



# Law Bulletin

## DRAFTING EFFECTIVE RULES AND REGULATIONS

by Gregory S. Lew, Esq.

### INSIDE THIS ISSUE:

- DRAFTING EFFECTIVE RULES AND REGULATIONS P1
- NEW REAL ESTATE SIGNAGE LIMITS P2
- INCREASING YOUR TURNOUT AT ANNUAL MEETINGS P3
- TEN BEST STRESS BUSTERS P4
- HOW TO INCREASE YOUR CHANCES OF GETTING YOUR AMENDMENT PASSED P5
- TIPS TO AVOID MECHANIC'S LIENS P7

The first step in ensuring effective enforcement of a homeowner association's rules and regulations is the promulgation of clear, and enforceable rules and regulations. Poorly drafted rules and regulations will be difficult if not impossible to enforce no matter how diligently the community manager or the association board of directors investigates and pursues reported violations. Accordingly, the following suggestions may help you to maximize the effectiveness of your homeowner association's rules and regulations:

### 1. PRECATORY LANGUAGE - WISFUL THINKING / ENCOURAGED CONDUCT

Rules must be drafted so that they regulate the prohibited conduct and provide the members with notice of what constitutes a breach thereof. For example, if a proposed restriction provides that members "should not engage in .....", or "should try to.....", the specified conduct is not actually prohibited or compelled but only suggested or discouraged. As such, an association may have no recourse should the members engage in the discouraged conduct. In order to avoid this situation and provide an association with the tools necessary to govern the conduct of the members and enforce desired restrictions, appropriate language either prohibiting or compelling the subject conduct should be used. For example, "members shall not ...." In so doing, the association clearly advises the members as to what conduct constitutes a violation and in addition gives the association the ability to effectively address such violations.

### 2. REDUNDANCY - UNNECESSARY / IMPROPER SUBJECT MATTER

Rules should be drafted as clearly and as simply as possible. Excess language makes for lengthier and more complicated rules and regulations which in turn, increases the difficulty in enforcement as well as the expense to the association. Accordingly, redundancy should be avoided.

#### A. PROHIBITION OF ILLEGAL CONDUCT

It is redundant and unnecessary to prohibit otherwise illegal conduct within a homeowner association's rules and regulations. For example, a rule prohibiting the sale of narcotics in association common areas is unnecessary and improper. This is one of the areas which should be left to local law enforcement agencies. The promulgation of rules and regulations regarding these types of conduct may lead to claims regarding the associations



COMMUNITY  
ASSOCIATIONS  
INSTITUTE



AFFILIATE MEMBER

4 CIVIC PLAZA  
SUITE 300  
NEWPORT BEACH CA  
92660  
PHONE: 949.729.8002  
FAX: 949.729.8012  
1888-HOA-LAW2  
1-888-462-5292  
WWW.CAHOALAW.COM

NEW REAL  
ESTATE  
SIGNAGE  
LIMITS

BY

Martin Lee, Esq.

Regulation of homeowner placement of real estate signs in common interest developments by homeowners associations (and their management companies) has recently taken a new turn with the 2003 promulgation of Civil Code §1368.1(a) and (d) in the Davis-Stirling Common Interest Development Act. Civil Code §1368.1(a) provides that any rule or regulation in a homeowners association that “arbitrarily or unreasonably restricts an owner’s ability to market his or her interest in a common interest development is void”. Civil Code §1368.1(d) provides that this section “does not apply to rules or regulations made pursuant to Section 712 or 713 [of the Civil Code] regarding real estate signs”. Civil Code §712, which has existed for quite some time, provides that “every provision . . . which purports to prohibit or restrict” the property owner or his or her agent from displaying for “sale, lease . . . , exchange” or directional advertising signs reasonably located, of reasonable dimensions and/or design, is void.

