

# Proposed CC&Rs and Bylaws

## Response to Town Hall Chats and Questions

Dear BTHA Homeowners:

On Wednesday, Feb. 22, 2023 a Town Hall meeting was held via Zoom with the HOA attorney who drafted our proposed new governing documents (CC&Rs and Bylaws).

The goal was to allow her to make a brief presentation on the reason behind the updates and key provisions of the proposed new governing documents. Approximately 40 callers (some of whom were representing absent homeowners) were in attendance and were invited to ask questions or make comments, many of which were captured in “chats.”

The Town Hall meeting was one of many efforts we have made and will continue to pursue to keep our HOA members Informed of the proposed changes to our CC&Rs and Bylaws, portions of which are almost 100 years old.

There were some common “themes” to the questions and chats at the Town Hall. We have grouped them below by topic, and if they relate to a specific Article in the CC&Rs or Bylaws, it is noted. The Board and our attorney have endeavored to answer all comments and queries to the best of their abilities.

**Please note:** The Davis-Stirling Common Interest Development Act refers to a portion of the California Civil Code which governs condominium, cooperative and planned unit development communities in California. It was drafted in 1985 and became effective Jan. 1, 1986. Each year thereafter, the California Legislature has amended, revised and added numerous provisions to the Act. A *complete* rewrite took effect on Jan. 1, 2014. The original Act was only 25 pages long; the rewrite is 100 pages long. It is within this framework that we are constructing our new Governing Documents.

### **OPEN DISCUSSION – QUERIES AND COMMENTS**

## DISTRIBUTION OF DRAFTS

**Query:** Was a draft (of the CC&Rs and Bylaws) mailed to residents or only posted on the BTHA website?

**Response:** The drafts of the CC&Rs and Bylaws have been evolving over many months since we received our first draft on June 8, 2022; the editions that were originally posted on the website represent the distillation of many hours of revision and discussion. Rather than mail *any* versions of the CC&Rs and Bylaws before all of the comments and changes have been incorporated, we opted to post our latest edition on the website in mid-January and invite comments and feedback from our members.

The intention of the Town Hall meeting on Feb. 22, was to begin to get input from members. The focus of the Annual Meeting on March 14 will also be to discuss the proposed CC&Rs and Bylaws. Additional Town Hall meetings are likely. The Board also plans to schedule small block meetings to discuss concerns with HOA members as well after March 14.

If members are unable to access the drafts being posted on our website, we will provide a printed copy to them. As you may know printing and postage will be costly; we estimate approximately \$16 per copy. Please submit your request to [bthaboard@balboaterrace.org](mailto:bthaboard@balboaterrace.org); allow 7 to 10 days to receive a copy.

The final draft will be printed and mailed to ALL HOA members with the ballot after as many of your concerns and questions have been addressed. We expect this process will take several months. We will only submit the draft documents to a formal vote when we are satisfied that they are acceptable to the majority of our homeowners.

## APPROVAL OF CC&RS AND BYLAWS

**Query:** What is the lawyer's plan if one-half of members or more vote NOT to approve? Would she still go to court and vote and force the approval?

**Response:** If 50% of the HOA members vote NOT to approve the new governing documents, there is no legal recourse. If more than half of the members vote to approve these new CC&Rs but it falls short of the two-thirds required in our current Bylaws, there is a petition appeal process which would cost approximately \$5,000 to \$6,000 in legal fees.

**Query:** If the CC&Rs need to be updated, why not break up the CC&R updates into two parts: 1) the minimum legally required and 2) all other topics not legally required?

**Query:** Why does it have to be either this document or nothing? Why can't the document be improved through the input of members?

**Response:** We have been actively working with our legal counsel to revise our CC&Rs and Bylaws for more than a year. Previous Boards going back decades have also taken on this task with little to no results. It is an expensive and time-consuming process. The input of members is welcomed as we finalize the draft of the proposed governing

documents. We have already made some changes based on what we heard at the first Town Hall meeting.

