



VIEW ENFORCEMENT

Selective enforcement of view obstruction restrictions held to be outside the bounds of a Board’s authority.

MAINTENANCE

In the presence of ambiguous CC&Rs, owners may be individually responsible to maintain parts of drainage systems even when located in association-maintained landscape areas.

CONSTRUCTION DEFECT

A complaint of water intrusion in a single unit is not enough to render community-wide roofing defects “patent” so as to begin the running of the statute of limitations.

DISCRIMINATION

Horse trails held not to be “public accommodations” for the purposes of the ADA—thus not requiring access for people with disabilities.

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Annual Legislative & Case Law Update

Once again we are at that time of year where we make an effort to inform our clients of the significant changes to the current law governing Homeowners Associations (HOAs). This COMMUNITY ASSOCIATION UPDATE provides a brief summary of (1) new case law and (2) the bills that the California Legislature acted on—along with their potential impact on more than 40,000 HOAs during the first half of the 2009-2010 session.

NEW CASE LAW

View Enforcement. In Ekstrom v. Marquesa at Monarch Beach Homeowners Association (Nov. 3, 2008), 168 Cal.App.4th 1111, homeowners sued the Board for declining to enforce view obstruction requirements to palm trees. The CC&Rs require owners

to trim “all trees” so they do not exceed the height of the house on the lot, unless the tree does not obstruct the view of any other owner. The Board declined to enforce the rule as to palm trees. The Court of Appeal held that the Board’s interpretation was inconsistent with the plain meaning of the CC&Rs, and that the Board did not have the authority to unilaterally except an entire type of tree (palm trees).



Maintenance. In Starlight Ridge South Homeowners Association v. Hunter-Bloor (Aug. 14, 2009), 177 Cal.App.4th 440, one provision of the CC&Rs requires the association to maintain designated landscape areas. Another section requires homeowners to

maintain drainage systems on their lots. The issue was whether an individual owner was required to maintain the v-ditches on his lot that were also within those designated landscape areas. After finding the CC&Rs to be ambiguous, the Court of Appeal held that the owner is responsible to maintain the v-ditches based on (1) the purposes of the maintenance provisions and (2) the prior interpretation by the association.

Construction Defect. In Creekside Townhome Owners Association, Inc. v. C. Scott Whitten, Inc. (Sep. 1, 2009), 177 Cal.App.4th 251, a complaint of water intrusion in a single unit of a 61 unit complex was not enough to render community-wide roofing defects “patent” so as to begin the running of the statute of limitations. Otherwise, a relatively minor

complaint would obligate an association to undertake a major investigation.

Discrimination Issues. In Carolyn v. Orange Park Community Association (Sep 21, 2009) 177 Cal.App.4th 1090, a non-resident Plaintiff argued that the horse trails maintained by the association were a “public accommodation.” Plaintiff contended that the association barred his access to the trails by installing poles at the entrance to the trails which would block the horse-drawn carriage he was required to use because of his disability. The trails were accessible by the public and linked to a system of county

maintained trails. The Court of Appeal found that the horse trails were not “public accommodations” for purposes of the ADA because the Association did not (1) hold them out as available to the public and (2) benefit in any way from the public’s use of them.

## ASSESSMENTS

Associations whose declarations do not currently allow for assessments based on the assessed values of owners' separate interests are prohibited from doing so.

## DISCLOSURES

Associations must adhere to new disclosure requirements. A "Disclosure Document Index" must be distributed to members upon request and each year with the association's annual disclosures.

## WATER CONSERVATION

No provisions in an association's governing documents may hinder or prohibit use of low water-using plants as a group. Association landscape regulations must comport with local government water conservation law. Associations are required to replace all plumbing fixtures with water conserving fixtures.

## NEW LEGISLATION

**Assessments. AB 313** ("Fletcher") adds section 1366.4 to the Civil Code. Fletcher adds a new prohibition on how associations may base their assessments. Associations whose declarations *currently* allow assessments to be based upon the assessed values of the separate interests may continue to do so. However, this amendment prohibits *all other* associations and any *newly formed* associations from doing so.

**Disclosures. AB 899** ("Torres"), effective January 2010, calls for new disclosure requirements for associations that affect funding forms and member communications. Association "Assessment and Reserve Funding" forms must now include: (1) the ending date of the fiscal year for which it was prepared and (2) disclose the rate of return and inflation rate assumptions used by the association in its reserve planning. More significant is the requirement that each association distribute to a member, upon request, a "Disclosure Document Index". This index describes the various disclosure forms and references their pertinent Civil Code Sections. The association's management company

must send this index out each year with the association's annual disclosures. CAI is opposed to Torres; there is a concern that requiring unnecessary and misleading disclosures to owners will increase both the costs to, and the potential liability of, associations. See a sample of the required "Disclosure Documents Index" below-