What a reasonable dimension and/or design is can be seen to be clarified by Civil Code §713. This leaves up in the air whether the regulating by the homeowners associations of homeowner placed real estate signs which do not advertise “sale, lease . . . , exchange”, or provide directions relative thereto, violates Civil Code §1368.1(a). For instance, it has become common practice to place “in escrow” signs over the “for sale” signs where a property has gone into escrow. A good argument can be made that such a sign is not protected by Civil Code §§712 and 713 since it does not “advertise” the property for “sale, lease or exchange”. The same can be said for “sold” signs. (Civil Code §§ 712 and 713 most likely apply to “for rent” signs, since “lease” is really just another term for “rent”.)

Will the new Civil Code §1368.1(a) restrict homeowners associations from promulgating rules

or regulations which unreasonably or arbitrarily prohibit “in escrow” or “sold” signs? The answer is likely to be “yes”. Unlike Civil Code §712, which relates to “for sale, “lease” and/or “exchange” signs, Civil Code §1368.1(a) is much broader. It applies to the marketing of separate interests and not just to their sale, lease or exchange. A sign advertising that a property has sold or is in escrow clearly deals with the owner’s ability to “market” his or her property (for instance, where property is advertised as “in escrow” or “sold”, back-up offers may thereby be solicited). And so, to the extent that a homeowners association rule or regulation bans outright such “in escrow” or “sold” signs, it will likely violate the new Civil Code §1368.1(a). A homeowners association rule or regulation which does not totally ban such signs, but instead permits same so long as they are of “reasonable dimensions and design” (as defined in Civil Code §§712-713) is much more likely to pass muster (and not be found to be “unreasonable” or “arbitrary” under Civil Code §1368.1[a]).

In future, with the exception of signs specifically covered by Civil Code §§712-713, homeowners associations and their management companies will need to be especially cautious that no association rule or regulation can be deemed to “arbitrarily” or “unreasonably” restrict an owner’s ability to market his or her home. This will be an area of special concern where homeowners associations try to regulate the placement of signs by homeowners or their agents and, in most instances, given the promulgation of Civil Code §1368.1(a), where any doubt exists whether the association’s rule or regulation might be violative of Civil Code §1368.1(a), the association would be well advised to consult with its legal counsel. ■

## INCREASING YOUR TURNOUT AT ANNUAL MEETINGS

BY

Denise Iger, Esq.

Just about every community manager, and most board members, have experienced the disappointment of not obtaining quorum at the annual meeting. It can be very frustrating to go through the effort of preparing the notice, proxies and ballots just to learn that no one seems to care what the board or manager are up to. Then, you are faced with having an adjourned annual meeting, or maybe two or three, until quorum can be obtained. This certainly is a waste of time, and may result in additional attorney's fees, management fees and room rental fees. Below are some ideas that may work for your community, so that perhaps this year you will not need to adjourn your annual meeting for lack of quorum.

1. Request that local merchants donate gift certificates or prizes that are raffled off to members in attendance. They can be small prizes like a free cup of coffee or a scoop of ice cream. If that is unsuccessful, consider asking the association's vendors for small prizes. Landscapers can give you potted plants. Your pool service provider may donate a raft. Your collections company may give you a gift certificate. Just don't alienate your vendors by asking for something every year or for every association.

2. Provide a modest amount of food or beverages, such as finger sandwiches or cookies. Alcohol is usually not a great idea.

3. Ask a local bakery or restaurant to donate food for the event.

4. Have the annual meeting before a social event. If it is a small community, consider a pot luck. If it is larger, invite some of the local teenage bands to play or ask young musicians in the community to play. Consider a fashion show organized by a local boutique. Or perhaps try a dog fashion show where people dress their

pooches in their favorite outfits.

5. Invite experts that are of interest to the membership. The local police station should have a community relations officer who can discuss security. The insurance agent can discuss insurance options for owners. The pest control company can discuss ways to eliminate household pests. The landscaper can discuss backyard garden maintenance. A city official can talk about improvement projects in your neighborhood. This is a great way to occupy people while the ballots are being counted.

