status: Employees and Independent Contractors -** Amends Labor Code Section 3351 and adds Labor Code Section 2750.3 to, the , and amends Unemployment Insurance Code Sections 606.5 and 621, relating to employment.

Existing law, as established in the case of Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 ("Dynamex"), creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission. Dynamex requires a 3-part test, commonly known as the "ABC" test, to establish that a worker is an independent contractor for those purposes.

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

NOTES:

This bill states the intent of the Legislature to codify the decision in the Dynamex case and clarify its application. The bill provides that for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor, unless the hiring entity demonstrates that:

- the person is free from the control and direction of the hiring entity in connection with the performance of the work
- the person performs work that is outside the usual course of the hiring entity's business, and
- the person is customarily engaged in an independently established trade, occupation, or business

California Assembly Bill 5 ("AB 5"), which codifies significant changes to the test for independent contractor status, has caused substantial upheaval for California businesses.

2. **AB 169 – (Lackey) Criminal Penalties for injury/death of service animal -** Amends Penal Code Sections 600.2 and 600.5

Under existing law, it is an infraction (failure to exercise ordinary care) or misdemeanor (reckless disregard in the exercise of control over dog) for a person to allow their dog to cause injury to, or the death of a guide, signal or service dog ("service dog"), while the service dog is in discharge of its duties. A person who intentionally causes injury to, or the death of a service dog, while the service dog is in discharge of its duties is guilty of a misdemeanor.

- No longer requires the service dog to be working at the time of the attack
- Definition of "Guide, signal, or service dog" now includes dogs that are enrolled in a training school or program for guide, signal or service dogs

© 2019 Fiore, Racobs & Powers, A PLC

Notes:

Under existing law, a defendant convicted of either crime is required to make restitution to the service dog's owner for any veterinary bills, the replacement costs of the dog and other reasonable costs deemed appropriate by the court.

- Defendant is now also responsible for the disabled person's medical or medical-related expenses and loss of wages or income

- Definition of "Replacement Costs" now includes:

  - Training costs for new dog

  - Cost of keeping the now-disabled dog in a kennel while the handler travels to receive the new dog

  - Costs of travel required for the handler to receive a new dog

- Does not currently apply to assistance animals

3. AB 1482 (Chiu) Tenant Protection Act of 2019

Places limits on landlords' ability to evict tenants (Civil Code Section 1946.12), and to increase rent (Civil Code Section 1947.12), subject to some exceptions

Under certain circumstances, single family homes and condominiums can be exempt from the eviction and rent increase restrictions. But, for that exemption to apply, the landlord needs to provide a qualifying notice and be something other than:

- a real estate investment trust, as defined in Section 856 of the Internal Revenue Code

- a corporation

- a limited liability company in which at least one member is a corporation

© 2019 Fiore, Racobs & Powers, A PLC

4. **AB 1804 (Committee on Labor and Employment) Reporting of injuries to OSHA -** Amends Labor Code Section 6409.1 to require employers to report serious injuries, illness or death to OSHA by phone or email

5. **SB 234 Family day care homes (2019-2020)** - Amends Health and Safety Code Sections 1596.72, 1596.73, 1596.78, 1597.30, 1597.45, and 1597.54 and adds Sections 1597.41, 1597.42, and 1597.455, repeals Section 1597.47, repeals and adds Sections 1597.40, 1597.46, and 1597., relating to family daycare homes to now specify that a small family daycare home or large family daycare home includes a detached single-family dwelling, a townhouse, a dwelling unit within a dwelling, or a dwelling unit within a covered multifamily dwelling in which the underlying zoning allows for residential uses. A small family daycare home or large family daycare home is where the daycare provider resides, and includes a dwelling or a dwelling unit that is rented, leased, or owned. Such use is considered a residential and not commercial use of the property, and cannot be prohibited by associations. The association can require license be provided, and insurance naming the association under certain circumstances.

