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FAQs
(frequently asked questions)

Small Condominium Dispute Resolution

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This article focuses on issues arising in dispute resolution situations involving small condominium Homeowners Associations ("HOAs"), including buildings with no more than a dozen units, and with particular attention to very small HOAs, with as few as two units. While state regulations are generally the same for all sizes of condominium HOAs, small HOAs, which typically are self-managed and where the occupants live in close proximity, face unique challenges. San Francisco has a large population of small condominium properties, owing to a preference for low-density, detached housing and City rules prohibiting condominium conversion of any buildings with more than six dwelling units. Updated versions of this article may appear on the firm's website at www.g3mh.com.

News

New Civil Code §4750.10 voids any prohibitions Homeowner Associations (HOAs) might have against clotheslines in exclusive use backyard areas (but not on balconies, railings, awnings, or other parts of the building). HOAs may adopt reasonable restrictions on clotheslines and drying racks that do not "significantly increase the cost of using a clothesline or drying rack." HOAs will want to amend their CC&Rs to eliminate any restrictions on clotheslines which conflict with this new law.

Condominium HOAs are now required to address Owners' claims of harassment on the basis of race, color, religion, national origin, sex, familial status, and disability. This includes harassment by other residents, board members, managers, and vendors (see within).

It has been three years since the California State Legislature updated, modified and re-numbered the entire Davis-Stirling Act, the governing authority for all California condominium Homeowner Associations. HOAs which have not yet updated their governing documents (CC&Rs, Bylaws, Rules, etc.) to reflect the current status of the state's rules on how HOAs operate may find themselves disadvantaged when they try to enforce their rules under their old documents. In most cases, when governing documents conflict with the Davis-Stirling Act, it is the state laws which prevail.

Condominium HOAs are allowed to conduct business via teleconference, under rules requiring at least one physical location where owners can attend in person. However, HOAs are still *prohibited* from conducting non-emergency meetings via email or text messages. Meeting and other notices can be sent by electronic transmittal, but only with the prior consent of the recipient.

What Laws Govern California Condominiums?

All California condominiums operate under the Davis-Stirling Common Interest Development Act (Civil Code §4000, et seq.). Each individual condominium Homeowners Association ("HOA") also operates under procedures defined in its recorded Declaration of Covenants, Conditions and Restrictions ("CC&Rs"); sometimes these procedures are augmented by "Bylaws" and "Rules", which are not recorded. Whenever the legislature changes the Davis-Stirling Act, in an effort to improve the governance of condominium HOAs, the rules for ***all*** California condominium HOAs change in lockstep. (Condominiums organized with an

incorporated HOA are also subject to relevant provisions of the Calif. Corporations Code, one of several reasons why small condo HOAs frequently organize as ***unincorporated*** associations).

How Much Do CC&Rs Matter?

The recorded Declaration of Covenants, Conditions and Restrictions ("CC&Rs") is the principal governing document for HOAs and owners. Most CC&Rs, even when drafted by different attorneys, look rather similar. This is because roughly seventy-five percent of the language in typical CC&Rs (& Bylaws), represents a snap-shot of the governing Davis-Stirling Act at the time the documents were drafted. Another fifteen or so percent of the language will consist of provisions which mortgage lenders insist upon, leaving only a small portion of the CC&R language in the hands of the drafting attorney, or susceptible to change by the members of the HOA. CC&Rs define the separate responsibilities of the individual owners and the HOA, assign usage rights to certain Common Areas, dictate voting and decision-making authority, specify how common expenses are to be shared, require the maintenance of adequate reserve funds, enumerate coexistence rules concerning pets, quiet hours, etc., and provide mechanisms for the fair resolution of potential disputes. The clearer the CC&Rs are as to who is responsible for what, the less likely the chances for an internal dispute. Unfortunately, even the most well-drafted CC&Rs can be difficult to read and interpret, simply because of the enormous range of issues covered, and the inter-relationships among the many sections of the document; what looks like a simple answer set forth in one section may be completely overridden by the provisions of another section, buried elsewhere in the CC&Rs.

