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# CALIFORNIA COMMON INTEREST DEVELOPMENTS
# 2019 LEGISLATIVE AND CASE LAW UPDATE

## I. APPROVED BILLS AND AFFECTED STATUTES

### SB 2912
### Association Finances
### Effective January 1, 2019

Amends Civil Code Sections 5380, 5500, 5501, 5502, and 5806.

SB 2912 implemented the following changes to the law: (1) homeowners associations must maintain fidelity bond coverage for boards of directors; (2) transfers greater than $10,000.00 or 5% of an association's total combined reserve and operating account deposits, whichever is lower, without prior written approval from the board are prohibited; and (3) certain financial documents and statements must be reviewed by the board on a monthly basis.

The law requires monthly reviews of the check register, monthly general ledger, and delinquent assessment receivable reports; these requirements are deemed to be met when every member of the board, or a subcommittee of the board (including the treasurer and at least one other board member), reviews these documents. The review of the said documents may be independent of a board meeting if the review is ratified at the board meeting subsequent to the review, and that ratification is reflected in the minutes of that meeting.

### SB 1016
### Electric Vehicle Charging Stations
### Effective January 1, 2019

Amends Civil Code Section 4745 and adds to Section 4745.1.

The new law sets for that: (1) a requesting homeowner must agree to pay, and pay for, all costs associated with the installation of an electric vehicle ("EV") charging station ("EVCS") located in common area or exclusive use common area; (2) owners of charging stations are required to maintain a liability coverage policy, and provide the association with a corresponding certificate of insurance within fourteen (14) days of approval and annually thereafter; (3) prevailing homeowner plaintiffs are entitled to the recovery of their attorney's fees in EVCS- related actions; and (4) any pre-existing governing document or transfer instrument that restricts the installation or use of an EVCS or an EV-dedicated Time of Usage (TOU) meter, is void and unenforceable. An association may still enact reasonable restrictions on EVCS and TOU meters; however, California intends to remove all obstacles possible to allow their installation.

For reference: an EV-dedicated TOU meter is defined as an "electric meter supplied and installed by an electric utility, that is separate from, and in addition to, any other electric meter and is devoted exclusively to the charging of electric vehicles, and that tracks the time of use (TOU) when charging occurs. An EV-dedicated TOU meter includes any wiring or conduit necessary to connect the electric meter to an electric vehicle charging station, as defined in Section 4745, regardless of whether it is supplied or installed by an electric utility." *See* Cal. Civ Code Section 4745.1(d).

**SB 261**
**Governance & Notice**
**Effective January 1, 2019**

Amends Civil Code Sections 4040 and 4360.

An association that is required to deliver a document to a homeowner is authorized to deliver the document by email, facsimile, or other electronic means, only if the recipient has consented in writing. This law permits a recipient to consent (and revoke such consent) to such delivery by email. It also changed the general notice requirements of a proposed rule change from at least 30 days before ratifying the rule change, to 28 days.

**SB 1300**
**Discrimination and Harassment in Employment Setting**
**Effective January 1, 2019**

Amends Government Code Sections 12940 and 12965, and adds Section 12923, 12950.2 and 12964.5 to the Government Code.

Under the California Fair Employment and Housing Act ("FEHA"), an employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees and other specified persons, if the employer, or its agents or supervisors, knew or should have known of the conduct, but failed to take immediate and appropriate corrective action. The new law specifies that an employer may be responsible for the acts of nonemployees with respect to other harassment activity also. It prohibits an employer from having an employee stipulate to a release of claim, right, or any other agreement that purports to deny the employee the right to disclose information about unlawful acts in the workplace under FEHA in exchange for a raise, bonus or continued employment. The law expands the scope of FEHA's sexual harassment acts to any type of harassment of employees, applicants, unpaid interns, volunteers, or independent contractors. In addition to the two hours of sexual harassment training required for employers with 50 or more employees, this law also requires employers to provide a bystander intervention training program to their employees. The law prohibits prevailing defendants from being awarded attorney's fees unless the court finds the action was frivolous, unreasonable, or groundless when brought, or that the plaintiff continued to litigate after it clearly became so.

**SB 1343**
**Sexual Harassment Training for Employees**
**Effective January 1, 2019**

Amends Government Code Sections 12950 and 12950.1.

