SECTION 8

LEGAL

GENERAL INFORMATION

MANWELL & MCOMBER
AN ASSOCIATION OF ATTORNEYS
NATIONAL BANK OF THE REDWOODS BUILDING
111 SANTA ROSA AVENUE, SUITE 400
SANTA ROSA, CALIFORNIA 95404

TEL (707) 526-7383
FAX (707) 526-0307

MALCOLM T. MANWELL*
MARTIN G. MCOMBER

*A PROFESSIONAL CORPORATION

October 27, 1993

King Haugner, Chairman
LOMAA
League of Oakmont Maintained
Areas Association
310 White Oak Drive
Santa Rosa, CA 95409

Re: Bylaws/CC&RS

Dear Mr. Haugner:

This is in response to your request of October 13, 1993 for my written opinion regarding whether the maintenance subassociations are required by law to have a set of Bylaws.

It is my opinion that the subassociations are unincorporated associations under California law, and there is no legal requirement that they adopt or operate under a set of bylaws.

California Corporations Code §24000 defines an "unincorporated association" as any partnership or other unincorporated organization of two or more persons, whether organized for profit or not, but not including a government or governmental subdivision or agency". The various Oakmont maintenance sub-associations come within this definition. There are no specific formalities required by California law to form or operate an unincorporated association.

On the other hand, corporations are required by statute to have Articles of Incorporation as well as a set of bylaws. The law also prescribes the content of a corporation's Articles and bylaws.

Nevertheless, in Oakmont. it was recognized that the sub-associations needed a

set of governing rules. Both the developer and the Department of Real Estate provided that that governance via the vehicle of the CC&Rs. In Oakmont, the provisions relative to the maintenance sub-associations are, in essence, the substantive equal of bylaws.

Since the CC&Rs are recorded against the various lots and become burdens against the land, any change in the procedures described in those CC&Rs must be adopted with the formalities required in the CC&Rs.

Please call me if you have any further questions or concerns regarding this opinion.

Very truly yours,

MALCOLM T. MANWELL

W:\WP51\LETSA-L\LOMAA.025

Section 1 1999

Civil Code Section 846, Duty of Care to Persons Entering Property for Recreational Purposes

Probably a concern that has more than once occured to Oakmont property owners is their liability to those persons who enter their property, such as hikers and walkers. This is particularly true of those associations who "owm" common areas, whether private streets, landscaped or open areas, or wooded areas. The common areas up towards Annadel Park are extensive and, being wooded, invite hikers. Are these areas a source of liability if someone, say, trips and falls down on the common?

The answer is provided by Section 846 which says there is no liability here. A copy of Section 846 is provided here together with "Notes of Decisions" on this section. These notes illustrate how the code section works:

1. One says "Section 846, immunizing owners of interests in real property from liability arising from recreational use of the property, was enacted to encourage property owners to allow the general public to engage in recreational activities free of charge on privatly owned property.

2. In another case, the child and parents of a child who climbed a tree in a vacant lot could not recover against the owner for the child's injuries. While tree climbing is not mentioned in Section 846, that Section's exceptions "include(s) such activities as" those listed. Thus since "hiking" is specifically listed, then "walking" should also be covered.

3. A motorcycle passenger could not recover for falling into a ditch alongside a railroad track. While the track itself was unsuitable for recreational activities, the non-track area was and Section 846 was applied.

4. Even the small property interest of a person who had a permit to graze cows on federal land, is protected. The fact that the permit did not give the permittee a land owner's interest in the usual sense, does not mean he is not protected by Section 846.

5. The section is not a complete blank check. It itself says it does not limit liability when (1) the injured plaintiff is expressly invited upon the property, (2) a money charge is made for entry, or (3) there is a "willful or malicious failure to guard or warn against a dangerous condition, use structure or activity." The latter was applied so that the US government was not protected when a road on its property ended in a cliff.

California Civil Code.

§ 846. Duty of care or warning to persons entering property for recreation; Effect of permission to enter

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

Added Stats 1963 ch 1759 § 1. Amended Stats 1970 ch 807 § 1; Stats 1971 ch 1028 § 1; Stats 1972 ch 1200 § 1; Stats 1976 ch 1303 § 1; Stats 1978 ch 86 § 1; Stats 1979 ch 150 § 1; Stats 1980 ch 408 § 1; Stats 1988 ch 129 sec 1.

NOTES OF DECISIONS

1. In General

Civ. Code, § 846, immunizing owners of interests in real property from liability arising from recreational use of the property, was enacted to encourage property owners to allow the general public to engage in recreational activities free of charge on privately owned property. The statutory goal was to constrain the growing tendency of private landowners to bar public access to their land for recreational uses out of fear of incurring tort liability. By amending the section so that it applied, not only to the owner of any interest in real property, but also to "any other interest" and "whether possessory or nonpossessory," the Legislature intended to broaden the scope of the section so as to immunize the owner of any interest in real property, regardless of whether the interest included the right of exclusive possession. Hubbard v Brown (1990) 50 Cal 3d 189, 266 Cal Rptr 491.

In an action by a four-year-old child and his parents against the owner of a vacant lot in which the child was injured while climbing in a tree, the trial court properly granted summary judgment for defendant on the ground of Civ. Code, § 846 (recreational use exception to landowner's duties), notwithstanding plaintiffs" argument that the child's use of the lot was not one of the recreational activities included within the purview of the statute. By stating that a recreational purpose "includes such activities as" those listed therein, the statute clearly indicates that the list is merely illustrative. A recreational purpose is one intended to refresh the body or mind by diversion, amusement, or play; clambering about in trees is such an activity. Valladares v Stone (1990, 3rd Dist) 218 Cal App 3d 362, 267 Cal Rptr 57.

In an action by a motorcycle passenger who was injured when the motorcycle fell into a ditch created by a drainage culvert on the shoulder of a railroad right-of-way, the shoulder of the right-of-way was not per se excluded from the scope of Civ. Code, § 846, which provides that a property owner has no duty of care to keep premises safe for recreational use by others or to warn of hazardous conditions on the property. Although the statute does not apply to accidents occurring on property that is unsuitable for recreational use, the aspect of the railroad's right-of-way that purportedly made it unsuitable for recreational use was the potential for injury from being struck by a passing train, and the passenger was not injured by a train but by her use of the railroad's property to ride a motorcycle. Thus, the trial court did not err in instructing the jury on the recreational use immunity created by the statute. Myers v Atchison, Topeka & Santa Fe Railway Co. (1990, 4th Dist) 224 Cal App 3d 752, 274 Cal Rptr 122.

3. Interest in Real Property

The holder of a permit to graze livestock on federal lands in California is an owner of an interest in real property sufficient to come within the immunity afforded by Civ. Code, § 846. Thus, in an action for negligence against the holder of such a permit by a motorcyclist who was injured as a result of colliding with a barbed wire gate that had been erected across a road in a national forest by the permit holder, the trial court properly granted summary judgment for the permit holder. A federal regulation stating that grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources, merely insures that the holder of a grazing permit does not acquire rights in federal land that are compensable in a "taking" context under U.S. Const., 5th Amend. Applying a recreational use immunity statute to grazing permit holders does not undermine this purpose. (Disapproving *Pacific Gas & Electric Co.* v. *Superior Court* (1983) 82 Cal. App. 3d 785 [193 Cal. Rptr. 336], to the extent the court in that case relied on a utility company's lack of a right to exclude recreational users from public waterways overlying land it owned as a basis for denying the immunity of Civ. Code, § 846.) Hubbard v Brown (1990) 50 Cal 3d 189, 266 Cal Rptr 491, 785 P2d 1183.

4. Landowner's Duty

Civ. Code, § 846 (recreational use exception to landowner's duties), constitutes an exception to the general rule that a private landowner owes a duty of reasonable care to any person who enters his or her property. In the absence of one of the statutory exceptions to the general exception created by the statute, the duty owed by the landowner is not greater than that owed to a trespasser under common law, i.e., the recreational trespasser on private land assumes the risk of injury, absent willful or malicious misconduct by the landowner. The legislative purpose of § 846 is to encourage landowners to keep the property accessible and open to the public for recreational use without charge by limiting their liability for injuries sustained during such use. Valladares v Stone (1990, 3rd Dist) 218 Cal App 3d 362, 267 Cal Rptr 57.

Actions of United States Forest Service in building and maintaining road that ended, without warning, at cliff, and which allowed no margin for driver or mechanical error, or for adverse natural conditions, constituted willful and malicious conduct that was not protected by landowner immunity under California's Recreational Use Statute. Termini v United States (1992, CA9 Cal) 963 F2d 1264.

