

**WATCH OUT!  
A PENNY SAVED IS NOT ALWAYS A PENNY EARNED!  
(PENNY PINCHING WOES)**

**by Beth A. Grimm, Esq.**



What Happens If A Community Association Fails To Adequately Fund Reserves, Continually Defers Maintenance, Or Fails To Pursue Existing Construction Defect Issues?

**It is a ticking time bomb. Eventually ... #?!\*BOOM\*?#!**

Ever heard a board member say something like:

- "And we're proud that we have not had to increase the assessments for more than ten years."
- "My interest in serving on the board is in keeping the assessments low."
- "We have postponed painting for a few more years, because the buildings look pretty good."
- "I want to limit the association's spending to maintenance only - any replacements or upgrades should require membership approval."

**OUCH!**

**Experience says these words can spell disaster...**

There are many, many associations that do not visit an attorney until there is a problem - a big one. And seeing the same problems over and over, one begins to wonder how it is that a board of directors can miss what is going on in their own backyards. It is understandable if an association has difficulty discovering a construction defect like a leaky roof - if there is a five-year drought. It is understandable the association representatives could miss poor construction or reconstruction if the work looks good cosmetically. It is reasonable to believe the board could miss any "latent" problem (one that is not easy to see or discover). But watching buildings, garages and carports coming apart at the seams is hard to miss. Complaints of leaky windows and peeling paint should not be overlooked. Defying and challenging expert opinions as to how long a roof or a paint job will last, or a solar or drainage system will be effective is not a fine art, it may be reckless. Stretching a dollar too far can lead to an undesirable and unanticipated nightmare, requiring a very large special assessment.

A special assessment can be devastating to the owner who never noticed the benefit of the \$1, \$2, or \$5 a month savings reduction in assessments that came about through overly frugal "pinching". The point of this newsletter is to give you some serious things to think about the next time the board discussion turns to scrimping on maintenance, deferring discussions about possible construction defects, declining to hire a construction manager or architect, or choosing the cheapest contractor.

Here is a common scenario: Residents are beginning to complain about what seem like little things. The ceiling corner of the bedroom is starting to darken. Doors are getting hard to close. The paint seems to be peeling in some areas. The ducks are lining up to swim in the crawl spaces. Cracks in the dry wall run faster than they can be patched and repainted. A couple of residents have mentioned that their children's bicycles are rolling to the corner of the deck.

## **So now what??**

If there are indications of problems with buildings, structures, drainage, or other improvements, or there are symptoms indicating potential construction or design defects, your board needs a plan of action. You need to protect and preserve legal "statutes of limitations"- preventing delays which might cut off reasonable claims.

Whenever a board receives a bunch of complaints (as opposed to one or two) which indicate a possibility of a problem with the structures or improvements, a certain amount of investigation is required. The board needs to decide what to do. The extent to which an investigation should be undertaken should be discussed with the association attorney. This phase could be referred to as a "due diligence" phase. It makes good sense to investigate "symptoms". The ostrich approach (bury head in sand) leaves the "derriere" dangerously exposed. Two very important preliminary questions that must be resolved at the outset are: Who owns the property? and Who is responsible for the property? The answers may not be the same. Either answer may implicate the Association.

There are some specifically defined laws that dictate responsibility. For example, the language of Civil Code Section 1365.7 requires (in my humble opinion) investigation of possible construction defects when there are "signs" and making a reasoned decision whether or not to file a lawsuit, if defects are discovered. The statute says that decision "is within the scope of the responsibilities of an Association Board" of Directors. To fulfill their fiduciary duty and to protect each and every Director from individual liability, the Board members must do something if the red flags go up about possible defects. The Board must act, in all cases,

- In good faith, with prudent judgment
- Within their capacity as Board Members
- And must carry at least \$500,000 or more (100 or fewer units), or at least \$1,000,000 or more (more than 100 units), in general liability and directors and officers' liability insurance protection.