What Happens When CC&Rs Conflict with State Law?

The Davis-Stirling Act can trump anything in the HOA's CC&Rs or Bylaws. Whenever the Davis-Stirling Act uses words such as "notwithstanding any provision of the governing documents to the contrary" the Act will override the association's CC&Rs. For example, §5605(b) starts with "Notwithstanding more restrictive limitations placed on the board by the governing documents" and then goes on to set a 20% limit on raising regular dues and a 5% limit on special assessments. This means that CC&Rs with a 10% cap on raising regular dues and a 3% cap on special assessments are nullified by the Davis-Stirling Act, and the Act's higher limits of 20% and 5% will prevail. Sometimes, however, the Davis-Stirling Act allows the CC&Rs to control. When the Act uses words such as "Unless the declaration otherwise provides," the CC&Rs will prevail. When the Davis-Stirling Act is silent on which controls – the Act or the CC&Rs – the answer lies within the general language of the statute. For example, when §4800 says that "A common interest development ***shall*** be managed by an association," the Act clearly controls because of its use of the word "shall."

What Are HOA "Rules"? What Happens when Rules Conflict with CC&Rs?

"Operating Rules" are defined under the Davis-Stirling Act as any regulation adopted by the board of directors of a condominium homeowners association that applies to the management and operation of the association or the conduct of its business and affairs, including parking, use of Common Areas, member discipline, architectural standards, and monetary penalties. The Davis-Stirling Act has special notice (§4360) and meeting (§4365) requirements for creating or changing certain Operating Rules, including rules governing how units and Common Areas may be used, architectural or esthetic standards, discipline and penalties, and dispute resolution procedures. To be enforceable, an Operating Rule must be in writing, be within the HOA's authority, be consistent with governing law and the HOA's Bylaws and CC&Rs, be adopted by the HOA in good faith, and be ***reasonable*** (Civil Code §4350).

Who Can Enforce Condominium Laws?

The state does not act on its own to enforce condominium laws. Only the condo owners can take action to enforce their association's CC&Rs, Bylaws and Rules, and compel HOA compliance with the Davis-Stirling Act; non-owner residents cannot, nor may an owner assign

any rights or obligations under the Davis-Stirling Act to a third party (*Martin v. Bridgeport Community Association* (2009) 173 Cal.App.4th 1024). An owner may exercise her or his vote, however, by proxy.

How Are Condominium Laws Enforced?

The provisions of condominium CC&Rs, Bylaws and Rules, and indeed of the governing Davis-Stirling Act itself, are not self-enforcing, and there are no "condo police." Over the years, courts have interpreted and refined condominium law, publishing precedents and procedures to assist judges and arbitrators when they are called upon to adjudicate disputes among condominium owners. In California, a "Business Judgment Rule" generally prevails, encouraging courts and arbitrators to uphold the majority decisions of the HOA's members or directors regarding the maintenance, control and management of a condominium development, ***even if a reasonable person might have acted differently,*** provided the HOA's actions are taken (i) in good faith, (ii) in the best interests of the association, and (iii) upon reasonable investigation (*Lamden v. La Jolla Shores* (1999) 21 Cal.4th 249). Some enforcement mechanisms are relatively straightforward and effective, such as in the case of failure to pay HOA dues, where the principal enforcement mechanism is a "lien" – a legal claim against the owner's unit, forcing the owner to pay up (eventually). Other enforcement mechanisms, particularly when coexistence rules are violated, are more convoluted and are much more difficult to enforce. In such cases, a disputing owner may be forced either to seek a "Political Solution", or simply to move elsewhere.

What Is the "Political Solution"?