6. **SB-508 Residential property insurance** – Amends Insurance Code Sections 10101 and 10104, and to amends, repeals, and adds Section 10103.5 the, relating to insurance to require that every residential property insurance disclosure shall be accompanied by a Residential Property Insurance Bill of Rights in 10 point font which states the information each consumer is entitled to receive

7. **SB 222 (Hill) Discrimination based on Veteran & Military Status** - Amends Government Code Sections 12920, 12921, 12927, 12931, 12955, 12955.8, 12956.1, and 12956.2 . Prohibits discrimination on the basis of veteran or military status and adds these to the list of protected classes

Notes:

© 2019 Fiore, Racobs & Powers, A PLC

8. **SB 778 (Committee on Labor, Public Employment and Retirement) – Extension of deadline to complete anti- harassment training (Committee on Labor, Public Employment and Retirement)** – Extends the deadline for anti-harassment training from 1/1/20 to 1/1/21

NOTES:

C. State Administrative Regulations

1. New DFEH Fair Housing Regulations

- Associations cannot discriminate against persons who are members of protected classes
- Protected classes include:
  - race
  - color
  - ancestry
  - national origin
  - religion
  - sex (including pregnancy, childbirth, and related medical conditions)
  - disability: physical or mental
  - age (40 and older)
  - genetic information
  - marital status
  - sexual orientation
  - gender identity and gender expression
  - AIDS/HIV
  - medical condition
  - political activities or affiliations
  - military or veteran status, and

© 2019 FIORE, RACOBS & POWERS, A PLC

- status as a victim of domestic violence, assault, or stalking

- Associations have potential liability for discriminatory housing practices

- Community associations may not discriminate against persons based on disabilities, and must allow persons with disabilities to request reasonable accommodations, including assistance animals

- Community associations should be prepared to receive requests for reasonable accommodations of disabilities

- The Verification of Disability Process is covered by the New Regulations

- Community associations may only deny a request for a reasonable accommodation under limited circumstances

- Community associations must engage in the "Interactive Process" if there are concerns about granting an accommodation request

D. Federal Regulations

1. FHA New Condominium Approval Rule

Effective October 15, 2019, the FHA's new Rules will allow certain individual condominium units to be eligible for FHA mortgage insurance even if the condominium project is not FHA approved.

To be eligible, the unit must be located in a completed condo project that is not FHA approved. For condo projects with 10 or more units, not more than 10% of the individual condo units can be FHA insured and projects with fewer than 10 units may have no more than two FHA insured units. The FHA will also require that between 30% and 75% of the units be owner occupied units. (Fannie and Freddie require 50%) FHA will only insure up to 50% of the total number of units in an approved condo project. Commercial/non-residential space is limited to @55% of the total floor area.

NOTES:

© 2019 Fiore, Racobs & Powers, A PLC

2019 NEW CASES

NOTES:

A. ***Western Heritage Insurance Company v. Todd, Inc.,*** 33 Cal.App.5th 976 (2019)

Where CC&Rs contain insurance language which require an association to obtain fire insurance and prohibits owners from obtaining such coverage, the association's fire insurance policy also benefits the lessees, absent language to the contrary in a lease. (Even if the lessee was negligent).

B. ***Richardson v. Huntington Pacific Beach House Condominium Assoc.*** unpublished case (2019 WL 4014736)

From 2002 to 2013, a condominium association allowed unit owners to add windows to the exterior walls of their units and to convert windows into doors. Approximately 80 percent of the condominiums had been modified through this process, including the homes of the plaintiff homeowners. No association-wide vote was ever held regarding these modifications.

In 2013, a homeowner sought approval from the association to: (i) swap a window and a door; (ii) convert a window into a door; and (iii) create a concrete path to the newly converted door. The architectural review committee approved the plans and the plaintiff homeowners ultimately sued the association over the project and claimed that the conversion of the window into a door was illegal under Civil Code Section 4600 since the homeowner was taking "common area for his exclusive use," which required approval from 67 percent of the membership. At trial, the trial court found in favor of the plaintiff homeowners and concluded that the conversion of the window into a door required membership approval.