L O M A A
League of Oakmont Maintained Areas Association
310 White Oak Drive
Santa Rosa, Ca 95409

President
Vice-Pres

TO: OAKMONT HOME OWNERS ASSOCIATIONS BOARDS OF DIRECTORS

FROM: King Haugner, President LOMAA

Date: July 24, 1995

Subject: Statement By Board of Governors

This letter is a continuation of the information contained in my letters of July 18, 1995 and June 15, 1995 with the accompanying letter of Malcom Manwell, subject Common Ground Encroachment.

I am attaching a copy of the form Statement By Board of Governors, this is a new revised form prepared by the Architectural Committee.

When an application for Architectural change is submitted by a member of a Home Owners Association, this form will accompany it. It will be up to the Home Owner to prove to the Governing Board that there is no violation of Common Ground.

If the Board of Governors approve the application then there is no known illegality and the Board of Governors will be the one that is liable.

The Architectural Committee will look upon the Board of Governors approval as approval to go ahead to make a decision based on the architectural change.

L O M A A
League of Oakmont Maintained Areas Association
310 White Oak Drive
Santa Rosa, Ca 95409

To: Oakmont Home Owners Associations Boards of Directors

From: King Haugner, President LOMAA

Date: July 18, 1995

Subject: Common Ground Encroachment

This letter is in addition and will supplement my letter of June 29, 1995, covering the same subject, and with a copy of the attorneys' (Malcolm T. Manwell) letter of June 9, 1995 attached.

With reference to the subject, the penalties for encroachment may occur at any time that one of the members of the Home Owners Association may object and consequentialy may sue, or not occur until the Home Owner is ready to sell the property, then a failure to disclose encroachment may make him liable in a law suit and the title to his property is clouded.

If the Homeowner desires to erect a permanent construction on Common Ground he will find it necessary to consult and attorney, this will be a legal process, then submit the proper forms to his Board of Governors and the Architectural Committee ,with written assurance that the home owner will bear the legal costs and the work of getting the agreement of all of the other members of his Home Owners Association.

Through the cooperation of the Chicago Title Company I have been able to obtain an example of the successful transfer of Common Ground to a homeowner.

Here is an outline of the documents involved:

EXHIBIT A - A complete listing of <u>all</u> of the Homeowners in the Association. These are listed by lot number and the names are fully written as the title to their property is held.

EXHIBIT B - This is a second complete listing to all of the Homeowners in the Association, however the listing is spaced so the Homeowners have room for their signatures and there is a column for the witness to sign and date. The witnesses must have these pages detailed and Notarized by signature.

EXHIBIT C - Legal Description of the property by a Licensed Land Surveyor. There also is a Document, <u>Combining Agreement</u> , which petitions the County for the City of Santa Rosa to combine the original parcel with the Common ground transfer.

INDIVIDUAL GRANT DEED - This is the final Document transferring ownership, it is Notarized and Recorded by the County and City.

Call me if there is an immediate question on this procedure or we will discuss this further at the September

L O M A A
League of Oakmont Maintained Areas Association
310 White Oak Drive
Santa Rosa, Ca 95409

evident

Quarterly Meeting.

A part of our discussion will be an attempt to define the difference between permanent construction and other kinds of encroachment. Clearly, anything that encloses a portion of the common area to the exclusion of all but that one homeowner, or even lends to extend the "exclusive use" of a homeowner into the common area should be considered permanent construction. This would include such things as fencing in areas of common area or extending decks and patios into the common area. In other words the homeowner usurps part of the common area to the effective exclusion of other home owners-in -common. This kind of encroachment should not be allowed without affecting a legal boundary line approved by all owners in common.

On the other hand, if an owner desires to improve a part of the common area(typically but not necessarily, a part near the lot he exclusively owns) in a way that all owners-in-common can enjoy, and other homeowners-in-common give their approval(or at least do not object), this would not be considered an encroachment in the same sense as the permanent construction described above. "Non-permanent" construction would include such things as landscaping upgrades, stepping stones, walkways, etc. This kind of "encroachment" would best be handled by The Home Owners Association Board of Governors at the request of the homeowner. The requesting homeowner would generally be asked to pay all costs of the construction and, perhaps subsequent maintenance. Note that in this case it would technically be The Board of Governors affecting the change, and they (per the CC&R's) have responsibility for landscaping and maintaining the common area. the key difference is that the "encroachment" is requested by one homeowner and paid for by one homeowner, but does not exclude the use of any part of the common area by other owners-in-common.

The Architectural Committee is preparing new application forms, these should be seriously studied by The Board of Governors

L O M A A
League of Oakmont Maintained Areas Association
310 White Oak Drive
Santa Rosa, Ca 95409

President
Vice-Pres
Treasurer
Secretary
Directors

Date: June 15, 1995

From: King Haugner, President LOMAA

To: All Board Chairmen HOA

Subject: Common Ground

Attached are two copies of the letter from the Oakmont Attorney, after reading this, it is suggested that you file these in your LOMAA Work Book: one under Board Responsibilities, Section 1 and one under Legal, Section 8.

NOTE CONCLUSIONS:

Neither the Association nor the Board of Governors has legal title to the Common Area. Only the agreement and a conveyance by ALL of the owners can transfer title.

The Architectural Committee has the overall authority to approve or disapprove encroachment into the Common Area, however ALL of the lot owners must agree before any encroachment may be granted.

I am asking OVA Chairman Lou Oberholtz if he will contact the attorney and get a suggested release form.

ARCHITECTURAL COMMITTEE:

A new Statement By Board of Governors is being prepared for submission for projects in the Home Owner Association Area. If there is a question of the project encroaching on Common ground the Board of Governors **cannot approve** until proof of title is established.

LOMAA
President King Haugner

cc: Lou Oberholtz, Chairman OVA
Jack Killeen, Chairman Architectural Committee

RENEÉ S. RAMSEY
CERTIFIED LEGAL ASSISTANT

LAW OFFICES OF
MALCOLM T. MANWELL
A PROFESSIONAL CORPORATION
NATIONAL BANK OF THE REDWOODS BUILDING
111 SANTA ROSA AVENUE, SUITE 400
SANTA ROSA, CALIFORNIA 95404

TEL (707) 526-7383
FAX (707) 526-0307

June 9, 1995

Lou Oberholtz, Chairman
Board of Directors
Oakmont Village Association
310 White Oak
Santa Rosa, CA 95409

RE: Encroachments in Common Area

Dear Mr. Oberholtz:

This is a follow up to our telephone conversation of June 1, 1995. You asked me to give the OVA, its Architectural Committee, and the various sub-associations[1] written direction on handling encroachments into Common Area.

It is my understanding that some of the homeowners in the maintained area sub-associations want to build additions which will encroach into the maintained area (i.e. into the Common Area). The question is how do you proceed to grant such an encroachment? Apparently, the Board of Governors of the sub-association doesn't object. You asked for my opinion as to who has the power to grant such an encroachment (easement), and what role does the Architectural Committee play in this process?

[1] "Sub-association" is my word. I use it to distinguish the various landscape maintenance associations (the so-called "sub-associations") from the "master association," the OVA.

CONCLUSIONS:

1. In a maintained area subdivision, neither the association nor its Board of Governors has legal title to the Common Area. Only the agreement and a conveyance by all the owners of all the lots within that subdivision can effectively transfer title or create an encroachment easement in the Common Area.

2. Subject to the other requirements in the Protective Restrictions, the Architectural Committee has the overall authority to approve or disapprove of any encroachments into Common Area. Naturally, the lot owners involved must also all agree before any valid conveyance or encroachment may be granted.

ANALYSIS:

In Oakmont, there are two types of Protective Restrictions ("CC&Rs") which correspond to the two types of subdivision. The maintained area subdivisions have been labeled as "Condominium Subdivisions" and the single family lot only subdivisions have been labeled as "Standard Subdivisions."

If you compare the definitions in Article II of a Standard Subdivision with the definitions in Article II of a Condominium Subdivision, you will see the differences. Only the Condominium Subdivision CC&Rs have the terms, "Common Area", "Owners Association" and "Board of Governors." [ART. II, ¶s 20, 21, & 22]. The reason is simple. There is no Common Area in a Standard Subdivision because Common Area under the Oakmont CC&Rs is the landscape areas. What the master association (i.e. the OVA) maintains is known as the "Community Facilities" [ART. II, ¶ 6].

Another important distinction in Oakmont is that the master association (the OVA) has title to and owns the Community Facilities, whereas the maintained area sub-associations do NOT have title to and hence do NOT own the Common Area they maintain.

If you compare deeds of owners of the lots in a Condominium Subdivision with the deeds of owners in a Standard Subdivision you will see how these differences are carried out. Whereas the owner in a Standard Subdivision has title only to a specific lot, the owner in a Condominium Subdivision has title to a given lot, plus an undivided interest in a particular parcels or parcels constituting Common Area. For instance in Oakmont No. 48 (Starry Knolls) each owner has title to his or her lot, plus an undivided 1/42 interest in Parcel A (i.e. the Common Area).

