



HindmanSanchez

# DEVELOPER LIABILITY AVOIDANCE

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## Developer Liability Avoidance

### I. General Advice to Developer-Appointed Association Directors

- A. Why increasing litigation?
  - 1. Some sloppy construction in 1980's
  - 2. Developer frequently does not understand how Association works
  - 3. Profit center for plaintiff's counsel
  - 4. Board fearful of breaching fiduciary duties
  - 5. Sometimes Board in control of aggressive few
  - 6. Generally litigious society
- B. Be aware of duties
  - 1. Duty of loyalty during transition
    - a. Directors and fiduciaries. See *Raven's Cove Townhomes v. Knuppe Development Co.*, 114 Cal.App. 3d 783 (1981)
    - b. Exculpatory clauses are ineffective
  - 2. Duty of "Reasonable and Ordinary Care"
  - 3. Duty to supervise manager and other employees. See *Francis T. v. Village Green Owners Association*, 42 Cal.3d 490 (1986)
- C. Get adequate General Liability Insurance and Directors and Officers Liability Insurance (D & O Insurance)
- D. Make and keep copies of minutes and other Association financial books and records
- E. Avoid common failures (see accompanying outline)

### II. Planning and Limiting Litigation

- A. Convey Maximum Common Area to Incorporated Association.
- B. Sometimes Minimize Developer Flexibility; be aware of pros and cons
- C. Require binding arbitration or mediation of disputes
  - 1. Pros: cost, speed, compromise

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2. Cons: compromise, limited issues, no finality
- D. Association Budget
  1. Avoid low-balling
  2. Realistic budget
  3. Use professional management experienced in budget preparation
- E. Architectural Guidelines and Procedures
- F. Involve homeowners
- G. Disclaim or limit warranties in writing
- H. Maintain control of Board of Directors and Architectural Committee
- I. Use separate Corporation, Partnership or LLC for each project. See *Munder v. Circle One Condominium, Inc.*, 596 S.2d 144 (1992)
- J. Ensure that subcontractors are bonded
- K. Require written warranties of subcontractors
- L. Sue large subcontractors for loss of reputation
- M. Require subcontractors to include Developer (owner) as an additional named insured
- N. Require errors and omissions insurance of design professionals
- O. Quality control and construction records
  1. Note Results of Homeowner Master Evaluation Survey
  2. Keep copies of all documents, maps, reports, and correspondence
  3. Video project and take photos during and after construction
  4. Supervise superintendents
  5. Pressure contractors to perform
  6. Respond quickly to complaints
  7. Keep records of complaints
  8. Communicate with Association Board
- P. Be aware of changes in technology and in building codes during construction
- Q. Select a quality team of employees, professionals, and subcontractors
- R. Get written acceptance of common area by Association
- S. Adopt continuing common area inspection program for Association

- T. Pay Association to do clean-up work
- U. Hire independent attorney to represent Association during transition
- V. Indemnify employees serving on Association Board. Consider appointing decision-makers from developer
- W. Transfer Documents
  - 1. Recorded subdivision tract map
  - 2. Each recorded condominium plan
  - 3. Each recorded deed of common area
  - 4. Recorded Declaration
  - 5. Each recorded Annexation or Supplement
  - 6. Filed Articles of Incorporation of the Association
  - 7. Adopted and signed Bylaws of the Association
  - 8. Adopted architectural guidelines and any rules and regulations of the Association
  - 9. Plans as approved by the City or County with appropriate disclaimers regarding their accuracy
  - 10. All posted bonds where the Association is the beneficiary
  - 11. Any warranty of common area transferred to the Association
  - 12. All insurance policies for the benefit of the Association, the Board, or the common area
  - 13. Any contract or lease to which the Association is a party
  - 14. All Board minutes

**III. Legal Management Documents**

- A. Reserve right in Builder to access and inspect property to correct problems, etc.
- B. Reserve right in Builder to redesign property
- C. Require Board to give notice to all homeowners before filing a lawsuit
- D. Require notice to Builder and meeting before filing a lawsuit and before experts write up their reports
- E. Require vote of minimum percentage of homeowners before lawsuit filed
  - 1. No assurance of victory nor is Association immune from cross-complaint
  - 2. After complaint filed, existing homeowners must disclose all allegations when they resell homes

- 3. If attorney gets 30% - 40%, there will be insufficient funds for remedial work
- F. Adopt Homeowners Bill of Rights (see attachment)
- G. Limit use of Assessments
- H. Indemnify Officers and Directors of Association

**IV. Disclosure and Disclaimers**

- A. Get written acknowledgment of receipt
- B. Specific Disclosures
  - 1. Common Subsurface Drains (drawing showing location and maintenance responsibilities)
  - 2. Post Tension Concrete Slabs (safe in slab)
  - 3. Optional and upgrade items
  - 4. Key Declaration provisions (E.g., Age Restriction (conform Federal and State laws), Front Yard Landscaping (installation, maintenance, and drainage)
  - 5. Association Maintenance (use) easements over Lots
  - 6. Owner occupancy requirements (lender)
  - 7. Expansive soils
  - 8. Fill Soils
  - 9. Cluster mail boxes (who maintains?)
  - 10. Location of airports, schools, shopping, etc.
  - 11. Architectural controls and procedural guidelines
  - 12. Future development of adjacent property
  - 13. Fire and flood hazards
  - 14. Relationship of Seller to Lender or Escrow Agent
  - 15. Railroads
  - 16. Wildlife
  - 17. Jails
  - 18. Fire Stations
  - 19. Landfills
  - 20. Electrical Lines (electromagnetic Fields)

21. Major roadways
22. Hazardous substances (loose ordnance, ammunition shells)
23. Public or private easements restricting use (pool spa, patio)
24. Who is developer or building (size, net worth, principals, etc.)
25. Location of public schools
26. Noise or dust from nearby quarry

**C. Specific Disclaimers**

1. Disclaim or precisely define views (balance privacy claims against view claims)
2. Prices may decrease
3. Size and type of home may change (note effect on Mello-Roos)
4. Model homes may differ from production homes
5. Building materials and appliances may be changed
6. If gated community, no security representations
7. Golf ball hazards
8. Warranty Disclaimer
9. Oral statements by sales representatives

**V. Sales Documents**

- A. No attorneys' fees clause
- B. Require Alternative Dispute Resolution and waiver of jury trial
- C. Site access and inspection rights
- D. Express warranties
- E. Walk-through procedures
- F. Sales contract to construction lender
- G. Brief all salespeople
- H. Attorney review marketing materials
- I. Beware of materials on file with City or County
- J. Good customer service
- K. Rescission right to buyer