Corporations Code Section 7231 requires a Director to perform his/her duties in good faith, in a manner such Director believes in the best interest of the Corporation, and with such care, including reasonably inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

"Reasonable inquiry" means consulting the appropriate experts rather than making decisions based on board member "guesstimates." Corporations Code Section 7231 entitles the Directors to "rely upon information, opinions, reports, or statements, ...[by counsel, independent accountants or other persons] as to matters which the Director believes to be within such person's professional expertise or competence...".

Remember the preliminary inquiry in any investigation of construction defect matters or deteriorating infrastructure? Who owns the property? and - who has the responsibility to do something if indeed there are problems or defects? The questions for the board are:

### **"What should be done by the association?" ... "What can be done?"**

If there is as determination that the Association either owns the property or has responsibility for it, the association should then investigate, determine the extent of the problem, and act. There may be a need to act first and then correctly assess responsibility. The answer might vary depending on whether the association is a condominium or a planned development. Even if the property is not owned by the Association, it generally has legal standing to bring an action on behalf of the members. This authority carries with it certain obligations.

## **Deteriorating Components/Deferred Maintenance Issues**

Here is another common scenario: The association board of directors have called a meeting to discuss major rehabilitation that is necessary, because the buildings, garages or carports have deteriorated, somehow it seems - when no one was looking ... The parties present usually include, in addition to the Board

- A large [anxious] contingent of owners
- The contractor or consultant that has made a report as to the damage and may have bid the necessary repairs/maintenance and replacements.
- The association's attorney, who is primarily there to talk about legal responsibilities of the board, and the legal means of raising the money to do the massive rehab work.
- At least one banker, who is there to present loan options to individual members and to the association board.

These meetings are difficult. By the time it gets to this point, there are no pleasant options. Everyone up front takes some heat because there is a "big bucks" project looming in the horizon, and the people in the room are going to have to pay for it. The meeting can become a finger-pointing expedition - the owners often feel betrayed. In order to avoid this scenario, be sure the pay attention and:

### **Have Periodic Inspections By Qualified Persons.**

Any association can gather information on contractors by opening up the yellow pages to contracting consultants and calling people, describing the problems. That is usually not the recommended course of action unless you know exactly what questions to ask. The better way to find an expert is by word of mouth, a recommendation from someone else in a similar situation, or perhaps by contacting your local Community Associations Institute (CAI) chapter in your area. Ask for the names of community association "wise" contractors, engineers, reserve study preparers and construction managers, bankers, and attorneys, depending on your needs. There is no cost involved in making some telephone calls and inquires, and seeking out information about the right kind of expertise and what is available in the market place. The more earnest the effort, the more valuable the "return."

Under California Law, namely Civil Code Sections 1365 and 1365.5, community associations are required to have a reserve study prepared every three years, which includes a visual inspection of the components. That is a minimum standard. Most associations would do much better if they arranged a cyclical or annual inspection plan, and an annual inspection.

### **Keep Good Maintenance Records.**

In past years, many associations struggled with maintenance records. In this day and age, with increased awareness and practices being improved, there is more attention given to the importance of maintenance records. There are services available which provide a service of keeping up-to-date maintenance records. There are associations and knowledgeable reserve study preparers available also.

### **Preventive Maintenance.**

Obviously, roofs, buildings, pools, walkways, road surfaces, and other improvements tend to last longer if they are properly maintained. Again, association representatives can get a considerable amount of information by talking to knowledgeable contractors about the improvements and buildings on their property. Most reserve preparers also have construction experts on staff or available. Part of the reserve study required by California Law should include an analysis as to what kind of maintenance can be done to prolong the life of a component for which reserve funds must be collected. For example, timely painting of buildings protects the building itself. I have heard at many seminars: "If you wait until the paint starts to chip or fade, you've waited too long to paint." Apparently, the paint acts as a sealant which keeps moisture from forming under siding and causing dry rot. Even if a roof looks decent, an inspection may show that there is some problem underneath the surface, or that flashings are missing, or some other condition

exists that will cause early deterioration of the roof. If the inspections are overlooked, important things may be missed.

Without preventive and ongoing maintenance, an association which for several years appears to be in good shape can quietly slip into deep trouble, such as that described above, requiring a substantial amount of time and money to fix.