6. Mention in the notice that something controversial will be discussed at the meeting. Some items to consider would be redecoration of the clubhouse, new exterior paint colors for buildings, hours of operation for community facilities, new landscaping schemes, and possible assessment increases for the upcoming year.

7. Make sure the board is organized. The board should consider a dress rehearsal of the annual meeting at the prior board meeting. This makes the board and management look good. The treasurer should give a financial report. The president should discuss all the things that were accomplished over the last year. Committee chairpersons should discuss the committee's contributions and plans for the future.

8. Consider giving out awards or certificates of merit to those that have contributed over the last year. This may be the person in charge of the fifty books in the clubhouse, the maintenance committee who performed walk-thrus, the regular attendees at the board meetings who have made great contributions or recognition of past presidents in attendance. This type of recognition makes people want to contribute their time and gives your community a smaller, more

CONTINUED ON PAGE 6

## TEN BEST STRESS BUSTERS

BY

Linda Miller Iger,  
Ph.D., Psy.D

So you're sitting at your desk frazzled by deadlines, you've got a crummy relationship, your boss is a jerk, your feet hurt and now you're stuck reading about Stress Busters. OK, let's start out with the obvious . . . what is stress? A physics definition of stress is "Any pressure on an object that distorts its form." Wow, if nothing else that should be an unpleasant reminder of what stress does to us . . . it "distorts," it distorts our perception, it distorts our thinking, it distorts our feelings and emotions and it distorts our bodies . . . yuck! Well, there are plenty of really simple things you can do to lower your stress level, but before we talk about the specific stress buster strategies let me tell you that good stress or *eustress* cause as much distortion as bad stress or *distress* . . . just ask any new bride or someone who just got a huge promotion whether or not they're stressed.

With that in mind, here are some ways you might eliminate stress in your life:

1. Close your eyes . . . shut down all visual stimuli for a few minutes and move your mind to a very pleasurable scene . . . allow your body to relax. Can you feel your breathing and heart rate slowing down?

2. Take a walk, depending on your level of fitness . . . take a long walk until you're tired or better yet, go for a jog or a run. Exercise to tiredness. This will help to lower your overall stress and actually dissipate the stress hormones already flowing through your body.

3. Get to sleep early and keep regular hours. I know you're going to say "This is impossible given my schedule," but you can do it. If you compromise your sleep, your cognitive functioning or thinking ability will diminish accordingly.

4. Take a long hot bath or shower and keep it hot . . . soak until your muscles begin to relax. Try a bath with bubbles or fragrance in it. Try a shower

with a mild pumice soap so you can stimulate your skin. And when you get out, wrap yourself in a nice warm towel or a cozy bath robe.

5. Listen to good music . . . put on a headset with your favorite relaxing music. Try finding something that quiets your soul.

6. Take a break from the world . . . put in ear plugs, cover your eyes with a washcloth (or cucumber slices), lay down, turn off the phone, stick a note on the door to send the world away and make a quiet refuge for yourself to de-stress.

7. Eat at regular intervals. Research is showing us that five or six little meals (a holdover from our hunter and gatherer days) keeps your blood sugar levels up and are better than a few heavy meals which will tend to make you feel lethargic. Try to stay away from comfort food. Adding a few extra pounds will not lower your stress level.

8. Rent a funny mindless movie like *Big* or *Milo and Otis*. Laughter is a wonderful stress buster . . . tell a joke or if you can't, hang around someone funny.

9. Talk to someone. Humans are social animals. In times of stress we do better talking with other people rather than isolating ourselves. And talking about your stress with someone else, whether it's a friend or a therapist, can provide a different point of view and put the stress in perspective.

10. Make love, not war. Stress is like being in a full-time war zone, so take a break from war. Ask a friend for a hug. Give someone a hug. Find time for a tender moment with someone you love. Tell a family member you love them. And remember most of all . . . making love, not war, is the best stress buster. ■

**HOW TO  
INCREASE  
YOUR CHANCES  
OF GETTING  
YOUR  
AMENDMENT  
PASSED**

BY

Denise Iger, Esq.