**Query:** Not a “power grab” but it allows “more control” and “enforcement” by the CC&Rs (typically enforced by the Board). Is that correct?

**Response:** The document does not give the Board more power that it currently has nor is that the intent of the proposed new governing documents. The documents are longer but this is largely a function of complying with a complex law and following the advice of our HOA attorney.

**Query:** It does sound like the Board is open to getting specific feedback on items before finalizing for circulation for a vote. Yes?

**Response:** Yes, most definitely.

**Query:** Last time the Board requested feedback via email it was in regard to Fines and Penalties. I submitted a lot of questions and received nothing in return. How would this be any different?

**Response:** Please submit your comments and questions regarding the proposed CC&Rs and Bylaws to the Board as requested, and you will receive a response. Our email is [bthboard@balboaterrace.org](mailto:bthboard@balboaterrace.org).

**Query:** What is the enforcement of the Bylaws vs. CC&Rs?

**Response:**

Here is an explanation of Bylaws vs. CC&Rs from the Davis-Stirling Act:

**Purpose of Bylaws.** Bylaws establish policies and procedures for the governing of an association. They set qualifications for the election of directors, their number and term of office, their powers and duties, the appointment of officers, when and how meetings are held, quorum and voting requirements, appointment of committees, etc.

**CC&Rs** A "Declaration of Covenants, Conditions and Restrictions" is referred to as "CC&Rs" or as a "Declaration." It is a recorded document that contains a legal description of the development and a statement that it is a community apartment project, condominium project, planned development, or stock cooperative. The declaration must additionally set forth the name of the association and the restrictions on the use or enjoyment of property. (Civ. Code § 4250.) Unlike bylaws, which address the governance of an association, CC&Rs describe property rights and obligations of the membership, such as (i) restrictions on the use of property, (ii) member and association maintenance duties, (iii) enforcement powers, (iv) lender protection provisions, (v) assessments obligations and lien/collection rights, (vi) duty to insure, and (vii) dispute resolution and attorneys' fees provisions.

Boards have a duty to enforce the governing documents. In addition to fines and suspension of privileges CC&Rs can be enforced through or by filing a lawsuit in superior court for breach of CC&Rs.

## **BEST PRACTICES AND STATUTES**

**Query:** You've represented best practice. Who are you referring to as the repository of best practice?

**Response:** In this case, “best practices” refers not only to the Davis-Stirling Act but also to the decades of experience of our HOA attorney, Melissa Bauman-Ward, and her firm, Adams-Stirling, the same Stirling that sponsored the Davis-Stirling Act. This is a complex area of the law and we are confident that we have located experts in the field.

**Query:** For items listed as “changes in accordance with statute” have any of the draft items gone BEYOND the requirements of the statute? If so, what items?

**Response:** All items listed as “changes in accordance with the statute” are required by law but go no further.

**Query:** Are there items which you thought MIGHT be hot items, controversial? If so, what was the rationale to include them? Providing specific examples from your experiences on the Board would be helpful.

**Response:** We endeavored to make these recommendations to improve our existing CC&Rs and Bylaws as consistent with current HOA governing practices and laws as possible, and we made a conscious effort to keep them easy to understand and implement. One of our overriding goals was to avoid controversial issues.

**Query:** Why not stick only to what the law requires vs. adding in “best practices”?

**Response:** The words “best practices” may have been overused in our town hall Zoom presentation. Best practices are the language and the provisions recommended by our HOA attorney that are most likely to protect the legal interests of our HOA and our homeowners. If you review the comparison chart prepared by Adams-Stirling most of the areas highlighted in green as “best practices” seem like reasonable solutions and approaches to maintaining a community such as ours. From the comments that were made at the Town Hall on Feb. 22, the areas of greatest concern with the highest concentration of “best practices” are Articles 5 (Architectural Control) and Article 6 (Use Restrictions). We have made changes to the draft documents to reflect your comments. For example, the revised CC&Rs make it clear that the Board has no desire to regulate the paint colors on your homes.

