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New Year, New Laws

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Why Energy Efficiency Should Top Your List

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Technology and Your Common Area

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New Year, New Laws

Legislation and Case Law Update

By Sandra L. Gottlieb, Esq., CCAL

RECENT LEGAL DEVELOPMENTS affect community association interests in a variety of ways. In 2016, the California Court of Appeal decided several cases concerning such issues as title to common area and board member liability. These cases may be instructive to board members and managers. Meanwhile, on the legislative front, new and pending laws affect association interests in the areas of governance, business dealing, FHA certification, annual notifications and use restrictions. Though not a complete or authoritative guide, we hope this article can be a useful resource for the most relevant legal updates this year.

FROM MAINTENANCE RESPONSIBILITY TO DISCRIMINATORY CONDUCT

Assembly Bill 968, aka "much ado about nothing," replaces the current language of Civil Code Section 4775 and is the legislature's clarification on the respective maintenance, repair and replacement obligations of owners and associations with regard to exclusive use common areas. Effective January 1, 2017, Section 4775's new language makes clear that an owner is responsible for *maintaining* his or her exclusive use common area and that the association is responsible for *repairing* and *replacing* it, unless the association's CC&Rs say otherwise. This update is not intended to change the current law, but merely to clarify language that has often been misinterpreted by associations. Of course, if your association's CC&Rs already address maintenance obligations for exclusive use common areas, Section 4775's new language will not affect you because the CC&Rs trump the Civil Code provisions, which function more as fallback for associations whose CC&Rs do not address maintenance responsibilities for these areas. If your association is relying on a different interpretation of the current language of Section 4775 and wants to keep its historical maintenance plan in place, now would be a good time for an amendment to the CC&Rs.

As of October 14, 2016, a Fair Housing Act amendment imposes potential liability on associations that fail to address discriminatory conduct or harassment by their residents if the association had the power to correct such conduct. The Federal Fair Housing Act prohibits discrimination in housing and housing-related services. As amended, the Fair Housing Act holds associations directly liable for failing to take prompt action to end any third party's discriminatory housing practice if the association (1) knew or should have known about it and (2) had the power to correct it.[1] If a manager or the board receives a complaint concerning possible discriminatory behavior by an owner or resident in the community, the board has a duty to investigate the complaint, even if it ultimately determines that no action is warranted. In light of the association's potential liability and the sensitivity of the situation, if an association receives an allegation of discriminatory conduct, it would do well to contact legal counsel for guidance.

MINIMUM WAGE INCREASE AND JANITORIAL SERVICE REGISTRATION REQUIREMENTS

Recent legislation that incrementally increases the minimum wage over the next several years may impact an association's vendor contracts.[2] Between 2017 and 2022, California's statewide minimum wage will increase by 50 percent over its current level. Many vendors serving associations rely heavily on minimum wage employees, so a 50 percent rise represents a considerable cost to absorb. As a result, these vendors may ultimately pass their higher labor costs on to the associations they serve through increased contract prices. Accordingly, association boards should discuss potential cost increases with vendors to determine the extent to which these increases should be addressed in annual budgeting.

Managers and associations should also be aware that, effective July 1, 2018, any association that contracts for janitorial services with an employer/vendor that is not registered with the Labor Commissioner is subject to a severe fine, pursuant to Assembly Bill 1978.[3] In light of these fines, a registration check will be an important step in the due diligence process before contracting for janitorial services. Of course, if your association directly employs custodial workers or your management company provides such services, your association or management company will need to comply with the registration requirements itself.

PROVIDING CORRECT AND CURRENT ADDRESSES TO ASSOCIATIONS

Beginning in 2017, every association will have an obligation to attempt to obtain contact information from it owners pursuant to newly enacted Civil Code Section 4041. Effective January 1, 2017, this new statute will require each association to solicit certain information from its members, including the mailing addresses where notices from the association are to be delivered and occupancy status of their homes in the association.[4] Although the statute does not mention how often an association must solicit this information, it does state that each member is responsible for providing it on an annual basis. At the very least, the association should solicit this information