On appeal, the Court of Appeal addressed whether:

- the unclean hands doctrine applied
- whether the conversion of a window into a door constituted a grant of exclusive use common area under Civil Code Section 4600 and
- whether any exceptions to the membership vote requirement of Civil Code Section 4600 applied

© 2019 FIORE, RACOBS & POWERS, A PLC

As for the unclean hands doctrine, the Court of Appeal determined that the plaintiff homeowners had not engaged in misconduct. Although they added windows to the exterior walls of their units, the Court determined that Civil Code Section 4600 only applies to actions of the association's board of directors. As a result, they had not engaged in any statutory misconduct since there was no evidence that they served on the board when their windows were added.

As for whether the conversion of a window into a door was a grant of exclusive use common area, the Court concluded that the walls were common area and that the conversion was a grant of exclusive use of common area. The Court also rejected the association's argument that the section of the wall under the prior window was exclusive use common area.

The Court also determined that none of the statutory exceptions to the membership vote applied. It determined that the exterior wall was "of general use" by the membership at large, and that the association was not transferring the maintenance obligation to the applicant homeowner.

C. ***Eisen v. Tavangarian*****,** 36 Cal App. 5th 626 (2019)

The Eisens brought an action against their neighbors the Tavangarians seeking an injunction and alleging that their structural renovations and the height of the hedges violated the CC&Rs regarding owners' views and limitations on construction.

The Court of Appeal reversed in part its own prior decision in *Zabrucky v. McAdams* (2005) and held: [1] the provision that controlled basic size of homes did not preclude renovations to second story; [2] plan-approval requirements were no longer in effect; [3] provision that limited construction of “structures” did not apply to alterations or renovations to existing homes; and [4] owners did not waive and were not estopped from enforcing provision that limited height of hedges.

Paragraph 11 (affecting holdings 3 and 4) of the Marquez Knolls CC&R’s provides, in part, that no tree, shrub or other landscaping shall be planted “or any structures erected that may at present or in the future obstruct the view from any other lot.”

The question before the Court was whether paragraph 11 of the CC&Rs applies to alterations or renovations to existing homes.

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

In *Zabrucky*, this court interpreted paragraph 11 as applying to any alteration or remodel of an existing dwelling but felt that it needed to add "unreasonably" obstruct to the reading.

This time around, the Court of Appeal said that "[t]the Zabrucky majority misread paragraph 11" of the CC&Rs and concluded that paragraph 11 restricts only building a new structure, not making alterations to an existing one. The Court analyzed the syntax and usage of "erection" and "alteration" as well as "residence," "detached garage" and "outbuilding" in applying the *noscitur a sociis* rule of construction.

D. ***Orchard Estate Homes, Inc. ("Orchard") v. Orchard Homeowner Alliance ("Alliance"),*** 32 Cal.App.5th 471 (2019)

Orchard is a 93-unit development located east of Indio. Orchard adopted a rule prohibiting short term rentals of units for durations of fewer than 30 days. The association attempted to enforce this rule, but a lower court ruled the rule unenforceable because it was not in the CC&Rs.

Orchard put the issue to a vote to amend the CC&Rs: 85 of the 93 members voted; 58 votes, or 62% of the votes cast, were in favor of the amendment. The 62% was insufficient, as the CC&Rs required 67% for the vote to pass.

Orchard filed a petition to reduce the percentage of affirmative votes to adopt the amendment under Civil Code Sec. 4275. Alliance, an unincorporated association of owners who purchased the units for short term rental purposes, opposed the petition.

Trial Court granted the petition. Alliance appealed, arguing that the Trial Court abused its discretion because voter apathy was not a prerequisite to an order authorizing relief under Civil Code Sec. 4275, and that relief is not proper unless voter apathy has been established.