Under the new law, employers with 5 or more employees (including temporary and seasonal employees) are required to provide at least two hours of sexual harassment training to all supervisors, and at least one hour of the same to non-supervisory employees by January 1, 2020, and once every 2 years thereafter. The Department of Fair Employment and Housing ("DFEH") will develop such training courses and informational packets, which will be made available on their website.

**SB 721**
**Building Standards: Decks and Balconies**
**Effective January 1, 2019**

Amends Civil Code Section 1954 and adds Section 17973 to the Health & Safety Code.

The new law requires an inspection of exterior elevated elements and waterproofing elements, including decks and balconies, by a licensed architect, licensed civil or structural engineer, a building contractor holding specified licenses, or an individual certified as a building inspector or building official. The bill requires the inspections, including any necessary testing, to be completed by January 1, 2025, with certain exceptions, and would require subsequent inspections every six years, except as specified. The bill requires that if the inspection reveals conditions that pose an immediate hazard to the safety of the occupants, the inspection report be delivered to the owner of the building within 15 days and emergency repairs be undertaken, with notice given to the local enforcement agency. The nonemergency repairs made under these provisions would be required to be completed within 120 days, unless an extension is granted by the local authorities. **The law as signed excludes common interest developments from these provisions.** However, it requires any building subject to these provisions that is proposed for conversion to condominiums to have the required inspection conducted prior to the first close of escrow of a separate interest in the project, and requires the inspection report and written confirmation by the inspector that any recommended repairs or replacements have been completed to be submitted to, among others, the Department of Real Estate.

**SB 1128**
**** VETOED ****

This bill would have allowed for elections by acclamation when the number of director nominees at the close of the nomination period is not more than the number of vacant director positions available; the director nominees could be considered elected by acclamation and no formal balloting process would have been necessary. The bill would have also made changes to acceptable director qualifications. *This bill was vetoed by the Governor on September 30, 2018*.

**SB 1265**
**** VETOED ****

In its final iterations, this bill would have, among other things, permitted an association to disqualify a member from nomination as a candidate for the board of directors for not being a member at the time of nomination, and for being convicted of certain felonies. It also would have authorized an association to disqualify a person from being nominated to or serving on the board for specified reasons, including the failure to pay regular assessments. The bill would have required an association's rules to mandate that the inspector of elections deliver to each member the ballots and a copy of the election operating rules at least 30 days before an election. The bill would have required the rules to prohibit the denial of a ballot to a member and to a person with general power of attorney for an owner. This bill would have made it unlawful for an association's management company to serve as Inspector of Elections. *This bill was vetoed by the Governor on September 30, 2018*.

## II. STATE AND FEDERAL COURT DECISIONS

***Dynamex Operations W. v. Superior Court***
(2018) 4 Cal.5th 903
(Labor and Employment Law)

**Facts:** In 2004, a nationwide package and document delivery company Dynamex Operations West, Inc. ("Dynamex") adopted a new company policy that classified drivers as independent contractors and not employees. Dynamex drivers provided their own vehicles and paid for all additional expenses, including, cellphones, shirts, badges, and Dynamex decals attached their vehicles. Dynamex assigned deliveries to on-demand drivers on its sole discretion. Drivers were free to set their own schedule; however, they were to notify Dynamex of their availability. Drivers were not contracted to exclusively deliver for Dynamex. Two individual drivers claimed that Dynamex had misclassified its delivery drivers as independent contractors rather than employees. In 2005, plaintiffs filed a class action lawsuit alleging that Dynamex misclassified its drivers as independent contractors.

**Applicable Law**: Industrial Welfare Commission Wage Order No. 9; Business and Professions Code Section 17200; Cal. Code Regs. tit. 8, Section 11010 *et seq*.; and Cal. Lab. Code Section 2802.

**Result:** The California Supreme Court affirmed the lower court's decision that the "ABC Test" was correctly applied in determining whether drivers were employees or independent contractors.

**Rule**: Newly-applied "ABC test," which states that a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

***Michaelson v. V.P. Condominium Corporation***
[Unpublished] No. D071215, WL 989826 (Cal. Ct. App., Fourth District, Feb. 21, 2018)
(Court Deference to Governing Documents)

**Facts:** An eleven-unit condominium development granted each owner an exclusive right to use a designated garage parking space pursuant to the association's condominium plan. The condominium plan also mentioned a twelfth unassigned garage parking space ("Parking Space"). The developer then sold unit number 5 ("Unit"), without mentioning the exclusive right to use the Parking Space. A month later, the Unit was deeded back to the developer, using the same description. The developer then sold the Unit to a subsequent owner, but this time conveying the exclusive right to use the Parking Space in the deed. The subsequent owner then sold the Unit to the plaintiff homeowners with the same description in the deed. Years later, the association accused the plaintiff of fraudulently acquiring the Parking Space and demanded that he conveyed the same to the association. Plaintiff then sued the association, asserting various claims – including an action to quiet title on the Parking Space on the following grounds: (1) that the deed included the exclusive right to use the Parking Space, and (2) that the same was acquired by adverse possession.