For lots more information on where the money comes from (to look at various sources), what kinds of issues come up over funding, spending (and borrowing from reserves), special assessments, lender's requirements, what can go wrong with careful planning, the board's fiduciary duty, and what to do once you have the money, go to the Publications page and look for a three part series on Reserves.

**For much more information on reserves, see the publications page.**

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**THE MATERIALS BEING MADE AVAILABLE HAVE BEEN WRITTEN OVER THE YEARS AND DO NOT COVER STATUTES OR CASE LAW OR PRACTICAL ISSUES THAT AROSE AFTER THEY WERE WRITTEN.**

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<http://www.californiacondoguru.com/hoarticles/hoarticlesframe.html>

**Townhall Meetings: How To Use Them Effectively:** A town hall meeting is a good way to communicate face-to-face with Owners and pass on and/or receive important information. It's a good way to get a finger on the pulse of the community. Some examples are to hold one during a document update- restatement project, to answer questions the members have, and to alleviate concerns. The format can be very good for presenting the "team" of professionals being used in a major rehabilitation or reconstruction project (such as the architect, contractor, banker, and attorney), or can be used to meet with neighbors in a neighborhood watch situation when there is criminal or drug activity in the community. Of course, it can backfire if there is no planning or organization to it. If the Board and management appear disorganized or unable to handle hecklers or important questions, the meeting can be very detrimental and cause owners to lose their trust in either or both. On the other hand, a manager and an attorney with experience in crowd control can help a board prepare for the worst.

Organizing the order of things to happen, setting the agenda, and giving thought as to how to keep things moving, preparing question and answer handouts - these are all things a manager can do, with the help of the Association attorney when there is the propensity for a really "lively" or "rowdy" crowd, or the need of some legal explanations of processes. Craziness and disorganization, too small a room, an overheated or chilled room, can engender distrust in the body (or manager) that organized the meeting. Do everything you can ahead of time to make sure that attendees will be comfortable, at least in their surroundings.

**Letters/Packets to Owners/Direct Mailings:** Obviously, letters are a means of communicating with the owners. Some people are very good writers, but the majority of people are not. This is another skill that a manager would do well to develop. The better writer the manager is, the better he or she can communicate ideas and helpful suggestions to the Board of Directors. Many Boards generally rely on a manager to supply it/them with form letters or suggested letters in the event of any disciplinary actions or communication with vendors about services. A manager who has really good writing skills can help write for/with the Board a summary of ongoing events or problems, in preparation for a town-hall or other meeting requiring action on the part of the homeowners. A good writer knows what kind of words create tension and engender defense of responses, and that words to use any alternative. For example, any use of the word "but" will commonly engender resistance to any statement containing the word, but in the alternative, the use of the word "however" will instead be tend to evoke a more sympathetic understanding. Use of the word "No" or "prohibited" where in the alternative positive choices can be given such as "not allowed" or cooperation is "encouraged" is another instance of "fighting words" versus "inviting" words.

<http://www.californiacondoguru.com/bmfaqs.html#problem>

Q

**What happens when we discover serious defects, and we know there is going to be great difficulty for the members and the association once the word is out?**

problem.  
foresees

A

**CONDOGURU:** It never serves an association well for a board to turn it back on a "doom" for the association, the best thing to do is move forward and look for a resolution. In any serious problems, the board should be consulting the right kinds of experts to help solve it. Each board member receives individual protection as in the Corporations Code and the Davis-Stirling Act for acting in good faith in consulting the right kinds of experts. For example, if serious defects are discovered, the board would want to consult with contractors to identify the problem, (its insurance company) to see if there is any coverage, an attorney (to see if there is any legal recourse available against any parties) and possibly a manager (to coordinate the effort) or a construction manager (to oversee the bidding and contractor processes). The board will need assistance in identifying the problem, wrapping its arms around the problem, presenting it to the membership, and getting membership support for the resolution. See [articles](#), [publications](#), [legal briefs](#), and [forms](#).