The Court found the Trial Court did not abuse its discretion Orchard satisfied the elements necessary for the petition to amend the CC&Rs:

- Notice was properly given
- Balloting was proper
- Reasonable efforts were made to permit eligible members to vote

NOTES:

© 2019 Fiore, Racobs & Powers, A PLC

- More than 50% of the votes voted in favor of the amendment and
- The amendment was reasonable.
- The purpose of Section 4275 is to provide HOAs with the ability to amend their governing documents when, because of voter apathy or other reasons, important amendments cannot be approved by normal procedures under the CC&Rs.
- The Court found that Alliance misconstrued the underlined phrase. The Court also found that none of the decisions relied upon by Alliance held that voter apathy is not an element that must be alleged or proven.

E. ***Sands v. Walnut Gardens Condominium Association Inc.,*** 35 Cal.App.5th 174 (2019)

"This case is about whether condominium owners can make their homeowners association pay for a water leak"

The Sandses owned a unit in the Walnut Gardens development. A pipe on the roof broke, causing water to flood the Sandses' bedroom. The association had the responsibility to maintain its common areas, which included the faulty piping and roof. The association repaired the pipe and roof, but refused to take responsibility for any damage caused to the interior of the Sandses' bedroom

The Sandses sued the association, claiming breach of contract and negligence. The contract in question was the association's CC&Rs, which contained the requirement that the association maintain the project in a "first class condition."

The Sandses first witness testified that the association was performing no preventive maintenance, even though preventive maintenance was desirable. "The roof and pipes over the Sandses' unit had not been inspected or maintained in years."

The Court found that "[r]easonable jurors could have concluded a total failure to maintain common areas breached a promise to keep these areas in first class condition."

The property manager testified "[m]aintenance wasn't happening. It was a very sad situation for the homeowners." A jury could find buildings need maintenance to remain in first

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

class condition. The association knew "[m]aintenance wasn't happening." As a prima facie matter, no more was needed. A complete lack of preventive maintenance is evidence the association did not keep the roof or pipes in first class condition. The jury would not need experts to grasp this. Based on the above facts, the Court found in favor of the Sandses on the breach of contract cause of action, reversing and remanding the case on that claim. However, on the negligence cause of action, the Court affirmed the ruling, holding that it was not legally permissible to fashion a tort claim out of what is clearly a contractual relationship situation.

The Court also mentioned in its opinion that, in the association's motion for nonsuit, it did not argue that Lamden v. La Jolla Shores Clubdominium Homeowners Assn., (1999) 21 Cal.4th 249, 253, required the court to give deference to the association's decisions relating to the lack of maintenance on the pipes and roof, so the Court did not consider this issue on appeal. It is not clear if the Court mentions this fact, because it believes that such an argument may have been compelling, or if it was simply an interesting point. Regardless, given the total lack of any maintenance, and the testimony relating to the association's knowledge that maintenance should be done, it does not seem likely that the Lamden argument would win the day for the association on remand.

F. Basave/Highland Greens 9th circuit Bankruptcy Appellate Panel case

On August 26, 2019, the United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") dealt a blow to associations. In In Re Maria A. Basave de Guillen (BAP No. CC-18-1248-LSTa), the panel held that assessment liens recorded by associations pursuant to the Davis-Stirling Common Interest Development Act (the "Act") only secure the amounts set forth therein on the date it is recorded, plus collection costs, unless the association's CC&Rs provide otherwise.

In California, associations have long relied upon the California Court of Appeal's holding in Bear Creek Master Association v. Edwards (2005) 130 Cal.App.4th 1470, 1489 that assessment liens are continuing liens, and that there was no need to record successive liens to secure unpaid assessments. However, the Basave Court found that holding to be inconsistent with the Act, and with the decision in Diamond v. Superior Court (2013) 217 Cal.App.4th 1172.

© 2019 Fiore, Racobs & Powers, A PLC

Maria Basave de Guillen became delinquent in payment of assessments to her association, Highland Greens Homeowners Association of Buena Park ("HGBP") beginning in September of 2008. HGBP recorded an assessment lien in December of 2008 setting forth an amount then due of $1,395.00, and filed a judicial foreclosure action to enforce the lien. Judgment in favor of HGBP in the amount of $21,398.02 was entered in April 2012. Ms. Basave filed a chapter 13 bankruptcy in 2018. HGBP filed a claim for $64,137.20, to which the debtor objected. The Bankruptcy Court held that only the amount set forth on the lien was secured thereby; amounts included in the judgment were secured by a judgment lien; and all other amounts were unsecured. HGBP appealed.