The first conclusion, therefore, flows from the ownership structure in the maintained area subdivision. Since only the owners have title to the Common Area, all owners must join in any encroachment license, easement, or conveyance regarding the Common Area.

ARCHITECTURAL COMMITTEE

As to the role of the Architectural Committee, there is no difference between the Standard and Condominium Subdivisions. The CC&Rs for both read the same.

> *"No building, fence, wall, tent, or any other structure shall be erected, constructed, altered or maintained upon, under or above...any part of said property...unless the plans...have been submitted to and approved by the Architectural Committee..."*
>
> [CC&Rs, ARTICLE III, §3 (a)]

In both, "said property" is defined in ARTICLE I as the entire subdivision. Therefore, the second conclusion is that before any encroachment may be made into the existing Common Area, the proposal must be submitted to and approved by the Architectural Committee.

I hope this answers your questions and provides you with some guidance on how to approach the problem from a legal standpoint. If there are any questions, please call.

Very truly yours,

MALCOLM T. MANWELL

W:\WP51\OVA-001\LETTERS\OBERHOLT.J-6

PROOF OF SERVICE BY MAIL
(Code of Civil Procedure 1013(a) & 2015.5)

1. I, _____, declare:

2. I am over the age of eighteen years> If this matter involves litigation, I am not a party.

3. My residence or business address is:
   a. Street Address _____
   b. City _____
   c. County _____
   d. State California
   e. Zip Code _____

4. a. On the following date: _____
   b. by placing true copies thereof enclosed in a sealed envelope, in the County where I reside or am employed, with postage thereon fully paid, in the United States Mail the following city/town: _____
   c. I served the document(s) described as: _____
   d. on the person(s) identified here:
      Name: _____
      Address: _____
      City/State/Zip: _____

      listed on the attached Exhibit

5. I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed
   a. on this date _____
   b. at the City of _____
   c. in the County of _____
   d. State of California

_____
(signature)

NOTICE IS HEREBY GIVEN THAT PURSUANT TO EVIDENCE CODE 641 A LETTER CORRECTLY ADDRESSED AND PROPERLY MAILED IS PRESUMED TO HAVE BEEN RECEIVED IN THE ORDINARY COURSE OF MAIL.

Form extracted from ECHO bulletin Vol.24, No. 2

FORM NO. 16

MODEL HOMEOWNERS' ASSOCIATION

RELEASE OF NOTICE
OF DELINQUENT ASSESSMENT

NOTIFICATION IS HEREBY GIVEN:

That the lien claimed by (association) against _____ upon the following described real property in Santa Rosa, Sonoma County, State of California:

Subdiv. ____ Lot _____ in the County of Sonoma, State of California as per map recorded in Book ____ Page ____, inclusive of maps in the Offices of the County Recorder of Sonoma County, California is hereby released, the claim thereunder having been fully paid and satisfied, and that certain Notice of Assessment Lien recorded as Instrument No.___ on _____, Official Records of Sonoma County, California, is hereby satisfied and discharged.

Date: _____

Signed: _____

Form No. 16 (Cont.)
RELEASE OF NOTICE
OF DELINQUENT ASSESSMENT

STATE OF CALIFORNIA)
)ss
COUNTY OF SONOMA)

On _____, before me, _____, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

(seal) (signature)

FORM NO. 14

MODEL HOMEOWNERS' ASSOCIATION

RELEASE OF NOTICE OF VIOLATION OF THE GOVERNING DOCUMENTS

Recording requested by
and when recorded return to:
(name & address of association)

In accordance with Article (No.) of the Protective Restrictions for (name of association) recorded on (date) as Instrument No. _____, of the Official Records of Sonoma County, California, the undersigned hereby certifies that the Notice of a Violation dated _____ and recorded on _____ as instrument No. _____ of the Official Records of Sonoma County, California against the real property described as (legal description) owned by _____ _____, then the record owner, is released effective on the date of recordation of this notice in the office of the Sonoma County Recorder.

Date:_____ Signature:_____
President

FORM NO. 15

MODEL HOMEOWNERS' ASSOCIATION

NOTICE OF DELINQUENT ASSESSMENT
(LIEN)

This NOTICE OF DELINQUENT ASSESSMENT is being given pursuant to California Civil Code 1367 and the provisions of the Protective Restrictions of the Homeowners Association as follows:

Association claimant: (name of association)
Declaration of Protective Restrictions
recorded on (date)
Instrument No. _____
County: Sonoma

The description of the common interest development property against which this notice is being recorded is as follows:

Common address: _____
Subdiv. _____ Lot _____ per Map
recorded in Book _____ Page _____ as shown on
the condominium plan recorded _____
as Document No. _____
The reputed owner is: _____
Owner's mailing address: _____

DELINQUENCY
Assessments due for: (DATES) $
Late fees, attorney's fees,costs & interest $
Total Amount of delinquency: $

Date: _____ Signed: _____

MISCELLANEOUS

GETTING STARTED WITH MEDIATION

A Seminar Prepared for

The

ECHO WINE COUNTRY RESOURCE PANEL

By

Terrence A. Carlson

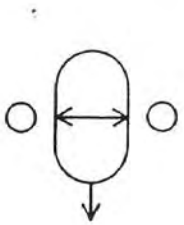
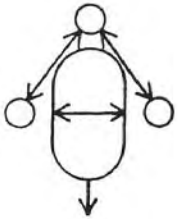
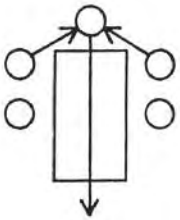
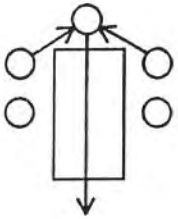
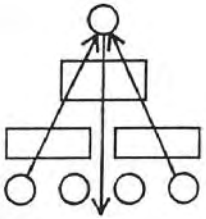
Mediator/Arbitrator

July 10, 1996

PROGRESSION OF DISPUTE RESOLUTION PROCESSES

The traditional dispute resolution processes are negotiation and litigation. Mediation and arbitration are considered alternative dispute resolution processes.

CONSENSUAL ----->---------->---------->---------->----- ADJUDICATORY

Negotiation	Mediation	Non-Binding Arbitration*	Arbitration*	Litigation
A process parties use to reach agreement or resolve disputes	*Negotiation facilitated by a mediator*	*Informal third-party proposed decision-making*	*Informal third-party decision-making*	*Formal third-party decision-making*
				
Potential for Resolution	***Potential for Resolution***	***Proposed Award***	***Award***	***Order***
Parties retain control of the outcome and the process	*Parties retain control of the outcome but seek assistance with the conduct of the process*	*Parties retain control of the outcome but give up some control of the process*	*Parties give up control of the outcome and give up some control of the process*	*Parties give up control of the outcome and the process*

***Arbitration is more formal than mediation, but less formal than litigation.**

Negotiation and mediation do not have an evidentiary hearing, but arbitration and litigation do.

Presented by
TERRENCE A. CARLSON
Mediator - Arbitrator
(707)252-4141

TERRENCE A. CARLSON
ATTORNEY AT LAW
33 LYNN DR.
NAPA, CALIFORNIA 94558
TELEPHONE (707) 252-4141
FACSIMILE (707) 252-4161

REQUEST FOR RESOLUTION

A properly prepared Request for Resolution makes proposals on important matters upon which agreement is needed to proceed with ADR.

1. It provides a brief description of the dispute.

2. It proposes a form of ADR.

3. It proposes a neutral, and/or a process to choose one.

4. It proposes how the neutral will be compensated.

5. It proposes a time to start and to schedule the process, or a way to accomplish this.

6. It makes proposals on confidentiality.

7. It describes the time frames for the response to the Request for Resolution and for completion of the process.

8. It encloses a copy of Civil Code §1354.

The way to see if a Request for Resolution is properly prepared is to review it with the following question in mind. If the other party accepts all of the proposals in the Request for Resolution, has it provided enough direction to allow the parties to complete the process without further negotiation about the process?

The failure to submit a properly prepared Request for Resolution which results in a failed ADR process will give the owner the opportunity to file a motion asking the court to dismiss the association's case until it makes a good faith effort to submit the dispute to ADR. This motion would be based upon the association's failure to comply with Civil Code §1354.

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_____ MANAGEMENT COMPANY
[ADDRESS]

[Date]

Mr. Opposing Party
126 Contention Ave.
Anywhere, CA 94448

RE: REQUEST FOR RESOLUTION

Dear Mr. Party:

As you know the Association is concerned about your extending your patio fence into the common area to enlarge your patio. This is a violation of Article VII §2 which prohibits encroachments upon the common area. I understand that you believe that the fact that past Board's have allowed four former Directors to do this requires this Board to allow you to do it. However, the new Board will be putting and end to this practice.