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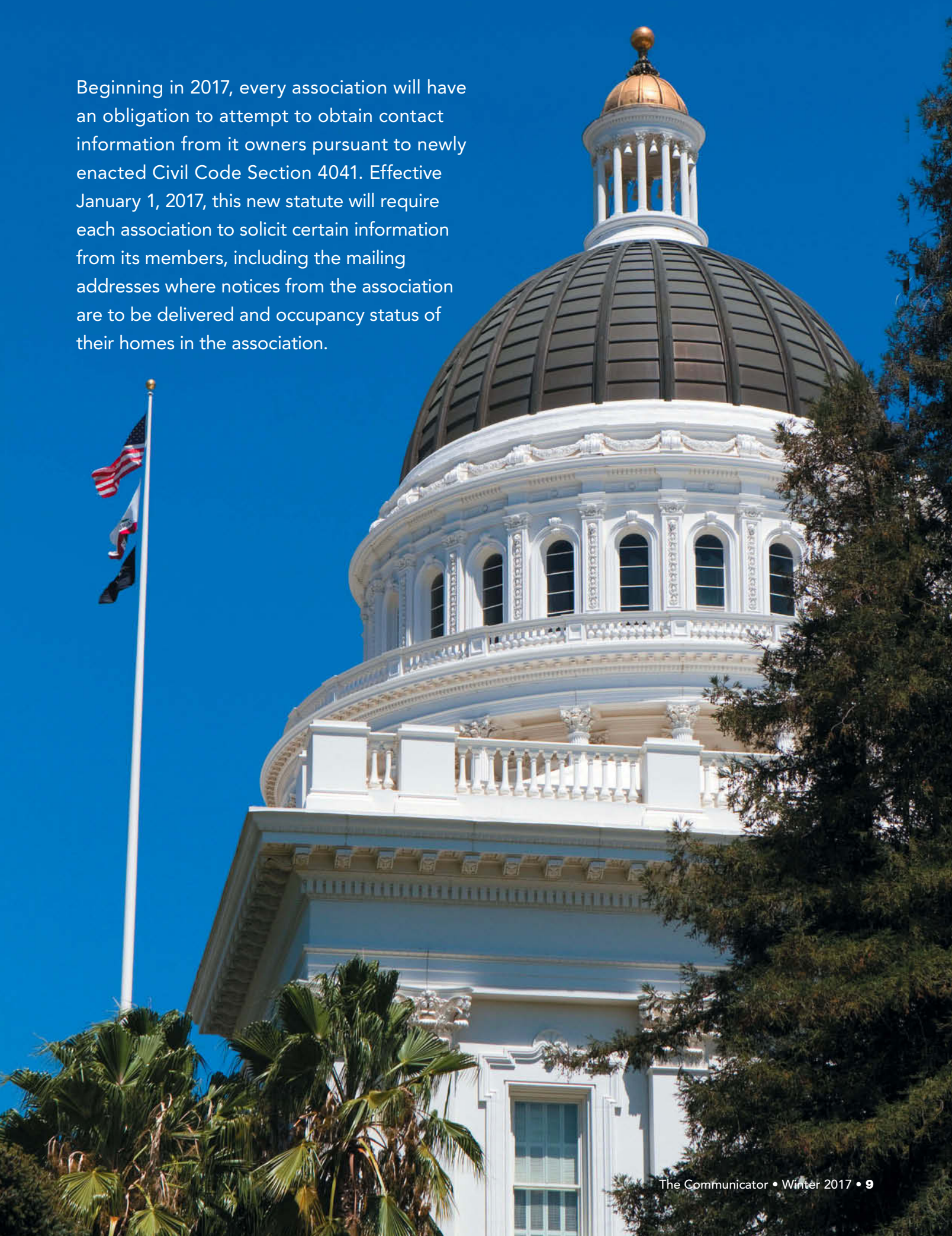

before it sends out its required annual disclosures. In the likely scenario that some (or many) members do not provide this information, the new law deems such members' onsite mailing addresses as the proper address for the association to deliver notice.

STREAMLINING THE FHA CERTIFICATION AND RECERTIFICATION PROCESS

On July 29, 2016, the Housing Opportunity Through Modernization ("HOME") Act of 2016 became effective as Public Law 114–201. The HOME Act should help more associations receive and maintain FHA certification by easing certification requirements and streamlining the recertification process. Among other things, the HOME Act should allow associations with high rental occupancy percentages to obtain FHA loan certification where they may previously have been ineligible. To what extent is still unclear, as the FHA is in the process of responding to the HOME Act. The potential downside is that this change could result in a higher number of renter occupied units in communities without rental restrictions, which can create a number of issues for associations. Boards and managers should stay current on the impending changes to the FHA's requirements, and those communities without rental restrictions may want to consider amending their governing documents to put these restrictions in place.

In 2016, the California Court of Appeal decided a handful of cases affecting community associations, which may be instructive for boards and managers.

In *Nellie Gail Ranch Owners Association v. McMullin*, a California court of appeal held that a homeowner could not acquire legal title to association common area by adverse possession because no single owner pays *all* property taxes assessed on common area.[5] In *McMullin*, the owners built a retaining wall on common area and sued for title to the land under a claim by adverse possession. Under California law, a person may acquire legal title to another's land without paying for it if that person can demonstrate to the court certain key requirements, including that the person paid all property taxes on the disputed property. In *Nellie Gail*, the property tax requirement ruined the McMullins' claim because as owners of a separate interest in the association, the McMullins did not pay *all* property tax assessed on the disputed common area. In this association, property tax on common area is not separately assessed and is instead reflected in each owner's individual property tax, which includes both the value of the owner's separate interest and the value of the owner's undivided share of the common area. Unless any single owner pays all property tax assessed on common area, any similar adverse possession claims are bound to fail. This case represents good news for associations who are concerned they may have lost the right to reclaim common area that has been claimed and used by individual owners.