**A**rguably, amending the governing documents will be the most productive and time consuming event that a board may undertake. The process, depending on the scope of the amendment, may take months or years and can be expensive as a result of attorney's fees and costs associated with copying and mailing information to the members.

With that in mind, the board should make an extra effort to ensure the greatest possible likelihood of the amendment being approved by the membership. Below are some suggestions that you may find helpful when going through this process.

**USE A COMMITTEE**

Consider forming a committee of non-board members to "think outside the box." Perhaps delegating the job to others will help the board understand what the members at large perceive to be the problems with the governing documents. It should also help to solicit votes later if more members are able to help with the effort. Just be sure that the committee members are aware that they are advisory in nature so that there are no misunderstandings when the board does not take every piece of advice offered by the committee.

**CHOOSE AN ATTORNEY WISELY**

Often times boards choose vendors based on price. Rightfully so, a vendor can be chosen based upon past dealings too. This may not be the best way to choose an attorney to amend the governing documents. The best litigator in the world is not going to be the best attorney to redraft documents. Likewise, cheap is not better either (but of course it does not hurt). Instead, you want to look for someone experienced in redrafting. Additionally, you want to be very sure that you can communicate well with the attorney so that the board understands the importance of different changes and gets the end result requested.

**HOLD EXTRA MEETINGS**

It is important to create a "buzz" in the neighborhood so that you get the large number of votes you need.

**THINK SMALL**

Try not to correct all of the world's problems with one amendment. Really, you should be sticking to the old adage that "if it is not broken, don't fix it". It is hard for anyone to sit behind a desk and imagine all the scenarios possible. So, it is likewise hard to imagine all the possible reasons that a particular section may have been included in the governing documents. So, you must think carefully before deleting provisions or adding new ones. When in doubt, leave it alone.

**GIVE THEM SOME TIME**

Utilize the mail-in ballot process, making sure that you have left enough time to hold one meeting, send out a reminder notice and avoid holiday conflicts with the return process.

**THINK LIKE A USED CAR SALESMAN**

Add a solicitation letter to "sell" the proposal. Remember, you need a lot of votes to be successful. You will need their participation. You must tell the members why the board believes that the amendment is a good idea. ■



C O N T I N U E D  
F R O M P A G E 1

failure to enforce same, as well as substantial liability and risk of personal injury or death.

#### **B. REASSERTION OF RESTRICTIONS CONTAINED WITHIN THE CC&Rs**

More is not necessarily better. There is a presumption that restrictions recorded within an association's governing declaration of CC&Rs are reasonable. As such, a restriction contained within the recorded CC&Rs is more easily enforced and more difficult to judicially challenge than a rule or regulation later promulgated by the association's board of directors. Accordingly, there is no need or benefit to subsequently reasserting restrictions already contained within an association's CC&Rs in the rules and regulations.

#### **3. CONDUCT SPECIFIC - RULES SHOULD ADDRESS SPECIFIC TARGET CONDUCT**

Rules should be conduct specific and should directly address the particular behavior for which they are promulgated. While this may seem redundant, oftentimes, rules are promulgated so as to indirectly restrict the subject conduct as opposed to directly addressing it. This may have the unwanted effect of being over or under inclusive under certain circumstances. For example, if a rule is promulgated for the purpose of prohibiting certain types of dangerous or aggressive dogs, it should be drafted so as to prohibit aggressive dogs as opposed to the promulgation of a rule prohibiting dogs over a certain weight. A simple weight restriction may be overly broad in that it would restrict large, non-aggressive types of dogs and may not restrict certain smaller but extremely aggressive types of dogs. A great example is a pit bull terrier.

#### **4. AMBIGUOUS PROHIBITIONS**

Rules must be drafted so as to enable an association to objectively evaluate the prohibited conduct and determine whether or not there has been a violation

of a particular rule. For example, a poorly drafted rule might provide that "Members shall not engage in loud activities in the association common areas". Such a rule necessarily begs the question of what is contemplated by the term "loud activities"? This rule would be difficult if not impossible to effectively evaluate or enforce. A better rule would set forth specific conduct which is prohibited, thereby providing the members with notice of the conduct restricted by the rule and in addition providing the association with an objective criteria for evaluating member conduct. ■

C O N T I N U E D F R O M P A G E 3

welcoming feel.