We have written to each other and have spent a few hours in discussion trying to settle this matter and have been unable to do so. The Association is required by law to enforce the CC&Rs. The Board would prefer to avoid litigation to require you to correct this matter. Accordingly, the Association is proposing that we both meet with Mr. Terrence A. Carlson, an ECHO Legal Resource Panel attorney who understands the law and operations of community associations. I have enclosed his letter outlining is qualifications to serve as a mediator in this matter.

I have also enclosed a proposed **Agreement to Mediate** which includes the **Community Association Mediation Procedure**. These help explain the initial understandings and process for the mediation. Please call me and we can set up a conference call with Mr. Carlson to answer our questions about getting started. The Association is making this Request for Resolution to comply with California Civil Code §1354 a copy of which is enclosed. If Mr. Carlson is not acceptable to you, I propose that we call Mr. Oliver Burford, Executive Director of ECHO, and have him send us the names, qualifications and hourly rate of three ECHO-trained mediators willing to mediate this dispute. You may go first and strike the name of the least acceptable proposed mediator. The Association will then do the same. The remaining mediator will conduct the mediation.

The law requires you to respond to me within thirty (30) days of your receipt of this, or the law will assume that you have rejected this Request for Resolution. At that point the Association will file a lawsuit against you to enforce the CC&Rs as it will have no other choice. The lawsuit will ask the Court to order you to pay our attorney fees. If you choose to accept, this mediation must be completed within ninety (90) days of receipt of your acceptance, unless we reach a written agreement to extend the time for mediation.

If you choose to accept this proposed process to resolve our dispute, please sign the enclosed Agreement to Mediate and mail it to Mr. Carlson with your check for $. If you have questions please call me. I am confident that Mr. Carlson's background and experience will provide us with some new insights concerning our dispute and that we will, with his help, reach a fair agreement to resolve it without the need for litigation.

Very truly yours,

_____ Management Company

Enc: CC §1354
Statement of Qualifications
Agreement to Mediate
Community Association Mediation Procedure

a24\req4res.wcp\188f

TERRENCE A. CARLSON
ATTORNEY AT LAW
33 LYNN DR.
NAPA, CALIFORNIA 94558
TELEPHONE (707) 252-4141
FACSIMILE (707) 252-4161

[TODAY'S DATE]

Name
_____ Management Company
[ADDRESS]

RE: Statement of Qualifications to Serve as Mediator

Dear _____:

This letter responds to your request for background information and my fees to serve as a mediator, in a dispute between an Association managed by _____Management Company and an owner.

I have practiced law for twenty-one years, including six years as a Deputy County Counsel in Contra Costa and Napa Counties representing county agencies, including social services, building inspection and school districts. During my fifteen years of private practice, two years were spent in a general practice and the last thirteen years have been confined to real estate and homeowner association law. At present, ninety-five percent of my practice is homeowner association law. Although most of my practice during the last thirteen years has involved representing homeowner associations, I have frequently represented owners in their disputes with their homeowner associations. I am a member of the Executive Council of Homeowners, ECHO, and have served on their Legal Resource Panel for thirteen years. I am also an Associate Member of the Council of Condominium Homeowner Associations.

I have represented public entities, administrators, county department heads and homeowner association directors as defendants in Federal and State court actions. I have represented school districts charged with unfair practices before the Public Employment Relations Board and have represented school districts in administrative hearings involving employee dismissals and layoffs. I have conducted fifteen court trials, twenty-five county or school district administrative hearings before state Administrative Law Judges, and twenty homeowner association due process hearings.

I first attended the American Arbitration Association's course on dispute resolution in 1976 and I have been utilizing those dispute resolution principles since that time. I am a certified Interboard Mediator for the California Association of Realtors, and I have recently completed the three-day ECHO mediation training.

My fees as a mediator are $155 an hour, to prepare for and conduct a mediation. I will begin when I receive a check for $155. I propose to discuss the provisions of the agreement and some operational aspects for getting started in a conference call with the Parties and/or their representatives. Once we have a signed Agreement to Mediate and I have a check for $310 for the first two hours of the mediation, we can begin. If either Party has questions about establishing our relationship, and the other agrees that they may speak alone with me, I will take the call, or you may have Karen set up a conference call so we can all speak together.

To preserve my neutrality, after I begin serving as a mediator, all communication with me will be by letter or fax, with a copy to the other party, or by conference call with both parties. Call my secretary, Karen, at **707-258-2349** to arrange for a conference call. I am available for pre-mediation conference calls and mediation hearings in the evening and on weekends with reasonable notice. I will go to your location with a one way charge for travel time, or you are invited to meet at my office.

As a potential mediator I must disclose whatever past relationship I may have had with the parties. In that regard, please let me know the names of owners and their representative, if any, and the names of the Officers and other Association representatives who will be participating in the mediation. I met you about six months ago when I began attending the ECHO Wine Country Resource Panel, which is a group of managers, insurance brokers, accountants and attorneys who meet monthly to discuss community association operations. I have presented an ADR seminar to the Managers at _____ Management Company. However, our relationship is not so close that it would prevent me from being impartial when mediating a dispute involving an Association whose operations were managed by _____ Management Company.

I believe my background and experience representing both boards and owners, qualify me as a mediator in homeowner association disputes. I have twenty-one years of diverse legal experience. I have knowledge of the manner in which CC&Rs relate to the law and I have frequently applied this knowledge during my fourteen years of working in this area. I am committed to using my skill and experience to provide an impartial, fair, prompt, and cost effective resolution of this dispute. I appreciate the opportunity you have afforded me to present my qualifications to serve as a mediator.

Very truly yours,

Terrence A. Carlson
Attorney/ADR Neutral

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AGREEMENT TO MEDIATE

1. PARTIES.

_____	_____ HOA
Represented by _____	Represented by _____
_____	_____
_____	_____
Ofc: _____	Ofc: _____
Fax: _____	Fax: _____

2. MEDIATOR.

Terrence A. Carlson
33 Lynn Drive
Napa, CA 94558
Off: (707) 252-4141
Fax: (707) 252-4161

3. NATURE OF DISPUTE. This dispute involves an alleged (e.g. CC&R violation with respect to exceeding the occupancy limit of a residence.) [No more than two sentences. A description of the dispute will be provided later, see §5 of the **Community Association Mediation Procedure**.]

4. DISCLOSURE OF PAST RELATIONSHIPS. The Mediator has made a reasonable effort to make written disclosure to the Parties of (a) all business, professional, and social relationships the Mediator has had with the Parties and their representatives during the last five years; (b) any financial interest the Mediator has in any Party; and (c) other circumstances that may create doubt regarding the Mediator's impartiality. Each Party and their representatives have made a reasonable effort to make written disclosure to the other Party and the Mediator of any relationships with the Mediator of a nature described in the preceding sentence not previously identified and disclosed by the Mediator. The Parties and the Mediator are satisfied that any relationships disclosed pursuant to the above two sentences will not affect the Mediator's independence and impartiality. Notwithstanding any such relationships, the Parties request the Mediator to mediate this dispute and they waive any claim based upon such relationships, and the Mediator agrees to so serve.

5. FUTURE RELATIONSHIPS. The Mediator shall not work for or against any Party during this dispute. The Mediator shall not work on any matter for or against a Party, regardless of subject matter, until one year after the termination of his services as a Mediator in this dispute.

6. COMMUNITY ASSOCIATION MEDIATION PROCEDURE. The Parties and their representatives agree that the Community Association Mediation Procedure will be the procedure which the Mediator will use to conduct the mediation and that they agree to mediate within that process. It is attached and its terms are included within this agreement by this reference.

7. PRESENTATION OF INFORMATION ON DISPUTED MATTERS. The Parties will present all information reasonably required to enable the Mediator and the other Party to understand their position on the disputed matters. The information will be presented in the order which will be determined by the Mediator.

8. MEDIATOR CONFIDENTIALITY. Confidential information disclosed to the Mediator by the Parties or by witnesses in the course of the mediation shall not be disclosed to persons outside the mediation process by the Mediator. All records, reports, or other documents received by the Mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

9. PARTY CONFIDENTIALITY. The Parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any civil, arbitral, judicial, or other proceeding with respect to the following information:

(a) views expressed or suggestions made by another Party in the course of the mediation proceedings with respect to a possible settlement of the dispute;

(b) evidence of anything said, or of admissions made by another Party in the course of the mediation proceedings;

(c) documents prepared for the purpose of, or pursuant to the mediation proceedings;

(d) proposals made or views expressed by the Mediator; or

(e) the fact that another Party had or had not indicated willingness to accept a proposal for settlement made by the Mediator.

The Parties agree that testimony or disclosure of the above information may not be compelled in any civil action. The purpose of this confidentiality provision is to implement, to the fullest extent of the law, the provisions of Civil Code §1354(g&h). The Parties agree that these confidentiality provisions may be modified only by their written agreement.