Because California judges and arbitrators are required to give great deference to the majority decisions of HOA members or directors under the state's Business Judgment Rule (see above), it is clear that the California legislature expects the resolution of many disputes among condominium owners to be resolved "politically," rather than judicially; that is, rather than suing the HOA because of a disagreement with a particular HOA decision or policy, owners are encouraged to run for election or attempt to recall the current directors, to effect a change. This highlights a bias in California law towards larger HOAs, where a political remedy may actually be achievable. In very small HOAs, however, it is usually impossible for a single owner to mount a successful political challenge against a majority vote – the total voting population is simply too small. In such cases, the personalities of the individual owners, more than with the language of the CC&Rs or even the Davis-Stirling Act itself, will often determine the outcome of internal disputes.

How Must HOAs Deal with Harassment Claims?

HOAs are now required under federal law to address members' claims of harassment on the basis of race, color, religion, national origin, sex, familial status, and disability. This includes harassment by other residents, officers, board members, managers, and vendors (Code of Fed. Reg. §100.7(a)(1)(iii)). The law requires that HOAs take prompt steps to investigate and end harassment. Complaining parties need not assert that they have suffered any psychological or physical harm, only that the alleged harassment occurred.

To determine if harassment is taking place, an HOA must investigate and evaluate the nature of the alleged harassment, the context in which the incident occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the people involved. If the HOA determines a complaint is unfounded, the complaining party can file a complaint against the HOA with the Department of Housing and Urban Development (HUD). Under new federal regulations, HUD will have authority to investigate the HOA. HOAs are advised to work with legal counsel to adopt anti-harassment rules for their associations, covering reporting and investigation of alleged harassment, and procedures for adopting findings and taking appropriate action.

How do Judges & Arbitrators Interpret the Language of CC&Rs?

CC&Rs are interpreted under California contract law, which tries to enforce the reasonable intentions of the parties (*Nahrstedt v. Lakeside Village* (1994) 8 Cal.4th 361). The wording of CC&Rs is read in its ordinary and popular sense unless a contrary intent is shown (*Harvey v. The Landing HOA* (2008) 162 Cal.App.4th 809). Because CC&Rs are enacted for the mutual benefit of all members of the HOA, they are interpreted to enforce the main purposes of the CC&Rs, and to avoid interpretations which will make the CC&Rs extraordinary, harsh, unjust, inequitable or which would result in absurdity (*Battram v. Emerald Bay* (1984) 157 Cal.App.3d 1184). CC&Rs should be read as a whole; provisions are interpreted in context rather than viewed in isolation, and as long as the words are clear and explicit and do not involve an absurdity, the plain meaning of the CC&R language governs (*Starlight Ridge HOA v. Hunter-Bloor* (2009) 177 Cal.App.4th 440).

How Long Can an HOA Wait to Enforce its Rules?

Code of Civil Procedure §336 provides for a five-year statute of limitations for violations of condominium HOA rules and restrictions, including certain architectural guidelines. Further, a CC&R amendment adopted in violation of its own amending procedures is not automatically void, but merely ***voidable***, and only if timely and successfully challenged in court (*Costa Serena Owners Coalition v. Costa Serena Architectural Committee* (2009) 175 Cal.App.4th 1175).

Can Owner Voting Rights Be Suspended?

Yes. Many HOAs have rules which allow for the suspension of voting rights (up to 30 days) when, ***after a hearing,*** an owner is declared to be in default. Owners may be obliged to cure their default, under protest, to preserve their ability to cast a vote.

What Are the Most Common Condominium Disputes?

Noise & Nuisance

The most common small San Francisco condominium buildings are Victorian and Marina-style flats, but such properties seldom meet modern expectations for sound transmission. While renters tend to be more tolerant of their neighbors, owners often have a heightened expectation of peace and quiet as their reward for paying mortgages and property taxes. When such properties are occupied by condominium owners, competing ideas of reasonable expectations can result.