Disclosure Documents Index - Sample (New Civ. Code § 1363.005)		
Item	Description	Reference Code
1	Assessment and Reserve Funding Disclosure Summary Form	Civ. Code § 1365.2.5
2	Pro Forma Operating Budget Summary	Civ. Code. § 1365(a)
3	Assessment Collection Policy	Civ. Code §§ 1365(e) and 1367.1(a)
4	Notice/Assessments and Foreclosure Form	Civ. Code. § 1365.1
5	Insurance Coverage Summary	Civ. Code § 1365(f)
6	Board Minutes Access	Civ. Code § 1363.05(e)
7	Right to Alternative Dispute Resolution (ADR) Summary	Civ. Code § 1369.590
8	Rights to Internal Dispute Resolution (IDR) Summary	Civ. Code § 1363.850
9	Architectural Changes Notice	Civ. Code § 1378(c)
10	Secondary Address Notification Request	Civ. Code § 1367.1(k)
11	Monetary Penalties Schedule	Civ. Code § 1363(g)
12	Reserve Funding Plan Summary	Civ. Code § 1365(b)
13	Review of Financial Statement	Civ. Code § 1365(c)
14	Annual Update of Reserve Study	Civ. Code § 1365(a)

**"The association's management company must send this index out each year..."**

## Environmental & Water Conservation Issues.

There are also new amendments dealing with environmental and water-conservation issues that affect association architectural guidelines and mandate the use of water conserving plumbing fixtures.



**AB 1061** ("Lieu"), effective January 2010, extends the current Civil Code restrictions that prohibit architectural guidelines from hindering or prohibiting use of low water-using plants as a group. Lieu prohibits such provisions in *all* of an association's governing documents, not solely architectural guidelines.

Lieu also specifically requires compliance with local water ordinances. Any association landscape regulations that violate local government water conservation law will be null, void and unenforceable.

**"landscape regulations that violate local government water conservation law will be ...unenforceable."**

**SB 407** ("Padilla") also concerns water conservation. Padilla requires replacement of *all* plumbing fixtures with water conserving fixtures. These replacements are required in single family residences, common area plumbing fixtures, multi-family residential real properties and commercial real properties. Compliance is mandated on or before January 2014 for remodeled units, January 2017 for single family units and January 2019 for commercial property and multi-family structures. Requiring replacement of every non-conserving interior water device (such as toilets, faucets and showerheads) is expected to generate significant costs. The estimated minimum costs for labor and materials is anywhere between \$100 and \$250 per fixture.



## PUBLIC SAFETY

Association pools must be equipped or retrofitted with anti-entrapment devices that meet certain performance standards.

## COMMITTEES

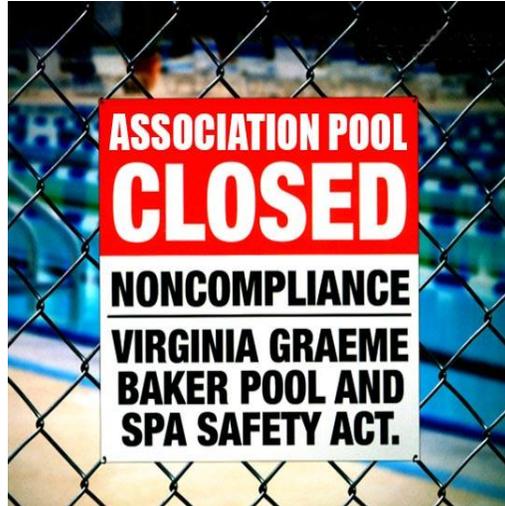
Committees that exercise the authority of the board may not include non-directors as committee members.

## DIRECTOR LIABILITY

Directors could be subject to personal liability for their negligent acts or omissions if the association's general liability insurance policy is deemed not to apply to those specific negligent acts or omissions.

**Public Safety.** New fixtures are also mandated in public and association swimming pools—though not for water conservation purposes.

**AB 1020** ("Emmerson"), effective January 2010, requires public swimming pool owners (including association pools) to be equipped with anti-entrapment devices that meet certain performance standards. The purpose of Emmerson is to make California Health and Safety Code consistent with Federal safety standards. The Federal safety standards were adopted in the Virginia Graeme Baker Pool and Spa Safety Act which aimed at preventing drowning and injuries associated with entrapment in public swimming pools and spas.



Pools constructed before 2010 must be retrofitted to comply with Emmerson's requirements no later than July of 2010. The cost of these anti-entrapment devices, new building permits and inspections ranges from hundreds to thousands of dollars per pool. The penalty for failing to install anti-entrapment devices is \$1,000/day (Federal law).

**Corporations Code Amendments effecting Board Members.** There are also new amendments to the California Corporations Code that effect association boards, directors and committees.

**AB 1233** ("Silva") authorizes the association governing documents to require the presence of one or more *specified* directors in order to constitute a quorum of the board needed to transact business. Silva prohibits a committee that exercises the authority of the board from including, as members of the committee, persons who are not directors. A board may still create other committees with non-directors provided that the committees do not exercise the authority of the board. Silva also amends current law regarding director immunity for negligent acts or omissions. Existing law

prohibits a negligence cause of action for money damages against any director if the association has a general liability insurance policy. Silva instead prohibits those causes of action if the association maintains a liability insurance policy that is "*applicable to the claim*". This could open up directors to personal liability for certain negligent acts or omissions if the association's general liability insurance policy is deemed not to cover them.

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*This COMMUNITY ASSOCIATION UPDATE is another example of our commitment to providing the highest quality legal services to our clients. If your company would like a more in-depth explanation of these new laws and regulations and how they may affect your associations, the Law Offices of Richard A. Tinnelly provides in house training completely free of charge. Feel free to call our offices or to email us at [tinnelly@hoalawyers.com](mailto:tinnelly@hoalawyers.com).*

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