The BAP noted courts' opinions have differed significantly in their assessment of legislative policy over the years. When Bear Creek was decided, the court held that the purpose of the Act was to facilitate the expeditious collection of assessments owed to associations; however, when Diamond was published, the purpose had changed to one that is designed to safeguard the rights of homeowners.

In this case, the BAP held that there were two independent bases to confirm the Bankruptcy Court's order. The first was that HGBP's CC&Rs did not provide that assessment liens secured more than what was set forth in the lien. The relevant provision in the CC&Rs for Bear Creek provided that "any demand or claim of lien or lien on account of prior delinquencies shall be deemed to include subsequent delinquencies and amounts due on account thereof." In contrast, HGBP's CC&R's did not provide for a continuing lien.

The BAP's second basis for confirming the order was that the Act does not provide for a continuing lien. It found that Civil Code §5675 limits a lien to the amount stated in the notice of delinquent assessment, and adding future assessments is inconsistent with that statute. It distinguished the Bear Creek and followed two District Court opinions which held that unless the governing documents specifically provide that liens secure future accruals, under the Act they do not. The BAP concluded that the notice of delinquent assessment may secure future costs and interest, but because Civil Code §5675 does not specifically include subsequent delinquent assessments as charges that are secured by a lien; those cannot be included in the amounts a lien secures. The BAP held that a lien recorded before assessments reach $1,800.00 or 12 months' of assessments can have subsequent assessments added to the

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

amounts secured thereby, but a lien recorded after the debt reaches the statutory threshold for foreclosure cannot secure subsequent delinquent assessments.

Based on this case, every association should review its CC&Rs to determine whether it provides that a lien secures ongoing assessments. If not, an amendment to the CC&Rs would be ideal. Associations without a continuing lien provision should amend their collection policies to record successive liens on a periodic basis to be determined by the association's board of directors. Associations will also want to consider the increased costs which will result from successive liens, and whether an assessment increase is needed to cover those costs. We are available to assist associations in regard to addressing these issues.

NOTES:

© 2019 FIORE, RACOBS & POWERS, A PLC

FIORE RACOBS & POWERS

A PROFESSIONAL LAW CORPORATION

Established in 1973, Fiore Racobs & Powers celebrates over 46 years as The Recognized Authority In Community Association Law. We are a full-service law firm, providing complete representation of common interest developments including: CC&R and Architectural Enforcement, Document Amendment, Elections/ Votes, Corporate Counsel, Legal Opinions, Assessment Collection, Litigation, Appeals & General Legal Services.

Our Firm's ongoing mission is to "Provide quality legal services to our clients while setting the example for others to follow in the legal community. We are dedicated to the success of community associations through the practice of law, the education of our clients and industry professionals, and the advancement of public policy."

Fiore Racobs & Powers is the Recognized Authority in Community Association Law.

> THE RECOGNIZED AUTHORITY IN COMMUNITY ASSOCIATION LAW SINCE 1973

FioreLaw.com

877-31-FIORE

CELEBRATING OVER 46 YEARS AS THE RECOGNIZED AUTHORITY IN COMMUNITY ASSOCIATION LAW

FIORELAW.COM
877-31-FIORE

> Orange County Office

6440 Oak Canyon
Suite 250
Irvine, CA 92618
949-727-3111
Fax 949-727-3311

> Inland Empire Office

6820 Indiana Avenue
Suite 140
Riverside, CA 92506
951-369-6300
Fax 951-369-6355

> Coachella Valley Office

74-130 Country Club Drive
Suite 102
Palm Desert, CA 92260
760-776-6511
Fax 760-776-6517

> San Diego County Office

380 S. Melrose Drive
Suite 330
Vista, CA 92081
760-707-1988
Fax 760-776-6517

FIORE RACOBS & POWERS
A PROFESSIONAL LAW CORPORATION