**Applicable Law:** Cal. Civ. Code Section 4600(b)(2), (3)(G).

**Result:** The California Court of Appeal affirmed the lower court's decision, dismissing the claim on both grounds. The first basis for the claim was dismissed because the conveyance was not "in accordance with the governing documents." The Parking Space was not identified as an appurtenant exclusive use area. The association's declaration defined exclusive use area as those portions of the common area to which an exclusive right to use is granted to an Owner as shown and described on the Condominium Plan. The Condominium Plan did not identify the Parking Space as an appurtenant exclusive use area, which as a result made it a part of the common area. Further, pursuant to the declaration, no common area property could be conveyed without the written consent of at least 75% of first mortgagees of mortgages encumbering the condominiums, which plaintiff failed to obtain. The second basis for the claim was dismissed because the payment of taxes by the rightful owner (the association and its members) prevented plaintiff from satisfying the exclusivity prong in an adverse possession claim.

**Rule:** When inconsistencies exist between subsequent conveyance instruments and the declaration, the court will interpret and defer to the covenants, conditions, and restrictions set forth in association's governing documents.

***Greenfield v. Mandalay Shores Community. Assn.***
(2018) 21 Cal.App.5th 896
(Short-term Rental Restrictions by Associations in Coastal Zones)

**Facts:** The Mandalay Shores Community Association, located in the Oxnard coastal zone, adopted a resolution barring the rental of single-family dwellings within the community for less than 30 days. A homeowner sued the association for violation of the California Coastal Act (Cal. Public Resources Code Section 30000, *et seq.*) The Coastal Commission deemed the short-term rental ban a "development" under the Coastal Act, which is any change in the density or intensity of the use of land. Since the association's ban on short-term leases changed the intensity of the use of the land, it was identified as a development, which required a coastal development permit. Plaintiff homeowner sued based on the association's failure to obtain such permit and therefore, making the ban unenforceable.

**Applicable Law**: Cal. Pub. Res. Code Section 30000.

**Result:** The Association's short-term rental ban was deemed unenforceable.

**Rule:** Short-term rental bans that impact the intensity of the use or access to single-family residence in "Coastal Zones" should be decided by the city and coastal commission and not private entities, such as homeowner associations. Coastal Zones generally extend inland 1,000 yards from the mean high tide line of the sea. In significant coastal estuarine, habitat, and recreational areas the Coastal Zone extends inland to the first major ridgeline paralleling the sea, or five miles from the mean high tide line of the sea, whichever is less. In developed urban areas the zone generally extends inland less than 1,000 yards. (Cal. Pub. Res. Code Section 30103).

***Johnston v. City of Hermosa Beach***
[Unpublished] No. B278424, WL 458920 (Cal. Ct. App., Jan. 17, 2018)
(Short-Term Rental Restrictions by Municipalities in Coastal Zones)

**Facts:** The City of Hermosa beach passed an ordinance prohibiting short-term vacation rentals for 30-days or less and any advertisement regarding the same. Plaintiff petitioned the court to enjoin the ordinance on the following grounds: (1) violation of the Cal. Pub. Res. Code Section 30000 (California Coastal Act); (2) banning commercial

speech; and (3) deprivation of the vested right to use their properties for nonconforming commercial purposes in a residential zone and generate income.

**Applicable Law:** Cal. Pub. Res. Code Section 30000.

**Result:** The second and third assertions were dismissed in trial court and not further pursued by plaintiffs on appeal. In this unpublished decision, the Court of Appeal held that the ordinance was not a violation of the Coastal Act because the Coastal Commission did not designate Hermosa Beach's coastal zone as a sensitive coastal resource area. Plaintiff also failed to establish whether the ordinance constituted a "development" under the Coastal Act. Therefore, the ordinance was enacted pursuant to the city's police power and did not fall under the auspices of the Coastal Commission.

