



HOA Brief Newsletter

Tips for the HOA Community

#25

Are you Giving Proper Notice When Using Reserves to Pay for Litigation?

Happy New Year! As we enter 2014, there have been some significant changes in community association laws in California ([Click Here for our 2013 Legislative Update](#)). Not the least of which is the restating of the Davis-Stirling Act. While we have already addressed the most significant changes in the new Davis-Stirling Act ([Click Here for our Guide to the New Davis-Stirling Act](#)), now that the revision has taken effect, and we are dealing with the new law on a day-to-day basis, new issues are being discovered which were not anticipated. As these issues pop-up, we will be writing on them to bring them to light, and provide some guidance on how to address these new issues.

Of course we couldn't get far into the new year without the first of these "unforeseen" issues already coming to our attention. This one courtesy of Cathy Acquazzino of Progressive Community Management. Cathy noticed that under the "old version of the Davis-Stirling Act, when an association used funds from reserves to pay for litigation, the

association was required to give notice of that decision to its members in the "next available mailing." (Old Civil Code section 1365.5(d)). This language set the time period within which the board had to notify its members of the use of reserve funds to pay for litigation.

Under the new Davis-Stirling Act, 1365.5(d) is restated in Civil Code section 5520. One of the changes from the old language in this section is the elimination of the phrase that notice of the board's decision to use reserve funds to pay for litigation must be given in the "next available mailing." Instead, section 5520 simply states that the association "shall provide general notice pursuant to Section 4045 of that decision, and of the availability of an accounting of those expenses."

Section 4045, the "General Notice" provision added to the Davis-Stirling act as part of the restatement, describes the methods for giving general notice to the association's members. Specifically it states that general notice may be given by one or more of the following methods:

- (1) Any method provided for delivery of an individual notice pursuant to Section 4040.

(2) Inclusion in a billing statement, newsletter, or other document that is delivered by one of the methods provided in this section.

(3) Posting the printed document in a prominent location that is accessible to all members, if the location has been designated for the posting of general notices by the association in the annual policy statement, prepared pursuant to Section 5310.

(4) If the association broadcasts television programming for the purpose of distributing information on association business to its members, by inclusion in the programming.

However, neither section 5520, nor 4045 identify any time frame within which notice must be given. Both statutes are silent on the issue. That raises the question as to when must notice of the decision to use reserve funds to pay for litigation be given to the members. Given that the legislature specifically removed the language requiring notice to be given in the “next available mailing,” it can be presumed that the legislature intended to eliminate that requirement, and that notice is no longer required by the next available mailing. Further, since both sections 4045 and 5520 are silent on when notice must be given, the law implies that the notice must be provided within a “reasonable time.” (Civil Code

section 1657). What constitutes a “reasonable time” will depend on the facts and circumstances surrounding the decision to use the reserve funds.

Due to the nature and purpose of reserve funds, the legislature has put in place a detailed process which a board must follow in order to use reserve funds for anything other than what they were intended. The question as to when notice of a decision to use reserve funds for litigation expenses must be given is only one example of the myriad of issues which can arise. Any association considering a transfer of reserve funds to manage cash flow or to pay for litigation expenses should consult with their counsel before the process is started so that proper notice is given to the members before and after the decision is made.



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