Nordberg | DeNichilo, LLP
ATTORNEYS AT LAW

HOA Brief Newsletter

Tips for the HOA Community **#38**

2023 Legislative and Case Law Update for California Community Associations

Legislative Update

1. *AB 572 (Haney) – Limitation on Assessment Increases on Affordable Housing Units*

AB 572 is another bill aimed at addressing the need for more affordable housing in California. Starting with associations whose CC&Rs are recorded after January 1, 2025, deed restricted affordable housing units will have increases in annual assessments capped at five percent plus the percentage change in the cost of living, not to exceed ten percent greater than the preceding regular assessment. While there are certain limited exceptions to this cap on increased assessments for deed-restricted affordable housing units, it will be difficult to identify the deed restricted units in any association.

Operational Tip: Starting in 2025, any manager handling new developments should discuss with the developer and legal counsel how to identify any deed restricted affordable housing units in the community and determine if there are any exceptions on increases on assessments for those units. Then a record should be developed and reviewed annually as part of the budgeting process so that the annual assessments can be distributed in compliance with the requirements of AB 572.

2. *AB 648 (Valencia) – Virtual Meetings*

One of the few positive things that came out of the pandemic was the increased use of tools such as Zoom and Microsoft Teams for virtual meetings. The use of these tools led to increased member participation and transparency as members logged in from wherever they were to watch and listen to their association's board meetings. While associations could have used these tools even prior to the pandemic, absent a state of emergency (following a change in the law in 2021), the Open Meeting Act has required boards to provide a physical location for members to attend in person should they choose to even if the board and management all attended via teleconference.

AB 648, was sponsored by the Community Associations Institute's (CAI) California Legislative Action Committee (CLAC). Under the new law, with the exception of meetings where ballots will be opened and tallied, board and member meetings can be conducted entirely via teleconference, without the need to provide for a physical location so long as some minimal requirements are met. These requirements include:

(1) The notice for each meeting conducted under this section includes, in addition to other required content for meeting notices, all of the following:

> (A) Clear technical instructions on how to participate by teleconference.
>
> (B) The telephone number and electronic mail address of a person who can provide technical assistance with the teleconference process, both before and during the meeting.
>
> (C) A reminder that a member may request individual delivery of meeting notices, with instructions on how to do so.

(2) Every director and member has the same ability to participate in the meeting that would exist if the meeting were held in person.

(3) Any vote of the directors shall be conducted by a roll call vote.

(4) Any person who is entitled to participate in the meeting shall be given the option of participating by telephone.

Operational Tip: (1) While the forms used for meeting notices may have already been updated to comply with the requirements of teleconference meetings under emergency circumstances, managers and boards should review their meeting notices to ensure that they contain the required technical instructions on how to participate by teleconference and provide not only a link but also a call in number, the telephone number and electronic mail address of a person who can provide technical assistance with the teleconference process, both before and during the meeting, and a reminder that a member may request individual delivery of meeting notices, with instructions on how to do so. (2) Boards should discuss who will be responsible for providing any required technical assistance as it is difficult for a manager or director to both run the meeting and provide any necessary technical assistance. (3) Lastly, boards should become accustomed to taking roll call votes rather than simply responding to a call for those all in favor or against.

3. AB 1458 (Ta) – Lower Quorum for Adjourned Board of Director Election Meetings

AB 1458 is another bill sponsored by CAI CLAC. It aims to help address a long-

All information contained in this article is subject to copyrights owned by Nordberg|DeNichilo, LLP. Any reproduction, retransmission, republication, or other use of all or part of any document is expressly prohibited, unless prior written permission has been granted by the copyright owner. All other rights reserved.

standing problem of associations being unable to reach unnecessarily high quorum requirements for board of director elections by lowering the quorum requirements for adjourned meetings to twenty percent unless a lower quorum is authorized by an association's governing documents.