**Rule:** A city that has not been designated as a coastal zone and a sensitive coastal resource area by the Coastal Commission may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

***McMillin Albany LLC v. Superior Court***
(2018) 4 Cal.5th 241
(Construction Defect Remedies and Procedure)

**Facts:** Plaintiffs (37 homeowners of homes built by McMillin) sued McMillin Albany, LLC ("Builder"), alleging their homes suffered multiple defects, including in the foundations, plumbing, electrical systems, roofs, windows, floors, and chimneys. Plaintiffs asserted claims for negligence, strict product liability, breach of contract, and breach of warranty, as well as a claim for violation of the Right to Repair Act, Cal. Civil Code Sections 895 - 945.5 ("Act"). The Right to Repair Act includes a pre-litigation process under which, prior to filing litigation, homeowners must give the homebuilder notice of the defects, and the Builder is allowed an opportunity to repair the defects or take other measures. In this case, however, plaintiffs filed suit without first having given defendants notice of the defects. At some point, the plaintiffs dismissed their statutory cause of action, taking the position that doing so relieved them from their obligation to comply with the pre-litigation process and that their common law counts should go forward.

**Applicable Law:** Cal. Civ. Code Sections 895 - 945.5.

**Result:** The California Supreme Court declared the homeowners were required to comply with the pre-litigation procedures under the state's Right to Repair Act, including the requirement of giving Builder notice and opportunity to cure defects, even though the homeowners' warranty and contract claims fell outside of the Act's exclusivity. The court said the complaint rested on allegations that the Builder defectively constructed the home's foundations, plumbing, roofs, electrical conduits, framing, flooring, and walls of homes, and no statutory exception applied to those strict liability and negligence claims. The court upheld the lower court's stay of proceedings until homeowners complied with the pre-litigation notice requirements.

**Rule:** The pre-litigation procedures set forth in the Right to Repair Act must be followed in claims seeking recovery for construction defect damages, regardless of how they are pleaded. However, actions for breach of contract, fraud and personal injury are not encompassed by the Right to Repair Act.

***Kulick v. Leisure Village Association, Inc.***
[Unpublished] No. 2D Civ. B281922, WL 1918670 (Cal. Ct. App., 2018)
(Disclosure of Pending Litigation)

**Facts**: A resident in a senior planned community ("Kulick") published a newsletter under an assumed name and circulated it within the community in violation of the association's rules prohibiting anonymous publications. The association later sued Kulick and prevailed for violating the association's governing documents. Later Kulick published another newsletter criticizing the lawsuit and accusing the board of directors of the association of malfeasance. In response, the association distributed a response letter to the community that addressed the accusations in the newsletter. Kulick then filed a defamation lawsuit, to which the association filed an anti-SLAPP motion.

**Applicable Law:** Cal. Code Civ. Proc. Section 425.16.

**Result**: In this unpublished decision, the California Court of Appeal affirmed lower court's grant of anti-SLAPP motion as to the defamation cause of action for the association. The court then dismissed that cause of action with prejudice and awarded attorney's fees and costs to the association and its attorneys.

**Rule**: Granting an anti-SLAPP motion requires a two-step analysis. First, the moving party (defendant in defamation case) must show that the challenged cause of action is one arising from protected activity. Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, constitutes protected activity under California's anti-SLAPP law. Further, a statement made by or on behalf of the governing body of a planned development may constitute a public forum, and a writing may be a public forum in the sense that it is a vehicle for communicating a message about public matters to a large and interested community. Second, the court determines whether the plaintiff has demonstrated a probability of prevailing on his defamation claim. The association succeeded on both criteria.

***Branches Neighborhood Corp. v. CalAtlantic Group, Inc.***
(2018) 26 Cal.App.5th 743
(Necessary Board Actions on Construction Defect Claims)

**Facts**: Plaintiff association filed a construction defect claim against a developer. The arbitrator granted summary judgment in favor of the developer on the fact that the association failed to obtain the consent of the majority of its members prior to commencing the action. The association appealed the decision claiming that the arbitrator exceeded its authority by restricting the association's un-waivable statutory right.

**Applicable Law**: Cal. Code Civ. Proc. Section 1286.2 and 1286.6; Cal. Civ. Code Section 4065.

**Results**: The California Court of Appeal held that the plain language of the CC&Rs ("required vote to make a claim") was controlling. The court also found no violation of public policy in the arbitrator's decision and concluded that judicial review of the arbitration award was not merited in this instance.