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**What does the board do with a serious disruptive homeowner, or a serious problem in the association related to conduct (such as a suspected drug house, meth lab, etc.)?**

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try other

**CONDOGURU:** These are serious problems that probably also require the assistance of some professional with expertise in the matters. The association could try other things first, such as a neighborhood watch program, reports to the police (including psychiatric officer, if there is one, in the case of a serious disturbed individual). If the matter involves harassment, of some kind, and any potential discrimination claim, matters must be handled very delicately. This means that there is considerable exposure to litigation in these matters and so the processes have to be carefully laid out. The extent of the board's responsibilities in these matters is not completely determined or definitive and there is case law emerging on the issues so they should not be taken lightly. See [articles](#), [publications](#), [legal briefs](#), and [forms](#).

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**What do we do if we have a disruptive member or members at a board meeting and cannot conduct business?**

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not

board

**CONDOGURU:** The ultimate answer is adjourn the meeting and go home, but that is not necessarily the best answer. If the board is armed with certain things, it can have ammunition to deal with disruptions, and possibly proceed more effectively than a board that is unprepared. Having an agenda is a good idea. Conducting an orderly homeowner forum prescribing reasonable limits on it can be effective. Having the chair bring and use a gavel appropriately can be quite effective. Disciplinary actions for disruptions may be useful. Threats may be helpful (keeping a cell phone on the table to call 911, for example) could be of some value. Sometimes, shaming people in front of their peers can be used effectively, but is not recommended for people without the necessary "people skills" to do it in a way that does not trigger confrontation. As with other drastic situations, there are less drastic measures to achieve success. Bringing in the right kinds of experts to deal with practically gritty situations usually proves to be of great benefit. For more information, see [articles](#), [publications](#), [legal briefs](#), and [forms](#).



ommunication is a lost art in some HOAs. The majority of people just are lacking in people skills. They might be in a hurry, frustrated, impatient, uneducated, or harried. Volunteer board members tend to get more criticism than praise, and often find themselves spending much more time than anticipated on association business. Then along comes a curious, tenacious and sometimes downright abusive or offensive owner who makes what seem to be unreasonable demands. Sometimes the shoe is on the other foot and an owner suffers at the hands of an overly egotistical, power hungry, or just plain tired board member.

The title says it all, communication is an art form. When you mention "communication", the name has a warm touchy-feely connotation. Seems like there should be a "community" of some kind involved. Some form of fellowship, something in common. Common possession or enjoyment of something, such as any use of common facilities; or common obligations, rights, and privileges, common interests, living under the same regulations, some kind of society, common character, similarity and likeness.

Sounds like an ideal situation, doesn't it? However, and if you read and believe everything that is said in the newspapers, you would think homeowner associations Boards are secret societies, police states, and HOAs are nasty places to live. Why? Much of what is recorded in the newspaper (selectively reported to glamorize or "make it a "horrible-sounding" story) revolves around the emotional side of living in an HOA. People have emotions, and act out and do crazy, immature and strange things. Homeowners who move into an HOA with a "my-home-is-my-castle" mentality are usually not nice about the way they approach things. Oftentimes, they do things without regard for the rules and regulations, and often because they have not read them nor do they understand them, nor do they believe in the board is cable of enforcing

them. Then, when the board is confronted by these kinds of people, they react with a "like-kind" attitude. Defiance begets negativity. Anger begets defensiveness. Attacks invite either a retreat or counter attack. What you have probably found, and what I have found, is that one of the biggest problems that boards have with regard to the homeowners is the inability to communicate "artfully". That is where people on either side of the table can shine. Teaching, directly or by setting an example, better communication skills may turn out to be a most important asset. It may involve assisting the board in proper communications with the owners, reigning in outspoken directors, schmoozing vendors in negotiations on contracts, organizing owners to challenge the Board if you believe that is necessary, soothing ruffled feathers between neighbors who are fighting, breaking bad news to owners in the face of some large rehabilitation or construction project, or helping to write rules or regulations with a "positive flavor" that will invite compliance, rather than evoke criticism and defiance. It may just be communicating your needs to the Board, in a way that will not invite a closed, negative response.