Pets

Since January 1, 2001, most California HOAs have been required to allow owners to keep at least ***one*** pet (dog, cat, fish or bird) in their units. HOA restrictions on unleashed animals in Common Areas, and prompt removal of waste are enforceable. A 2015 Court of Appeals decision (*The Villas In Whispering Palms v. Richard M. Tempkin,* D065232 Court of Appeal, Fourth Appellate District Division One) confirms that condominium CC&Rs and Rules can place reasonable restrictions on the number of pets allowed in each unit, that HOA boards can enforce those restrictions even after a long period of non-enforcement, and may grant variances to deal with exceptional cases. This decision is "non-published", meaning that it cannot be cited as precedential law, but it does offer a good indication of how California courts will deal with condo pet rules. There is no current authority under the Davis-Stirling Act for HOAs to limit the size or weight of dogs, or to ban "fighting breeds." Nevertheless, some CC&Rs and Rules do include such restrictions, and while their enforceability has not yet been tested in court, this new ruling offers hope that such pet restrictions may become enforceable, as long as the rules are not arbitrary, discriminatory, or subject to selective enforcement.

Window Maintenance

Condominium owners seem to understand instinctively that the maintenance and replacement of the roof of their building is a shared responsibility. But while no one would think for an instant that maintenance and replacement of windows in a 60-story high-rise is the responsibility of individual unit owners, in small condo-

minium buildings, it is a common assumption that the unit owners are each responsible for "their own" windows. This may follow, or contradict, the condominium's CC&Rs; it is not unusual for condominium owners inadvertently to ignore their own written rules. Custom and practice over time among the owners do ***not***, however, modify the terms of their recorded CC&Rs.

LEAKS

Water leaks and attendant mold damage are a major concern for individual owners and their condominium HOAs. They are also a major cause for skyrocketing insurance premiums. Water leaks can emerge from walls, ceilings, windows, roofs, underneath floors, through foundations, as a result of worn seals, or due to negligent construction, installation or use of appliances. Depending on the source, duration and extent of the leak, disputes may arise over who is responsible for the costs of abatement and repair. Both owners and HOAs should have a clear and documented understanding concerning payment responsibilities, the HOA's right of entry to perform repairs, and obligations of owners to carry insurance above and beyond the HOA's master insurance policy.

IMPROVEMENTS & ALTERATIONS

Owners are usually entitled to make improvements to their individual units ***without*** HOA permission, provided that the changes do not impair the structural integrity or mechanical systems of the building, or impair the value or desirability of any other unit. Changes to Common Areas – even Exclusive Use Common Areas, such as decks and patios – generally require the advance approval of the HOA. The CC&Rs establish the criteria for the HOA's decision, and describe the process by which such approval may be requested. The HOA must provide owners with an annual notice, setting forth the association's Requirements for Approval of Physical Changes to the Property.

"NONSTANDARD" UNITS

Smaller buildings which start out as rental apartments and later convert to condominium ownership may include a unit, such as a penthouse or detached cottage, which is significantly different from the other units. The distinctness of these "nonstandard" units sometimes puts them at the center of HOA disputes over maintenance responsibilities.

UNIT RENTALS

Condo associations are often concerned with the inherent transient nature of tenants, which can lead to a higher incidence of rule violations, including noise disturbance, unlawful storage, and illegal parking, and a lower likelihood that the property will be treated with the same degree of care by tenants is it would be by owner-occupants. However, HOA prohibitions against renting or leasing a unit are ***unenforceable*** under the Davis-Stirling Act, unless the prohibition was already in effect ***before*** the owner acquired title to his or her unit. An owner's protections under this new law continue following changes in title, including probate, spousal, parent-to-child, adding a joint tenant, and certain other transfers. Rental prohibitions in effect ***before 2012*** are grandfathered, and remain effective. Even when HOAs cannot legally ***prohibit*** rentals in a condominium building, HOAs can still ***regulate*** these rentals, although such regulations may not be arbitrary or unreasonable, and must be applied in a fair and non-discriminatory manner. Such regulations may include prohibitions on vacation rentals (like Airbnb). Limitations on rent increases and eviction restrictions under the San Francisco Rent Control Ordinance may also limit the HOA's ability to regulate rentals in a condominium building. Rental restrictions (or lack thereof) may affect an owner's ability to obtain financing, as well, since many lenders will not offer mortgages on condos if more than

a certain percentage of units in the building are rented. Meeting a typical lender requirement of at least 50% owner-occupancy is much easier in a 200-unit complex than it is in a 3-unit building.