9. Introduce new members of the community if your association is small enough that change in ownership is noticed.

10. Explain what all the committees do and have sign up sheets available. Volunteerism is contagious and the more people who become involved, the more other people may want to participate, even if it means just by showing up.

11. One retirement community I know of invites Marines from Camp Pendleton every year to use the pool and spend the day with the members. The election is performed and then everyone begins the task of setting up the clubhouse and pool area for a party. Many homeowners make snacks for their military guests. I think I have even seen grandparent members with their 20 something single granddaughters in what appears to be an informal dating service where the grandparents play matchmaker to granddaughters and Marines!

12. Have the association's attorney develop a three-year proxy for quorum purpose only. ■

## TIPS TO AVOID MECHANIC'S LIENS

BY

Denise Iger, Esq.

**M**any people do not realize that even if you do absolutely nothing wrong during a construction project, you can find yourself facing a foreclosure of a mechanic's lien. This is true even if you paid the contractor completely for the work performed. You see, if the contractor is paid, but fails to pay the suppliers, laborers, or subcontractors, for whatever reason, you may end up having to pay these people, which could double your contract price. But, there are some simple steps you can take to reduce the possibility of a mechanic's lien being recorded against the property.

1. Always use retention funds. A retention fund is a portion of the money that would normally be paid to the contractor that is instead held aside until all punch list items have been resolved and lien releases have been received. Ten percent (10%) of the payment is standard for retention funds.

2. Write joint checks to all companies that have sent you a preliminary notice until you have received unconditional releases from the companies. If you see a subcontractor or a supplier on-site, consider writing joint checks with their name as well. You may also consider paying suppliers and subcontractors directly, if your contract allows it.

3. Never pay cash or a cashier's check to a contractor. You always need a paper trail to show that payments were made.

4. Reference invoice numbers on checks made to the contractor so that it is clear where the payment should be applied.

5. Request that the contractor provide you with unconditional lien releases from anyone that previously supplied a preliminary notice. Be sure that the release is "unconditional". A "conditional"

release does nothing to protect you.

6. On larger jobs, look into performance and payment bonds. It may not be necessary to get a bond for the entire amount of the contract. These bonds can be filed at the County Recorder's Office to protect you from liens being recorded against the properties.

7. Make sure that you keep very good records of the preliminary notices, invoices and payments made.

8. Consider hiring a third party to administer the contract, authorize the drafting of checks, and collect information for you if you feel that you may not understand the correct method of making payments to contractors. Most, construction consultants provide this service.

9. Owners should consider recording Notices of Non-Responsibility on the property which serves to identify to third parties that the owner of the property has not contracted for the services rendered, but instead it is the homeowners association that is the responsible party.

10. Do not enter into a front-loaded contract where you end up paying for more work than has been performed to date. Limit your down payments to less than ten percent, as required by law. Make sure you have a "measurable" payment schedule.

11. Involve your attorney when developing the contract and payment schedules. ■



**Feldsott, Lee, Iger & Lew**

4 CIVIC PLAZA, SUITE 300  
NEWPORT BEACH, CA 92660

# *Celebrating 30 Years of Service to the* COMMUNITY ASSOCIATION INDUSTRY

***Feldsott, Lee, Iger & Lew*** 

REPRESENTING COMMUNITY

ASSOCIATIONS SINCE 1970

- General Counsel
- Assessment Collection
- Building Defect
- Business Litigation
- Contract Review
- Arbitration / Mediation
- Maintenance Matrices
- CC & R Enforcement
- Board Resolutions
- Mechanic's Liens
- Amending Governing Documents
- Opinion Letters
- Recall Elections
- Mold Litigation