10. EVIDENCE CODE §1152.5. The Parties have read the provisions of this code section and agree to abide by its terms in this mediation. It is attached and its terms are included within this agreement by this reference.

11. NO ATTORNEY-CLIENT RELATIONSHIP WITH MEDIATOR. The Mediator is an attorney whose practice consists of representing clients who own property within community associations, as well as community association boards or their suppliers. During the mediation the Mediator may have confidential discussions with a Party, concerning the law and practice of the community association industry. The Parties each understand and agree that the purpose of these discussions is to assist them as they consider various ways of resolving their dispute. These discussions may point out some issues upon which they may decide to obtain legal advice from their own attorney, or to assume the risk of proceeding without it. The Parties agree that their purpose in sharing these confidences and participating in these discussions is not to obtain legal advice from the Mediator. Accordingly, they understand that no attorney client relationship is created between them and the Mediator at any time during this mediation.

The Parties are encouraged to consult with their attorneys, and/or other advisors, concerning their legal and financial rights and obligations, in this dispute before signing this Agreement to Mediate, during the mediation process (each Party's attorney or other advisors may be present), and before they sign an agreement to resolve the dispute.

12. RESOLUTION NOT GUARANTEED. The Mediator does not guarantee that this mediation will resolve the dispute. The Mediator does guarantee that he will use all of his skills, experience and knowledge of the community association industry to help the Parties design a resolution of their dispute which they can both accept.

Each Party understands that any agreement reached during mediation may differ greatly from, and could be substantially more disadvantageous than the outcome of litigation or other forms of dispute resolution. Each Party agrees to release the Mediator from liability with respect to future claims that the outcome was less advantageous than an outcome they could have obtained from a judge or jury.

13. ROLE OF THE MEDIATOR. The Mediator's role is to use his knowledge of dispute resolution processes, as well as his knowledge of the law and practices of the community association industry to help the Parties create the most fair, just, and equitable resolution of their dispute. It is not the Mediator's role to pass judgment on who is right and wrong. While the Mediator helps to create a resolution, the final decision remains with the Parties, requires their joint effort to create, and is not final until they mutually consent.

14. COMPENSATION OF MEDIATOR. The Mediator will be compensated at the rate of $155/hour, billed in tenths of an hour, for the time spent preparing for and conducting the mediation. Travel time will be billed one way only. _____ agrees to pay ??% of the amount invoiced and _____ Homeowner

Association agrees to pay ??%. The Mediator has received $465 to answer questions about the mediation process, get the Agreement to Mediate prepared and signed, review the Description of the Dispute and any other materials sent prior to the mediation, and to provide the first two hours of mediation. Should the Mediation continue beyond that time, the Mediator will send each of the Parties an invoice for their share of his services. The Parties agree to pay this invoice within fifteen days.

15. COUNTERPARTS. This Agreement to Mediate may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one and the same agreement.

Signatures:

_____ _____ HOA
(Name)

by: _____
(Name), President

Date: _____ Date: _____

Represented by: Represented by:
_____ _____
_____ _____

_____ _____
(Name) (Name)

_____
Terrence A. Carlson, Mediator

Date: _____

Enc: Civil Code §1354 (g&h)

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6. **Authority of the Mediator.** The Mediator does not have the authority to impose a settlement. The Mediator contributes his knowledge of dispute resolution processes, as well as his knowledge of the law and practices of the community association industry to help the Parties create a resolution of the dispute which addresses their needs and concerns.

The Mediator is authorized to conduct joint and separate meetings with the Parties and to make recommendations for resolution. The Mediator may obtain expert advice concerning the technical aspects of the dispute, provided that the Parties agree and assume the expenses of doing so. Arrangements for obtaining such advice shall be made by the Mediator or the Parties, as the Mediator shall determine.

7. **Privacy.** Mediation sessions are private, with attendance limited to the Parties and their representatives. Others may attend only with the consent of the Parties and the Mediator. Each Party understands that information they reveal during the mediation process could be verified outside of the mediation process and used to that Party's disadvantage in subsequent legal proceedings if the dispute is not resolved through mediation.

8. **No Stenographic Record.** There shall be no stenographic record of the mediation process.

9. **Termination of Mediation.** The mediation shall be terminated

(a) by the execution of a settlement agreement by the Parties;

(b) by the mediator's written declaration that further efforts at mediation are no longer worthwhile; or

(c) by a Party's written declaration that the mediation is terminated.

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Community Association Mediation Procedure

1. **Initiation of Mediation.** The mediation will be initiated by the Parties entering into an AGREEMENT TO MEDIATE which makes this Procedure a part of their agreement. The Parties may consult with the Mediator by conference call when drafting the AGREEMENT TO MEDIATE. The Parties shall provide a brief statement of the nature of the dispute and the names, addresses, and telephone numbers of all the Parties and their representatives, if any, to be placed into the AGREEMENT TO MEDIATE.

2. **Community Association Mediation Procedure.** The Procedure has been adapted from the American Arbitration Association COMMERCIAL MEDIATION RULES to facilitate mediation of disputes which arise between the board of a California common interest development and its owners or suppliers. The person with whom the board is having a dispute is referred to as the "owner", although owner refers to the supplier when appropriate. This Procedure may be adapted, with the written consent of the Parties and the Mediator, to accommodate the circumstances of the dispute.

3. **Representation.** The owner and the board may be represented by persons of their choice. However, the owner must also attend, and participate in, the mediation sessions. The owner understands that the board acts in a representative capacity. Accordingly, the entire board, or even a majority of a quorum, may not be present during the mediation sessions. The board understands that at least one officer must attend and participate and that it must provide its representative with authority within which (s)he is authorized to settle the disputed issues. The board's representative agrees that in the event that a tentative agreement is reached which is outside the authority to settle, that (s)he will recommend it to the board and make a good faith effort to persuade the board to accept it.

4. **Scheduling and Location.** In consultation with the Parties, the Mediator shall fix the date, time and place of each mediation session and shall provide written notice.

5. **Description of Dispute.** At least five days prior to the first scheduled mediation session, each Party shall provide the Mediator with a brief memorandum which identifies the issues it hopes to be resolved, and which sets forth its position with respect to those issues. At the Mediator's discretion, this memoranda may be mutually exchanged by the Parties.

The Parties are expected to produce all information reasonably required to inform the Mediator about the disputed issues. The Mediator may require a Party to supplement such information to facilitate his understanding of the disputed issues.

CIVIL CODE §1354

ENFORCEABILITY OF COVENANTS AND RESTRICTIONS AS EQUITABLE SERVITUDES

(a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

(b) Unless the applicable time limitation for commencing the action would run within 120 days, prior to the filing of a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, not in excess of five thousand dollars ($5,000), related to the enforcement of the governing documents, the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. The form of alternative dispute resolution chosen may be binding or non-binding at the option of the parties. Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution. The Request for resolution shall include (1) a brief description of the dispute between the parties, (2) a request for alternative dispute resolution, and (3) a notice that the party receiving the Request for Resolution is required to respond thereto within 30 days of receipt or it will be deemed rejected. Service of the Request for Resolution shall be in the same manner as prescribed for service in a small claims action as provided in Section 116.340 of the Code of Civil Procedure. Parties receiving a Request for Resolution shall have 30 days following service of the Request for Resolution to accept or reject alternative dispute resolution and, if not accepted within the 30-day period by a party, shall be deemed rejected by that party. If alternative dispute resolution is accepted by the party upon whom the Request for Resolution is served, the alternative dispute resolution shall be completed within 90 days of receipt of the acceptance by the party initiating the Request for Resolution, unless extended by written stipulation signed by both parties. The costs of the alternative dispute resolution shall be borne by the parties.

(c) At the time of filing a civil action by either an association or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, not in excess of five thousand dollars ($5,000), related to the enforcement of the governing documents, the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parties to the dispute refused alternative dispute resolution prior to the filing of the complaint, that preliminary or temporary injunctive relief is necessary, or that alternative dispute resolution is not required by subdivision (b), because the limitation period for bringing the action would have run within the 120-day period next following the filing of the action, or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties.

(d) Once a civil action specified in subdivision (a) to enforce the governing documents has been filed by either an association or an owner or member of a common interest development, upon written stipulation of the parties the matter may be referred to alternative dispute resolution and stayed. The costs of the alternative dispute resolution shall be borne by the parties. During this referral, the action shall not be subject to the rules implementing subdivision (c) of Section 68603 of the Government Code.

(e) The requirements of subdivisions (b) and (c) shall not apply to the filing of a cross-complaint.

(f) In any action specified in subdivision (a) to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs. Upon motion by any party for attorney's fees and costs to be awarded to the prevailing party in these actions, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution prior to the filing of the action.