**Query:** The best practices should be what the residents consider best. How do we get the residents input on what is best for us?

**Response:** The Board is receptive to input from all HOA members; however, we must be mindful that this is a community of 288 households and no one member of the HOA can set the course for the entire Association. Our goal is to wind up with Governing Documents that are acceptable to the vast majority of our members.

**Query:** Instead of defending the draft (which you have indeed worked hard on), why not ask how the members believe the draft could be made better?

**Response:** The purpose of the Town Hall, the Annual Meeting on March 14, future Town Halls and neighborhood block meetings is to do exactly that: make the drafts better.

## **DISCUSSION FORUM**

**Query:** Can the BTHA provide a discussion forum, e.g., on the website or elsewhere so everyone can share ideas?

**Response:** The Board is open to this suggestion, and this will be discussed at the March 14 Annual Meeting.

## **DISSOLVING THE HOA**

**Query:** What is the process to dissolve the Association? If that is a route the homeowners want to pursue, would it require a 2/3 vote of the homeowners?

**Response:** Dissolving the Association is a complicated process. There is extensive information posted on the Davis-Stirling website that addresses this question. Dissolution is probably not practical given that the Association is responsible to maintain the common areas, and the alleys in particular.

## **CC&RS**

### **DISCRIMINATORY RESTRICTIONS**

**Query:** The CC&Rs Draft 5 starts with a section about discriminatory restrictions based on race, etc. being void. Are we clear that we have purged all discriminatory terms from the CC&Rs so it is clear nothing would need to later be ruled as void?

**Response:** Yes, this is one of the many reasons why our Governing Documents need to be updated.

### **DUTIES OF THE ASSOCIATION (ARTICLE 4)**

**Query:** Section 4.6 seems to give the Board power to amend the CC&Rs and Bylaws without a vote of the membership.

**Response:** Section 4.6 deals with the Board's authority to amend Rules and Regulations, which are different from the CC&Rs and the Bylaws. Here is Section 4.6 in the draft CC&Rs:

4.6 Rules and Regulations. The Board may adopt, amend, and repeal Rules and Regulations regarding any matter set forth in the Governing Documents, including, but not limited to: (i) the use, occupancy, and maintenance of the Development; (ii) the general health, welfare, peace, comfort, safety and security of Residents in the Development; and (iii) the interpretation and implementation of the Governing Documents.

"Rules and Regulations" are defined in Article 1 of the CC&Rs as follows:

1.39 "Rules and Regulations" or "Rules" means the rules and regulations adopted by the Board to interpret and implement the Governing Documents and for the orderly conduct of the business of the Association.

And here is the definition of Rules and Regulations in the Davis-Stirling Act:

**Rules Defined.** Rules and Regulations (sometimes called "HOA Rules," "House Rules" or simply "Rules") are called "Operating Rules" by the Davis-Stirling Act and means "a regulation adopted by

the board that applies generally to the management and operation of the common interest development or the conduct of the business and affairs of the association." (Civ. Code § 4340.)

**Authority to Adopt.** If authorized statutorily or in the governing documents, boards can adopt and enforce rules. Your CC&Rs are like California's constitution--in the same way that only voters can amend the constitution, only members can amend the CC&Rs. Your rules are like state laws. Just as legislators in Sacramento can pass laws consistent with the constitution, boards may adopt rules consistent with the CC&Rs.

For example, if your CC&Rs allow owners to have a dog, boards can pass rules requiring that dogs be on a leash and not bark excessively. Accordingly, an association's rules typically cover pets, parking, signs, nuisance noise, use of recreational facilities and the like. The importance of such restrictions has been recognized by the courts.

**Adopting Rules.** As provided for in the Davis-Stirling Act, boards must give written notice to the membership of proposed rule changes and a 28-day period so the membership can comment on those changes. If the board adopts a rule despite membership objections, there is a process whereby the membership can veto the rule. These requirements do not apply to policies and procedures.