In order for the reduced quorum to apply certain requirements must be met. The first is that the notice that is sent to the members at least thirty days prior to distribution of ballots must include not only the date, time, and location of the meeting at which a quorum will be determined but also a statement that the board of directors may call a subsequent meeting at least 20 days after a scheduled election if the required quorum is not reached, at which time the quorum of the membership to elect directors will be 20 percent of the association's members voting in person, by proxy, or by secret ballot. Second, if a quorum is not achieved at the initial date identified in the notice, then the meeting must be adjourned to a date at least twenty days in the future. Third, the association must provide general notice no less than 15 days prior to an election, which includes:

(A) The date, time, and location of the meeting.

(B) The list of all candidates.

(C) A statement that 20 percent of the association present or voting by proxy or secret ballot will satisfy the quorum requirements for the election of directors and that the ballots will be counted if a quorum is reached, if the association's governing documents require a quorum.

Operational Tip: Update election forms and timelines for any association which has a quorum requirement that is higher than twenty percent for an election of directors to include the requirements for providing notice to the members that the meeting may be adjourned and the quorum may be reduced as a result.

4. AB 1764 – Director Qualifications

Following a change in the law in 2020 as a result of SB 326, associations were limited in the grounds that could be used to disqualify candidates for election to the board of directors. SB 326 also led to some confusion whether the grounds for disqualifications that could be stated in election rules applied to sitting directors. AB 1764 cleans up some of those questions and reinstates term limits as a ground for disqualification if term limits are included in the association's bylaws. In addition to reinstating term limits, the bill also makes clear that a director who ceases to be a member of the association is disqualified to serve on the board of directors, and that any grounds that may disqualify a candidate for election must also apply to sitting directors.

Operational Tip: Associations should review their bylaws to determine if they contain term limits which might disqualify directors from running for reelection, and update

All information contained in this article is subject to copyrights owned by Nordberg|DeNichilo, LLP. Any reproduction, retransmission, republication, or other use of all or part of any document is expressly prohibited, unless prior written permission has been granted by the copyright owner. All other rights reserved.

election rules to clarify that any grounds that may disqualify a candidate for election will also apply to sitting directors.

5. AB 1033 (Ting) – ADUs

This is another attempt by the legislature to create what it believes will be additional affordable housing in the state. The bill allows homeowners who have constructed Accessory Dwelling Units (ADUs) on their property to split their lot and sell those units separately from their main residence. CAI CLAC lobbied the author of this bill and was able to have language inserted into the law that any owner who wants to sell their ADU must obtain the permission of any homeowners association that governs the property and any lender that has a mortgage on the property. In addition, local municipalities must pass an ordinance permitted ADUs to be sold separately from the main residence.

6. AB 1572 (Friedman) – Watering Restrictions

Pursuant to AB 1572, beginning in 2029, associations will not be allowed to water non functional turf with potable water. Non functional turf is defined as “any turf that is not functional turf, and includes turf located within street rights-of-way and parking lots.” Functional turf is defined to include that which is "located in a recreational use area or community space" (terms which are also then defined).

In reality, AB 1572 simply codifies the current California State water restrictions on watering non functional turf in community associations. While those restrictions are scheduled to expire in June of 2024, it is likely that as a result of AB 1572 they will stay in place.

7. Corporate Transparency Act (Federal Legislation)

The goal of the Federal Corporate Transparency Act is to track suspicious activity, money laundering, and terrorist financing. Unfortunately, as written, it will create a significant burden on community associations across the country. The law applies to corporations with less than $5 million in assets and fewer than 20 employees. The bill requires all entities that qualify under the act to annually report certain information, including name, address, taxpayer identification number and its “beneficial owners” and “applicants” (full legal name, date of birth, address and passport or driver's license number, with a photocopy of such document). While titled the “corporate” transparency act, the law applies to any entity that is formed via a state filing.