(g) Unless consented to by both parties to alternative dispute resolution that is initiated by a Request for Resolution under subdivision (b), evidence of anything said or of admissions made in the course of the alternative dispute resolution process shall not be admissible in evidence, and testimony or disclosure of such a statement or admission may not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(h) Unless consented to by both parties to alternative dispute resolution that is initiated by a Request for Resolution under subdivision (b), documents prepared for the purpose or in the course of, or pursuant to, the alternative dispute resolution shall not be admissible in evidence, and disclosure of these documents may not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(i) Members of the association shall annually be provided a summary of the provisions of this section, which specifically references this section. The summary shall include the following language:

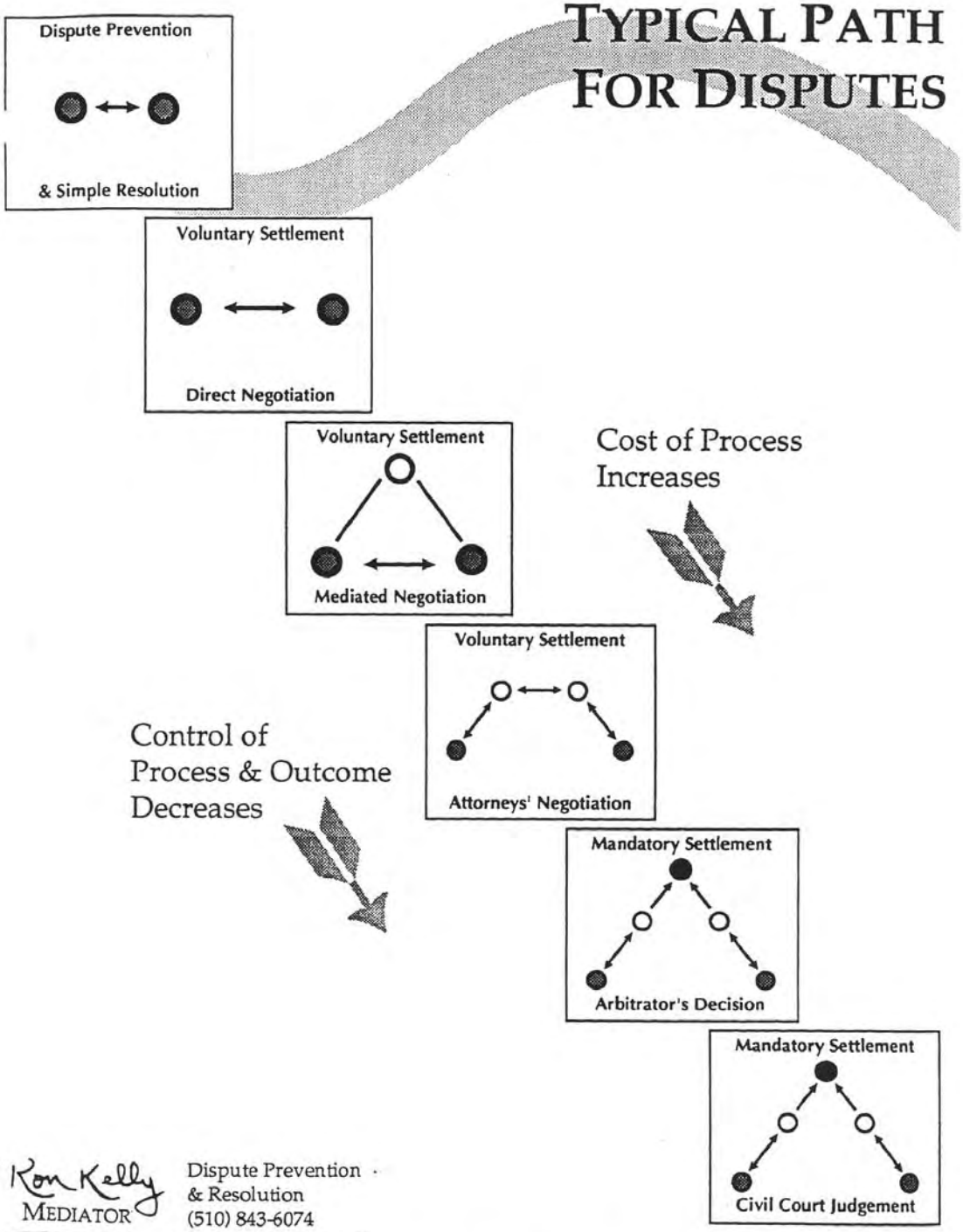
> "Failure by any member of the association to comply with the prefiling requirements of Section 1354 of the Civil Code may result in the loss of your rights to sue the association or another member of the association regarding enforcement of the governing documents."

The summary shall be provided either at the time the pro forma budget required by Section 1365 is distributed or in the manner specified in Section 5016 of the Corporations Code.

(j) Any Request for Resolution sent to the owner of a separate interest pursuant to subdivision (b) shall include a copy of this section.

1354\188f

TYPICAL PATH FOR DISPUTES



Ron Kelly
MEDIATOR
Dispute Prevention & Resolution
(510) 843-6074

SECTION 8 09/96

TYPICAL SEQUENCE FROM CONFLICT TO RESOLUTION:
Mediated Negotiation of Settlement

1. *CONFLICT:*
   - Disputants have trouble negotiating directly
   - One contacts mediator
2. *MEDIATOR INVOLVED:*
   - Mediator contacts all parties
   - Secures written agreement to confidential mediation
   - Prepares the parties to assure productive negotiations
3. *MEDIATED NEGOTIATIONS:*
   - Mediator conducts unbiased joint review of contract documents, technical site problems
   - Provides face-to-face negotiations, legally confidential under Evidence Code 1152.5
   - Helps build framework for resolution, options that satisfy the real interests
   - **Disputants develop best voluntary settlement available**
4. *RESOLUTION:*
   - Disputants weigh voluntary settlement against alternatives
   - Binding settlement language improved and refined with mediator and counsel
   - **Disputants execute binding final agreement**

KEY PHRASES FOR PROBLEM-SOLVING

Suppose you have to choose only one for now. Would you rather a) fight? or b) solve the problem?

At the very least, you DO want to know what your bird in the hand is, before you risk going for the two in the bush, right? What's the best possible voluntary agreement you can get? To work this out together, you need to shift the question from a) "Whose fault is this?" to b) "How could we resolve the problem ourselves, if we wanted to?"

You want to move things away from angry contest, and toward cooperative problem-solving, at least for now.

Each sentence below is a proven language tool to help you. These neutral phrasings have been collected over fifteen years of mediating, and the list has been used all over California. If you can, PRACTICE using them BEFORE you meet or write.

- "Right now we can still decide this ourselves. We have a real common interest in avoiding a long fight, with an unknown ending handed down by some court (arbitrator, license board) a year from now."
- "Can we agree that what we want to do here is work together, develop the best voluntary agreement possible, then let everyone look at it and see if it's good enough?"
- "I'll bet we can each make a pretty good case for why it's not our fault. I don't think it's going to help us much to be arguing about whose fault this is."
- "Can we figure out together what it takes to fix this problem? Then maybe we can talk about who might take responsibility for doing what, if we can work out a voluntary agreement."
- "I'm convinced we can work out something we can both live with."
- "It's important to me to understand how you see this."
- "I'm not saying I'm right. May I just explain how I honestly understood our original agreement?"
- "Let me see if I understand you right. Are you saying...?"
- "I can really understand how you'd feel that way. I had no business saying that (doing that), and I'm sorry. Is there something you'd like to see in our agreement to address how you feel?"
- "Leaving all the feelings aside for a moment, what do you think two prudent business people would do if they were in our current situation?"
- "Whose responsibility do you think this should be? What objective standards led you to thinking that?
- "One fair solution might be.... Can you think of others?"
- "What would that do for you? What other ways are there of accomplishing that?"
- "Let's suppose for a minute that your attorney (friend, mother) is absolutely right. Does that mean...?"
- "Regardless of who ends up paying for it, I believe this is going to have to be redone. About how much would it normally cost to have this done over again?"
- "I'm feeling pretty stirred up right now. I've just got to step outside for a breath of air and I'll meet you back here in five minutes."
- "We can deal with that issue next if you like. Right now we're talking about..."
- "Is our agreement not to interrupt each other (badmouth each other to John) still in effect?"
- "Is this helping (working)? Are we still going the right direction with this?"
- "Can we go back to the way we were feeling about ten minutes (days, months) ago?"
- "When you explain this agreement to your strongest critic, what's she/he going to tell you is wrong with it? How will you explain why you want to agree to it?"
- "If we don't resolve this between ourselves, I wonder where it will be settled."
- "So are you saying that you believe it's in your best interest to gamble on the solution that an arbitrator or judge will impose, rather than to...? Have you considered...?"
- "What would it take to get you back into trying to work this out ourselves? If you could have this turn out any way you wanted, how would that be?