**Query:** Please elaborate on the statement that gives the Board the power to foreclose on lot (Article 4.7).

**Comment:** The mission of the Balboa Terrace HOA is to keep Balboa Terrace a good community and to maintain home values. The Board should be very careful not to scare off potential buyers with restrictive rules and overreach by the HOA. The Board does not need foreclosure powers, for example.

**Response:** Please see the "Delinquent Assessment Collection Policy" on the website which was adopted in January 2020. The foreclosure provision of the Policy has been used only once and that was a situation where the homeowner had not paid HOA dues for several years, was not willing to accept a payment plan, and the delinquent HOA fees were in excess of several thousand dollars. Since the "Delinquent Assessment Collection Policy" was adopted in 2020, the number of delinquent accounts has dropped to a handful.

**Query/Comment:** I am also interested in understanding whether any of these changes with regard to utility easements (Article 4.9) may have any positive or negative impact to the fact that outside of Comcast, we have no access to broadband providers.

**Response:** Article 4.9 allows the Board to give Comcast and other utilities the right to use our Common Areas if the Board determines that is in the best interest of our community.

## **ARCHITECTURAL CONTROL (ARTICLE 5)**

**Comment:** In my opinion there are many controversial issues such as the penalties against members for the colors they paint their houses and/or plans for houses. Also, that remodels must be completed in one year.

**Response:** Both of these issues are addressed in the revised draft CC&Rs that were posted on the website after the Feb. 22 Town Hall meeting. The Board has never attempted to regulate paint colors and that is now explicit, Article 5.20 requiring “diligent construction” has been removed from the draft CC&Rs.

**Query:** If someone has approval from the city, is that sufficient? I remember the case when front window replacement was approved by the city but rejected by the ARC.

**Response:** This is not part of the CC&Rs and is an operational rule. The new CC&Rs are not expanding the operational rules governing the ARC.

## **USE RESTRICTIONS (ARTICLE 6)**

**Comment:** The new CC&Rs state that a barking dog is a nuisance which is not consistent with nuisance law.

**Query:** There is already a City law regarding barking dogs. Why does the Board want to be the police instead of leaving it to SFPD or SF Animal Care and Control?

**Comment:** Unlike gated communities, Balboa Terrace is a neighborhood in a city. Nuisance laws exist in San Francisco. Law enforcement should enforce nuisance violations. They have the resources and expertise to handle this. Let the Board address other issues more appropriate to its mission.

**Response:** This provision (barking dogs) will be removed from the next draft and complaints will be referred to the non-emergency telephone number of the SFPD.

**Query:** How many FedEx deliveries are too many? Why is that there in the CC&Rs? Isn't this subjective?

**Response:** This question refers to Article 6, Section 6.6 Residential Use (3) Package deliveries are kept to a minimum. This provision has been removed since the Feb. 22 Town Hall meeting.

## **BYLAWS**

### **DIRECTOR ELECTIONS (ARTICLE 6)**

**Query:** What is the reason for reducing the size of the Board from 11 to 7?

**Response:** With an 11-member Board it is often difficult to secure enough candidates to run for the Board; once elected, it is also difficult to achieve a quorum (6 directors present). An organization of our size typically has 5 Board members. We compromised with 7.

**Query:** Was there consideration to adding term limits for Directors in Bylaws?

**Response:** No, we did not consider term limits because of the difficulty of recruiting candidates for the Board; however, if there is strong sentiment for term limits we can consider making the change to the Bylaws. It should also be noted that under the new Bylaws, terms would be staggered, so that there is some overlap between “new” and “current” Board members.

As you can see below, the Davis-Stirling Act discourages strict term limits:

A term limit is a restriction on the number of terms a person can serve as a board member. Term limits for board members, if any, are normally found in the bylaws. If properly drafted, term limits can be positive.

**No Term Limits.** If there are no term limits in an association's governing documents, directors can be elected and re-elected to the board until they cease to be qualified to serve on the board.