There are several questions as to how community associations are going to comply with the law, and who would qualify as its “beneficial owners.” Under the law, a “beneficial owner” is an individual who, directly or indirectly, either exercises substantial control over the reporting company or owns or controls at least 25

All information contained in this article is subject to copyrights owned by Nordberg|DeNichilo, LLP. Any reproduction, retransmission, republication, or other use of all or part of any document is expressly prohibited, unless prior written permission has been granted by the copyright owner. All other rights reserved.

percent of its ownership interests." While there are several exemptions from the reporting requirements, community associations are not currently exempted from the process as most are not created as non-profit organizations. CAI is currently working to have the law amended to add an exemption for community associations.

Case Law Update

Fairly-Haze v. Whitesails Community Association

This case is an unpublished decision about a dispute over whether the association was required to make a reasonable accommodation by granting to a disabled owner a parking space in an underground garage closest to an elevator. All owners in the association were deeded two spaces in the parking garage and those by the elevator were already owned by other owners.

The association had no authority to require owners to exchange their deeded parking spaces in the parking garage. Therefore, the association offered the disabled owner an exclusive use handicap parking space on common area outside the parking garage in exchange for the disabled owner's surrender of one of his deeded parking spaces inside the parking garage.

The court agreed that the association's offer of an outside exclusive use handicap parking space in exchange for the owner surrendering one of his deeded inside parking spaces was a reasonable accommodation.

Recommendation: Boards should consult legal counsel anytime requests for reasonable accommodations arise.

Lake Lindero Homeowners Association, Inc. v. Barone

This case is about a dispute over the recall of the association's Board of Directors and focused on what was the appropriate member approval requirement for a recall election in an association with 50 or more members.

The Association's bylaws stated a recall election must be approved by a majority of all members. However, the Corporations Code states a recall election in an association with 50 or more members must be approved by a majority of a quorum.

After conducting a statutory analysis of the relevant provisions of the Corporations Code, the court held that the proper approval requirement for a recall election in an association with 50 or more members is a majority of a quorum pursuant to Corporations Code section 7222(a)(2), which statutory approval requirement trumped any conflicting requirement in the association's bylaws.

Recommendation: Boards should have legal counsel review their bylaws for any conflicts with current law and amend them as necessary. Boards should also immediately

All information contained in this article is subject to copyrights owned by Nordberg|DeNichilo, LLP. Any reproduction, retransmission, republication, or other use of all or part of any document is expressly prohibited, unless prior written permission has been granted by the copyright owner. All other rights reserved.

consult legal counsel if a recall petition is presented.

***Manrodt v. Albelo* (Unpublished)**

After moving into a small HOA, Manrodt sought out and obtained a civil harassment restraining order protecting herself and her family.

The basis for the order was that one of her neighbors, a prior board member, was engaging in an escalating pattern of photographing and video recording her family. Initially, it started when they walked by his front door. He then began following them while recording; he started using a body camera instead of his cell phone; and he filmed over the wall into their backyard and through the glass of their front door into their residence.

Albelo argued that he was recording Manrodt's family in the event that they violated HOA rules so that he could submit it to the board as evidence. The court indicated: "Mr. Albelo has apparently appointed himself as the guardian of all the rules and regulations of the project." While the court recognized that it may be appropriate to document ongoing violations, it distinguished Albelo's conduct of constantly recording *in the hope of a possible violation* as having no legitimate purpose. Instead, the conduct became a tool of harassment or other potential illegal activity which justified the restraining order.

LNSU #1, LLC, et al. v. Alta Del Mar Coastal Collection Community Association

The California Fourth District Court of Appeal recently examined whether board members can engage in e-mail discussions about association business outside of regular noticed meetings.

The case involved a small common interest development of 10 homes located in San Diego County. Two homeowners sued the association claiming the board engaged in multiple violations of the Open Meeting Act ("OMA") (*Civ. Code* §§ 4090 *et seq.*), including that directors had exchanged e-mails discussing landscaping plans and other association business without giving members notice or an opportunity to participate. The trial court found in favor of the association and determined that the e-mail discussions between board members did not violate the OMA.