Our next case shows that although the Business Judgment Rule generally shields board members from liability for acts taken pursuant to their official duties, it does have its limits. In *Palm Springs Villas II Homeowners Association, Inc. v. Parth*, the association claimed its president, Erna Parth, breached her fiduciary duties by taking a number of actions that were outside of her authority as dictated by the association's governing documents.[6]

Parth argued the fiduciary duty claim against her should be dismissed because she was protected by the Business Judgment Rule, which shields a director from errors in judgment where that director is (1) disinterested and independent; (2) acting in good faith; and (3) reasonably diligent in informing herself of the facts. Though the trial court agreed with Parth, the court of appeal reversed that decision and held the Business Judgment Rule does *not* shield a board member who fails to exercise reasonable diligence or act within the scope of his or her authority as granted by an association's governing documents. In other words, *Parth* shows that board members are not permitted to ignore their duties and the limits of their authority and then run for cover under the Business Judgment Rule.

The case of *Rancho Mirage Country Club Homeowners Association v. Hazelbaker* demonstrates a court backing the public

policy favoring alternative dispute resolution over litigation.[7] In *Hazelbaker*, the association and the Hazelbakers had a dispute over architectural approval for patio modifications, which the parties sought to resolve through mediation. In mediation, an agreement was reached, but the Hazelbakers breached this agreement and the association sued to enforce its terms. During litigation, a second agreement was reached, but the parties could not agree upon whether the Hazelbakers should pay the association's attorneys' fees. The court ultimately awarded the association its attorneys' fees, reasoning that although the association's suit was officially to enforce a settlement agreement, it was, in essence, an attempt to enforce the association's governing documents. This decision shows the importance of participating in ADR, as courts generally view such participation favorably if the association is later forced to litigate.

Finally, *Boswell v. The Retreat Community Association* is a general reminder that when a personal vendetta sours into a lawsuit, it becomes the association's headache.[8] This suit stemmed from a personal feud between Boswell and the association's president that began when Boswell performed unapproved construction work at his residence. This feud spilled over into a smear campaign and general nastiness on both sides. Predictably, a lawsuit ensued. Boswell alleged 19 instances of intentional infliction of emotional distress, and the association responded with an Anti-SLAPP motion (which prevents law suits intended to stifle protected/free speech). In the end, the court decided that only 14 of the incidents involved protected speech and that Boswell had a chance of succeeding on the remaining claims. Still, because the association prevailed on the 14 other instances, the association was deemed the prevailing party and awarded its attorneys' fees. This case should serve as a good lesson and reminder to boards and managers not to let their personal interactions turn into vendettas that drag their associations into costly litigation. ■

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1. The Fair Housing Act updates are set forth in 81 FR 63054: Quid Pro Quo and Hostile Environment. Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act.
2. California's statewide minimum wage increases are set forth in SB 3 amendments to the Labor Code § 245.5, 246, 1182.12. Note that California law sets the statewide floor for minimum wage, but this floor may be set at a higher level by applicable municipal codes.
3. The registration requirement and fines are incorporated through AB 1978 that adds Section 1420–34 to the Labor Code. Under these laws, the fine for a first offense ranges from $2,000 to $10,000.
4. These requirements are incorporated under SB 918, which adds Section 4041 to the Civil Code.
5. Nellie Gail Ranch Owners Ass'n v. McMullin (Oct. 3, 2016, No. G051244) ___Cal.App 5th ___ [2016 Cal. App. Unpub. LEXIS 7286].
6. Palm Springs Villas II Homeowners Assn., Inc. v. Parth (2016) 248 Cal.App.4th 268, 271 [204 Cal.Rptr.3d 507].
7. Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker (2016) 2 Cal.App 5th 252, 253 [206 Cal.Rptr.3d 233].
8. Boswell v. Retreat Cmty. Ass'n (July 11, 2016, No. E064171) ___Cal.App 5th ___[2016 Cal. App. Unpub. LEXIS 5133.

To make better laws, legislators need to hear from individuals in the industry (their constituents). CLAC has had an undeniably positive impact in Sacramento over the years, including in 2016, but we need your help. Please consider supporting CLAC. For more information on legislation and to find out how you can support CLAC (including through CLAC's Buck-A-Door and Grassroots Advocacy Campaigns), visit CLAC's website at www.caiclac.com. Don't forget to check out CLAC's blog and follow CLAC on Facebook and Twitter.

In addition to the significant impact on existing laws, CLAC works hard to develop and sponsor new legislation. Submit your ideas for future legislation to CLAC's Legislative Strategy & Research Committee at LSRC@caiclac.com.

If you have questions regarding the specifics of new laws, consult with your association's attorney.