**Strict Limits.** Strict term limits that allow owners to serve one or two terms and then forever bars them from the board are unworkable. It is much too difficult to recruit members to serve on the board. Also, what happens when everyone in the association has served on the board? Accordingly, strict limits should NOT be adopted.

**Flexible Limits.** A more common term limit is one that allows directors to serve two terms and then requires them to step down for a year. This allows other owners the opportunity to serve on the board without permanently barring seasoned directors from serving at a later date. Even this kind of limitation can be problematic if no other owners are willing to serve on the board. To avoid this problem, term limitations should only take effect if there are people willing to run for the board.

**Bylaw Amendment.** Term limits can be added by means of a bylaw amendment and then revising the election rules. It is unclear, but it may be possible to impose term limits by amending the election rules without the need of amending the bylaws.

## MEETINGS OF THE BOARD (ARTICLE 10)

**Query:** Meeting recordings would be very helpful (to me anyway) as this time is nearly impossible for me to attend meetings. Hope to hear why the draft prohibits it.

**Query:** Could you please share the references and rationale for not recording the meetings?

**Query:** Could you please share the references and rationale for not recording the meetings? This is the first time I'm seeing it as a part of a legal stipulation.

**Comment (from chat):** The anti-recording clause, while maybe it's "standard," is very troubling to me. The clause allows the Board to record meetings if it wants to (i.e. if it's in the Board's best interest) but does not require them to record meetings which would be in the homeowners' best interests. It sounds like we are protecting the Board at our expense because of the fear of litigation or embarrassment for Board members.

**Response:** There is nothing in the Davis-Stirling Open Meetings Act that requires Associations to allow recording of their meetings. Our HOA attorney has advised us against recording of Board meetings. Several current members of the Board have served on other Boards, and none allow recording of Board meetings. Minutes of every meeting are posted on our website and all Board meetings other than executive sessions are open to the public.

Here is what the Davis-Stirling Act says about recording of meetings:

**Negative Aspects of Recording.** Owners who bring audio or video recorders to board meetings often do so because they are threatening litigation or wish to intimidate participants into silence. Sometimes, they

will have a lawyer sitting at their side as they record the meeting. Under those conditions, meeting participants are reluctant to speak freely for fear of being dragged into litigation or having their voices appear on internet websites. As a result, members' free speech rights are suppressed by the person doing the recording.

Moreover, even though owners attending a meeting may not have an expectation of privacy within the community, they have a reasonable expectation that their conversations and likeness are not going to be posted on YouTube or other websites open to the general public outside their community. For these reasons, many boards prohibit private recordings, whether audio or video. This is especially true for executive session disciplinary hearings.

**Query:** Why is Zoom run on your law firm's (Richard Hill's firm Littler) website?

**Response:** In the beginning of Covid-19 when in-person meetings were no longer possible, we used Bay Area Property Service's Zoom account; however, that required an employee from their company to host the account, permit access to the Zoom account and often continue to monitor the session for one-to-two hours for which we were billed. Switching over to Littler eliminated this expense entirely and it was easier to coordinate upcoming meetings, etc. At the March 6, 2023 Board meeting, the Board discussed purchasing a Zoom Pro plan. We need to confirm the cost before making a final decision.

## **BUDGETS, RESERVES AND FINANCIAL STATEMENTS (ARTICLE 13) DISCLOSURES (ARTICLE 15)**

**Query:** Why doesn't the Board tell us exactly how much they have spent year to year on legal fees?

**Response:** This information is posted annually ("Annual Budget Report") on our website under the Finance section and YTD expenses and revenues are reviewed on a quarterly basis by the Board. Finances will also be discussed at the Annual Meeting on March 14.

**Comment:** Save money! Yes, that's a good goal for BTHA. Let's investigate where else we can save money.

**Response:** Thank you for the feedback. If you have suggestions on ways to save the HOA money, they would be welcomed. Over 43% of the HOA's budget is devoted to building the Reserve Fund and most of the other expenses are non-discretionary, e.g., insurance, administrative expenses and landscaping.

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