**Rule**: If a requirement exists in an association's CC&Rs that a vote of the membership be taken to approve a construction defect action, then that requirement must be met before such an action may be filed. Additionally, an

arbitrator's decision generally is not reviewable for errors of fact or law. This is true even when the error appears on the face of the award and causes substantial injustice to the parties.

***Staats v. Vintner's Golf Club, LLC***
(2018) 25 Cal.App. 5th 826
(Association Premises Liability)

**Facts**: A golfer brought an action for general negligence and premises liability against a golf course operator of the association after she was stung by swarm of yellow jackets while taking golf lessons on the course.

**Applicable Law**: Cal. Civ. Code Section 1714.

**Result:** The California Court of Appeal held that the duty of golf course operators to maintain their property in a reasonably safe condition includes a duty to exercise reasonable care to protect patrons from nests of yellow jackets on the premises, since based on the facts such risks were reasonably foreseeable.

**Rule:** A person who controls property must inspect the premises or take other proper means to ascertain their condition and, if a dangerous condition exists that would have been discovered by the exercise of reasonable care, that person has a duty to give adequate warning of such condition or remedy it.

***Geraci v. Union Square Condo. Ass'n***
891 F.3d 274 (7th Cir. 2018)
(Disclosure of Pending Litigation)

**Facts:** A homeowner filed an action against the association alleging failure to accommodate her for her post-traumatic stress disorder (PTSD) condition. She further asserted that the association retaliated against her when the board published two litigation updates and held an open forum to discuss and update the owners about the pending lawsuit.

**Applicable Law**: 42 U.S.C. Section 3617.

**Result**: The U.S. Seventh Circuit Court of Appeal affirmed the lower court's decision and held that the moment the owner filed a lawsuit against the association, her PTSD became public knowledge. Further, there is no federal law that prevents co-owners of a condominium association from knowing why their association is bearing legal costs.

**Rule**: Co-owners in an association are entitled to information regarding ongoing lawsuits and publication of such details are not in violation of the Fair Housing Act provisions.

***Goudelock v. Sixty-01 Ass'n of Apartment Owners***
895 F.3d 633 (9th Cir. 2018)
(Collection of Assessments)

**Facts:** A homeowner stopped making assessment payments to the association. In response, the association initiating foreclosure proceedings. Owner filed for bankruptcy and surrendered the unit. The association moved the

bankruptcy court for an order finding that the assessments which accrued between the time the owner filed her bankruptcy petition and the time the mortgage lender foreclosed were not dischargeable.

**Applicable Law**: 11 U.S.C. Section 1328(a).

**Result:** The U.S. Ninth Circuit Court of Appeal reversed the lower court's decision and held that the debtor homeowner's obligation for post-petition assessments made by the condominium association based on debtor's continued ownership of condominium unit that she had purchased pre-petition, was within fair contemplation of the parties at time that the unit was purchased, and qualified as "pre-petition debt" dischargeable in her Chapter 13 bankruptcy case.

**Rule:** Condominium association assessments that become due after the debtor has filed for Chapter 13 bankruptcy may be dischargeable in the bankruptcy case.

***Artus v. Gramercy Towers Condominium Association***
(2018) 19 Cal.App.5th 923
(Permanent Injunctive Relief/Attorney's Fees and Costs)

**Facts:** A homeowner brought an action against the association alleging that the association had adopted a new rule without the consideration of member comments and without giving all members an opportunity to be heard, for which she was granted preliminary injunctive relief. Following the issuance of the preliminary injunctive relief, the association held a second election on the removal of cumulative voting, to which homeowner made no objections. Homeowner later proceeded with her claims for permanent injunctive and declaratory relief, which the court denied.

**Applicable Law**: Cal. Code Civ. Proc., Section 1060; Cal. Civ. Code Sections 4000, 5145, 4225, 5230 and 4605.

**Result**: The California Court of Appeal held that the homeowner's claim that association's conduct violated the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act") did not present an actual controversy, and thus homeowner was not entitled to a declaratory judgment that: the association violated the Davis-Stirling Act; or a final judgment in the homeowner's favor was required for award of attorney's fees and costs under the Davis-Stirling Act.

**Rule:** Courts are less-likely to grant permanent injunctive and declaratory relief, so long as the association remedies the perceived deficiencies by holding a second election, showing no habitual violations of the Davis-Stirling Act, and there is no indication of repeating such violations in the future. The prevailing party is to be determined, and attorney's fees and costs are to be awarded, at the conclusion of a case, upon final judgment.