Unit Sales

The Davis-Stirling Act voids any CC&R provisions or HOA Rules that unreasonably restrict an owner's ability to market and sell his or her unit. Levying fees in connection with the marketing of an owner's unit which exceed the HOA's actual costs is also prohibited.

Assessments (Dues)

Assessing and collecting the money HOAs need to operate the condominium property is expressly governed by the Davis-Stirling Act. The HOA is required to prepare an annual budget and is responsible for preparing for all major expenses of the association. Collection of overdue assessments must strictly comply with the procedures set forth under the Davis-Stirling Act; mandatory alternative dispute resolution rules (mediation and arbitration) generally do not apply to collection actions (Civil Code §5930(d); see below).

Inadequate Reserves

While the Davis-Stirling Act requires all condominium HOAs to build up reserve funds for eventual replacement of common areas, such as the roof, exterior paint, etc., a surprising number of small HOAs ignore this law, and instead operate on a pay-as-you-go basis. Initially, this may seem reasonable to the owners, and appealing as a way to minimize HOA assessments (dues), but over the long haul, the results can be disastrous. Without adequate reserves, when critical repair work needs to be done but one owner is short of cash, the only practical solution may be for another owner to cover the gap, and hold an IOU for the cost. Also, inadequate HOA reserves can pose an obstacle to unit sales.

Usage Restrictions

These restrictions encompass a wide range of issues, including maximum occupancy, pets, parking, satellite dishes and noise. As a result, a variety of laws, including the Davis-Stirling Act, may affect the enforceability of usage restrictions. California statutes explicitly prohibit housing discrimination based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income and disability. California case law also prohibits discrimination against children and families with children. However, HOA restrictions needed to comply with local and state health codes are authorized.

Is Condo Dispute Resolution Expensive?

It is unpleasantly surprising to discover just how expensive it can be to try to resolve a serious condominium dispute. Notwithstanding the statutory mechanisms in place to assist, enforcement of default provisions can be a high-stakes crapshoot. Condominium dispute resolution rules which appear, on their face, designed to protect the little guy can have quite the opposite effect. Attorneys for both sides will charge hourly rates, expert witnesses are frequently required (also paid hourly), and of course, professional mediators and arbitrators must be paid their fees – usually in advance. The HOA's attorneys' fees are often covered by insurance, which puts the individual owner, who must pay his/her lawyer out-of-pocket, at a distinct disadvantage. Worse, an association whose attorneys' fees are being paid through insurance may have no incentive to settle. The combined expenses incurred resolving even a minor dispute can easily exceed $10,000; amounts well over $75,000 have become commonplace. Reimbursement of costs, including attorney's fees, by the loser to the winner is typically at a judge's or arbitrator's discretion, and cannot be assured, even in victory. Furthermore, if the reason for the dispute in the first place

is because one of the owners has run out of cash to meet his or her HOA obligations, an expensive legal battle will not likely generate any funds to settle unpaid HOA debts, or to reimburse the costs of enforcement.

What Is Mandatory ADR?

The Davis-Stirling Act requires every HOA to provide a "fair, reasonable and expeditious" procedure for resolving disputes (Civil Code §5905(a)). If an association does ***not*** establish its own procedures, default Davis-Stirling Act rules will apply automatically, including an obligatory "meet and confer" session prior to taking any other actions. The Davis-Stirling Act also requires that before a lawsuit is filed, the parties ***must*** attempt to resolve their dispute by **Alternative Dispute Resolution** ("ADR") in front of a neutral third party. The most common forms of ADR are ***mediation*** and ***arbitration***. Disputes which involve monetary damages in excess of $5,000, small claims cases, and certain assessment disputes are excused from this requirement. The Small Claims Jurisdiction for personal claims has increased from $7,500 to $10,000. Owners can sue their associations for up to $10,000, but HOAs are still limited to $5,000.