Ron Kelly, Mediator · Before You Need a Lawyer℠ · For info or help call: 800-RON-KELLY

KEY QUESTIONS BEFORE YOU MEET

You're heading for a real nasty fight, but you're going to meet first.

You want the problem solved as soon as possible, and you'd rather spend your money on other things than fighting.

BE PREPARED. You'll be making the very best use of your time by working through these questions before you meet. Even better - give copies to both sides. This questionnaire has been used all over California to settle tough court cases, and to train lawyers, mediators, business professionals, and others. Nearly everyone who's written out serious answers to these questions has developed a way to settle their fight themselves - on terms that both sides could live with.

You can use your money and your time for something better than the battle.

A. YOUR INTERESTS:

1. List your basic interests, and then number their order of importance to you (for instance: time, money, security, get even, get on with life, minimize risk, fairness, future plans, etc.)
2. How will you know when an agreement will adequately satisfy your most important interests? What criteria will you use?
3. How do you think they see their interests?
4. Any voluntary agreement will have to satisfy both your interests and theirs. Where could you cooperate to do this?
5. Where do you think you already agree?
6. Where do you think you disagree most strongly?
7. In these areas, what objective criteria will you use together to develop fair and constructive voluntary resolutions?

B. YOUR UNDERSTANDINGS:

8. From your perspective, what important understandings did you think you had when you originally got involved together? (Time, money, allocation of risk, division of responsibilities, rights and duties, decision-making, dispute resolution, etc.)
9. What important shifts in these understandings happened as the situation developed, and where do you think their perspective differs from yours?
10. What feelings of trust and goodwill supported your original agreements?
11. Exactly when and over what did you first have any feelings of betrayal, bad faith, or loss of confidence? How strong are these still? Do you feel like they might owe you something to specifically make up for this?

(Continues next page)

KEY QUESTIONS BEFORE YOU MEET - CONT.

C. YOUR RESOLUTION:

12. In areas where you have sharply different perspectives, what useful evidence can you bring in that will be credible to them, to help them see your view? (Written industry standards, notes, receipts, photographs, witnesses, etc.).

13. What could they say or do in your coming discussions that would really push your buttons all over again? How will you keep things on track if this happens?

14. What do you currently believe is your next best alternative, if you're unable to develop a voluntary settlement? (As much detail about potential benefits and risks as possible.)

15. What are their next best alternatives?

16. List every issue which might reasonably be disputed if this goes to court or arbitration (verbal representations, contract language, unforeseen problems, mistakes, interpretations of law, delay, scope and quality of work, methods of calculating direct and consequential damages, etc.)

17. What are the possible consequences of impasse? Suppose you're unable to settle it between yourselves, you end up in the lengthiest and most costly alternative, and the judge, jury, or arbitrator eventually agrees completely with the other side's arguments. What's the maximum amount of your financial risk for:

    a) the difference between your likely claims,

    b) everyone's attorney's fees, expert witness fees, and procedural costs,

    c) the value of your time lost from work and family?

    If you don't know, go find the most accurate information you can get, before you complete this.

18. In resolving this, how will you balance your longer term financial interests with your shorter term emotional interests? (Are you willing to risk your future financial interests to avoid uncomfortable discussions now? Will you accept a satisfactory offer, even if you're very resentful about how you've been treated? etc.)

19. What are two different proposals you can make that 1) you believe will satisfy their interests as you understand them, 2) you can live with, and 3) will address all your really key issues?

20. How could a neutral party help you develop your best voluntary settlement? (Defuse emotions? Be a confidential sounding board to help you evaluate your options and approaches? Provide for safe and productive direct negotiations? Help develop specific language for a resolution?)

Summary of Laws Protecting Mediation Information

California Statutes In Effect on January 1, 1996

• "... **no mediator, shall be competent to testify, in any subsequent civil proceeding**, as to any statement, conduct, decision or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could ... constitute a crime ..."

- Evidence Code §703.5

• "When persons agree to ... participate in a mediation ... **evidence of anything said** ... in the course of the mediation **is not admissible in evidence or subject to discovery** ... in any **civil action or proceeding** ...

... **unless the document otherwise provides, no document prepared** for the purpose of, or **in the course of**, or pursuant to, **the mediation** ... **is admissible** in evidence or subject to discovery ...

... **all communications** ... by and between participants or mediators in the mediation **shall remain confidential** ...

All or part of a communication or document ... **may be disclosed if all parties who conduct or otherwise participate** in a mediation **so consent** ...

If the testimony of a mediator is sought ... the court shall award **reasonable attorney's fees and costs to the mediator** against the person or persons seeking that testimony ..."

- Evidence Code §1152.5

• **"A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator**, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing **prior to commencement of the mediation** ..."

- Evidence Code §1152.6

• **"An agreement** resolving a dispute entered into **with the assistance of a [Dispute Resolution Programs Act-funded] program** ... **shall not be enforceable** in a court **nor** shall it be **admissible** as evidence in any judicial or administrative proceeding, **unless** ... the agreement ... **clearly states** ... that [it] shall be so enforceable or admissible ..."

- Business and Professions Code §467.4

•... **all proceedings conducted by a [DRPA-funded] program ... including,** but not limited to, **arbitrations and conciliations, are subject to Section 1152.5** of the Evidence Code."

- Business and Professions Code §467.5

Cautions and Notes: The above sections do not apply to Family Court Services mediations. 1152.5 and 703.5 would appear to apply only to state civil matters, and may not provide clear protection in administrative, criminal, arbitral, or federal court proceedings. 1152.6 would appear to apply broadly, except to Family Court Services. Check the full text for exceptions and applicability. Land use mediations under Government Code §66032 and administrative mediations of earthquake insurance claims under Insurance Code §10089.80 both specifically maintain the 1152.5 and 703.5 protections, and include protections similar to 1152.6. Government Code §11420.30 would appear to provide similar protections for mediations to be referred out by California administrative agencies.

Recent Court Decisions: The Third District Court of Appeals, in Ryan v. Garcia, stated plainly that "a document prepared at mediation is inadmissible in any later proceedings 'unless the document otherwise provides'." (27 Cal.App.4th 1006, 33 Cal.Rptr.2d 158 1994). This implies that all mediation-related documents, especially agreements to mediate and settlement agreements, should expressly state whether they are intended to be admissible, to prevent later conflicts over enforceability. It also found that 1152.5 expressly prevented alleged oral settlement agreements from being later introduced in evidence and enforced, unless all parties consented. The First District Court of Appeals, however, in Regents of UC v. Sumner, ruled in the opposite direction, stating its agreement with the dissenting justice in Ryan: "Once a compromise is reached the mediation process is over. An oral agreement cannot be crafted until after compromise has been reached. Therefore an oral statement of the terms of a settlement agreement does not fall within 1152.5." (42Cal.App.4th 1209, 50Cal.Rptr.2d 200, 1996). The Second District Court of Appeals, in Garstang v. CalTech, stated that "where the communications were tendered under a guaranty of confidentiality, they are thus manifestly within the [California] Constitution's protected area of privacy" (46 Cal.Rptr.2d 84 Cal.App.2, 1995). This appears to provide important additional confidentiality protection beyond statute, based on assurances to the parties.

About Ron Kelly...

Ron Kelly is a full-time professional mediator and arbitrator, specializing in real property and construction. He's been mediating voluntary settlements since 1970.

Ron has played a central role in drafting and enacting many of the recent state laws protecting the integrity of mediation and arbitration in California. These include key sections of the California Evidence Code, Insurance Code, Government Code, Business and Professions Code, and others. He is a frequently-published author and speaker on current issues in the field. In recognition of his work, Ron has been honored with both the Sleizer Memorial Award and the American Arbitration Association's Distinguished Service Award. He is a Nationally-Certified Mediator (CRI), and regularly arbitrates cases through the American Arbitration Association, and many local Bar Associations.

Ron has over fifteen years of experience serving as a neutral in real property and construction cases. He regularly conducts accredited trainings for lawyers, arbitrators, mediators, business professionals, property owners, realtors, and others in dispute resolution techniques. He's also an expert instructor in building and zoning code interpretation. Ron has helped thousands of property owners, business owners, public officials, contractors, realtors, and others resolve their disputes quickly and fairly, before they end up in court.

Former Chair of the Design Review Committee for the City of Berkeley, he served eight years reviewing plans and holding hearings on proposed commercial and residential developments for the city. His background also includes training in real estate and construction law, structural engineering, and architectural design. He's holds three California Contractor's Licenses, and is an affiliate of the Berkeley Association of Realtors. Ron has extensive experience in the purchase, design, construction, and sale of real property.

Ron Kelly has been elected to the boards of several mediation and arbitration associations. He is a fully-accepted member of the Society of Professionals in Dispute Resolution, and is pledged to follow the Society's Ethical Standards of Professional Conduct.