In affirming the trial court's ruling, the Appellate Court rejected the homeowners' argument that board members' e-mail exchanges constituted a board meeting under *Civil Code* § 4090(a) in violation of the OMA. That section defines a "board meeting" as "[a] congregation, at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business that is within the authority of the board."

Historically, board members have been cautioned to avoid discussing association

All information contained in this article is subject to copyrights owned by Nordberg|DeNichilo, LLP. Any reproduction, retransmission, republication, or other use of all or part of any document is expressly prohibited, unless prior written permission has been granted by the copyright owner. All other rights reserved.

issues through e-mails, as that could be deemed a "virtual assembly" of the board. However, the court rejected that argument and concluded that by specifying that the congregation be "at the same time and place," the Legislature intended this provision to only reflect "an in-person gathering of a quorum of the directors." The court reasoned that e-mails are often sent "hours or days apart and from different homes and offices." The court concluded that e-mail exchanges that occur before a board meeting in which no action is taken on the items discussed, therefore do not fall within the definition of a "board meeting" under Section 4090(a).

The court also held that the directors' e-mail exchanges did not constitute a "board meeting" within the second definition found in *Civil Code* § 4090(b), referring to a "teleconference," because e-mails do not allow the participating directors "to hear one another, and the discussion did not take place at the same time and place…."

In holding that discussions via e-mail did not violate the OMA, the court relied on a significant distinction between the language in the *Civil Code* and near-similar provisions found in the Brown Act (*Gov. Code* § 54950), which governs meetings by state and local legislative bodies. The Court noted that in adopting the Brown Act, the Legislature prohibited any form of discussions outside of a meeting by expressly including language that "[a] majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." In contrast, the Legislature did not include such language in the *Civil Code*, but instead only prohibited boards from "tak[ing] action on any item of business outside of a board meeting." (*Civ. Code* § 4910(a).) The Court reasoned that the Legislature knew how to draft the necessary language if it intended to prohibit e-mail or other discussions by a majority of board members outside of a noticed meeting. Because the Legislature did not include similar language in the *Civil Code*, it must not have intended to prohibit board member discussions via email in the OMA.

Thus, the court concluded that while the OMA prohibits the board from acting on items of association business outside a board meeting, it does not prohibit the board from discussing items via email outside a meeting.

Despite the above holding by the Appellate Court, boards should continue to exercise caution before engaging in this type of approach. Both a request for depublication and a petition for review have been filed and are currently under consideration by the Supreme Court, so it remains possible that the decision could be overturned,

All information contained in this article is subject to copyrights owned by Nordberg|DeNichilo, LLP. Any reproduction, retransmission, republication, or other use of all or part of any document is expressly prohibited, unless prior written permission has been granted by the copyright owner. All other rights reserved.

modified, or ordered to have no controlling impact.

Even if the Supreme Court elects not to consider the issue now, this is the first time that any appellate court has interpreted the meaning of "board meetings" as found in this portion of the *Civil Code*. Other appellate districts are not required to follow this decision, which may potentially create a conflict that will eventually need to be resolved by the California Supreme Court.

Boards are urged to consult their legal counsel regarding the interpretation and possible impact of this case, as well as to keep in mind that there are also practical implications that these types of e-mail discussions might have on how the membership perceives the board, issues of transparency, and the way the association is governed. In addition, a director should consider that all directors should have the same information, so all directors and managers should be included on email discussions between board members.

We provide this newsletter for advertising and general informational purposes only. It is not intended to create an attorney client relationship. Readers should not act on any issues raised in this newsletter without consulting with legal counsel.

Nordberg | DeNichilo, LLP
ATTORNEYS AT LAW

Ph: (949) 654-1510

Robert M. DeNichilo, Esq., CCAL
Email: robert@NDHOALaw.com
Website: NDHOALaw.com

ndnl38 11142023 leg update .docx

All information contained in this article is subject to copyrights owned by Nordberg|DeNichilo, LLP. Any reproduction, retransmission, republication, or other use of all or part of any document is expressly prohibited, unless prior written permission has been granted by the copyright owner. All other rights reserved.