Mediation or Arbitration?

Because of the Davis-Stirling Act's ADR rules, California courts are rarely involved in resolving condominium HOA arguments. If informal resolution is unsuccessful, most CC&Rs require the HOA and the owners to resolve their disputes through ***binding arbitration***, a private proceeding in which a paid neutral arbitrator reviews the case and imposes a decision that is legally binding on both sides. Arbitrators' decisions are final, and generally not appealable. Getting the dispute in front of an arbitrator, however, can be costly, and any award of attorney's fees to the prevailing party is usually at the arbitrator's discretion. Many CC&Rs will postpone arbitration until the parties have first attempted to settle their dispute through formal ***mediation***, a non-binding negotiation facilitated by a trained mediator. Mediation can be a useful tool in helping the parties resolve their issues quickly and at a low cost, by offering a resolution tolerable to all parties. When successful, mediation can eliminate the unpredictable nature of litigation. However, achieving a negotiated solution where compromise is required by everyone can sometimes be difficult in small condominium disputes. The fact that legal fees are not recovered through mediation may reduce the incentive to settle. A mediator has no authority to render a decision, so if the parties fail to settle at the mediation, they will have to proceed to arbitration or a civil lawsuit to resolve their dispute.

What Are Attorney Conflicts of Interest?

Whenever condominium owners were all represented by the same lawyer in the formation of their condominium HOA, that lawyer may be unable to take sides in any dispute among the owners, due to attorney conflict of interest rules. This prohibition applies to *all* members of the attorney's law firm. Thus, an owner seeking legal representation likely will need to engage a lawyer who has no prior relationship with the owner(s) on the other side of the dispute.

What Can I Do to Reduce the Risks of Condominium Ownership?

All co-ownership forms (TICs, condominiums, cooperatives, partnerships, etc.) involve risks associated with sharing use of property with others, and relying on each other to fulfill mutual obligations. If you are a condominium owner, you should:

- Have your HOA keep the condominium CC&Rs updated, to remain in sync with the Davis-Stirling Act;
- Participate in regular HOA meetings and share in the responsibilities of HOA operations;
- Be mindful of your own ability to cover the financial obligations of an owner default; consider the possibility of *more than one* defaulting owner;

- Maintain a calculated reserve fund, and use reserve funds *only* as budgeted; and
- Observe and enforce the rules of your CC&Rs, including timely payment of all financial obligations.

What Sets G3MH Apart in Condominium Dispute Resolution?

CONDOMINIUM EXPERIENCE:
Goldstein, Gellman, Melbostad, Harris & McSparran, LLP (G3MH) has been a respected member of San Francisco's real estate community for over thirty years. G3MH attorneys have provided guidance and drafted the legal governing documents for over 3,000 condominium associations, with a special emphasis on small HOAs. Our attorneys have reviewed and are intimately familiar with thousands of pages of condominium CC&Rs and Bylaws drafted by other counsel.

LITIGATION, MEDIATION AND ARBITRATION EXPERIENCE:
No other firm in San Francisco offers G3MH's depth of experience in small condominium dispute resolution. In addition to representing individual clients in meditation, arbitration and court, G3MH also offers skilled mediators to help condominium owners resolve internal disputes.

SERVICE:
Any San Francisco Realtor® can confirm that G3MH is the "go-to" firm for help resolving disputes within small condominium associations. G3MH maintains the staffing and resources to offer response times to client needs which few firms can match. G3MH's attorneys are available to offer additional guidance in CC&R amendments and updates, landlord/tenant issues, title transfer and vesting, trust and estate matters, CC&R enforcement, and all other matters related to condominium ownership.

About the Authors:

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