2731 Webster Street Berkeley, CA 94705 • Tel: (510) 843-6074 • Fax: (510) 843-4439 • Internet: ronkelly@igc.org • Contractor's Lic. 355554

Model Dispute Prevention and Early Settlement Language

1. PREVENTION OF CLAIMS. We agree that we have a common interest in preventing any misunderstandings or differences that may arise between us from becoming claims against one another. With the intent of avoiding this, we agree that we shall make good faith efforts to identify in advance and discuss the potential causes of disputes in projects like ours. We agree that we shall make good faith efforts to jointly review the progress of the work on a [*daily, weekly, etc.*] basis. We agree to promptly bring up and resolve any miscommunications or dissatisfactions which we become aware of, and to each initial entries in a jointly-maintained journal documenting our discussions and resolutions. Upon agreement that the work to date appears satisfactory, and upon written approval by inspectors, engineers, etc. where required, we agree that we shall initial a journal entry to this effect, that a check shall be issued in accordance with the payment schedule, [*that a partial or full Release of Lien shall be issued if applicable*], and that work and payments shall continue through to substantial completion.

2. VOLUNTARY SETTLEMENTS - DIRECT AND MEDIATED NEGOTIATIONS. We agree that, should any difference of interpretation, or any other controversy or claim arise out of, or related to our contracts dated_____, or the breach thereof, we shall immediately make good faith efforts to negotiate our own written voluntary resolution of the matter directly between ourselves. We agree that, if the matter still remains unsettled for [*thirty, forty-five, etc.*] days after certified mail notification that a dispute exists, we shall immediately jointly retain Ron Kelly, or another mutually-agreed neutral mediator with at least ten years experience in dispute resolution in this field, and conduct and participate in good faith confidential mediation, to continue attempting to work out our own written voluntary settlement. We agree that if any of us files any arbitration claims, or administrative or legal actions, for disputes to which this clause applies, without first having attempted to resolve the dispute ourselves through neutral mediation, then that filing party shall not be entitled to collect attorneys fees or procedural costs, even if they would otherwise be entitled to them (subject to the discretion of the arbitrator or court involved).

3. ARBITRATION OF DISPUTES. We agree that if, and only if, the dispute still remains unsettled for an additional [*thirty, forty-five, etc.*] days, then we shall submit the dispute to binding neutral arbitration. In this event, we agree that any controversy or claim arising out of, or relating to our contracts dated _____, or the breach thereof, shall be settled by binding arbitration in accordance with the applicable rules of the American Arbitration Association then in effect as modified below. We agree that Ron Kelly, or another mutually-agreed arbitrator with at least ten years experience in dispute resolution in this field, shall serve as our neutral arbitrator. We stipulate and agree not to seek to introduce in evidence, and not to compel the production of, documents prepared for, or statements made in the course of, our good faith settlement discussions including the confidential mediation process, in any subsequent arbitration, litigation, or administrative proceeding, except that fully-initialed journal entries as described above, and any written change orders and dispute settlement agreements which have been fully signed by all necessary parties, may be introduced in evidence.

We stipulate and agree that no mediator shall submit, and no arbitrator or court shall consider, any mediator evaluations, recommendations, declarations, or findings, unless all mediation participants specifically later agree in writing. We agree that judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. We agree that in any action, or arbitration claim, brought to interpret or enforce the terms of our contract dated_____, and any written settlement agreements as described above, [*we shall each bear the costs of presenting our own cases.*[**OR**] *the prevailing party shall be entitled to reasonable attorneys fees and procedural costs.*]

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

Initials: _____ _____ _____ _____ [In California, this notice and separate initialing required in any "contract for work on residential property with four or fewer units" which has an arbitration clause - B&P 7191]

AGREEMENT. We the undersigned agree that we have read and understood Sections 1 to 3 above [*and hereby amend our agreement dated _____, including any other dispute resolution clauses, by incorporating this addendum into it.* [**OR**] *and agree as stated above.*]

_____	_____	_____	_____
Signature	Date	Signature	Date

* * *

ABOUT RON KELLY: Ron Kelly is a nationally-recognized mediator, arbitrator, and trainer. He has played a central role in drafting and enacting many of the current California laws protecting the integrity of mediation and arbitration. He regularly conducts accredited trainings for attorneys and business professionals. Ron Kelly is available to serve as a neutral, and to speak, train, or consult on the design of dispute resolution contract language and systems. He may be reached at 510-843-6074 - Fax: 510-843-4439 - Internet: ronkelly@igc.org

DISCLAIMER: Every sentence in the above has a specific purpose, and is copyrighted educational material used by the author, Ron Kelly, as a state-credentialed adult instructor. If license has been granted for use, it is granted only to the intended recipients to use the above language as an instructional guide in writing specific dispute resolution language for their own contracts in consultation with an attorney, and on the condition that the recipient hold the author harmless and indemnify him from any and all claims arising in connection with the use of this language and its interpretation in any specific case. How any contract or law will be interpreted is up to the particular judge or arbitrator hearing the case, and the author makes no representations regarding specific uses of the above.

MANWELL & MCOMBER
AN ASSOCIATION OF ATTORNEYS
NATIONAL BANK OF THE REDWOODS BUILDING
111 SANTA ROSA AVENUE, SUITE 400
SANTA ROSA, CALIFORNIA 95404

TEL (707) 526-7383
FAX (707) 526-0307

MALCOLM T. MANWELL*
MARTIN G. MCOMBER

*A PROFESSIONAL CORPORATION

October 27, 1993

King Haugner, Chairman
LOMAA
League of Oakmont Maintained
Areas Association
310 White Oak Drive
Santa Rosa, CA 95409

Re: Bylaws/CC&RS

Dear Mr. Haugner:

This is in response to your request of October 13, 1993 for my written opinion regarding whether the maintenance subassociations are required by law to have a set of Bylaws.

It is my opinion that the subassociations are unincorporated associations under California law, and there is no legal requirement that they adopt or operate under a set of bylaws.

California Corporations Code §24000 defines an "unincorporated association" as any partnership or other unincorporated organization of two or more persons, whether organized for profit or not, but not including a government or governmental subdivision or agency". The various Oakmont maintenance sub-associations come within this definition. There are no specific formalities required by California law to form or operate an unincorporated association.

On the other hand, corporations are required by statute to have Articles of Incorporation as well as a set of bylaws. The law also prescribes the content of a corporation's Articles and bylaws.

Nevertheless, in Oakmont, it was recognized that the sub-associations needed a

set of governing rules. Both the developer and the Department of Real Estate provided that that governance via the vehicle of the CC&Rs. In Oakmont, the provisions relative to the maintenance sub-associations are, in essence, the substantive equal of bylaws.

Since the CC&Rs are recorded against the various lots and become burdens against the land, any change in the procedures described in those CC&Rs must be adopted with the formalities required in the CC&Rs.

Please call me if you have any further questions or concerns regarding this opinion.

Very truly yours,

MALCOLM T. MANWELL

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Section 1 1999

LANAHAN & REILLEY LLP

SAN FRANCISCO SANTA ROSA SACRAMENTO LOS ANGELES

HOMEOWNER ASSOCIATIONS
TYPICAL LEGAL SERVICES

The following is a brief list of typical legal issues that arise in the general operation and day-to-day management of homeowner associations. The list is not intended to be exhaustive, but merely illustrative of the range of legal issues facing homeowner associations. For information on a specific issue, please contact your association's attorney.

- Drafting amendments to and complete restatements sets of CC&R's, bylaws and articles of incorporation.
- Multi-million dollar construction defect litigation against developers and builders.
- All aspects of assessment collection, including preparing assessment collection policies and all notices and liens, foreclosing on property, obtaining judgments and collecting on the judgment, including wage garnishment and attaching bank accounts. (No fees to association in most cases)
- Establishing and enforcing rules for use of common area, including recreational facilities and parking area
- Defending defamatory attacks on directors and property manager by a members and attempted recall of directors.
- Enforcing CC&R's against tenants of an absentee owner.
- Levying special assessments to cover deferred maintenance by prior boards.
- Defending challenges to the board of director's authority on the basis that the board was not duly elected and did not follow appropriate procedures in the association's operations.
- Reviewing and preparing contracts with third parties.
- Pursuing contractors for defective repairs and advising the directors potential liability for use of unlicensed contractors.
- Enforcing association and architectural committee rules and advising on permissible alterations to a member's unit/lot.
- Resolving disputes regarding unauthorized structures in the common area.
- Preparing disclosures of insurance maintained by the association as required by the state law.
- Negotiating the value of a portion of the association's common area condemned by the county.
- Unauthorized changes to the exclusive use portions of an association's common area.
- Analyzing easements affecting common area and obtaining title to common area for association.
- Defending challenges under the Solar Energy Act to an association's restrictions for installation of solar energy panels.

Telephone (707) 534-4200 3558 Round Barn Boulevard, Suite 300, Santa Rosa, CA 95403 Fax (707) 523-4610