"I NEVER RECEIVED NOTICE !"

A Simple Approach to Proving Notice was Served and Received©

By Glenn H. Youngling, Esq.

How many times have you heard it before? "It's not fair to enforce that rule against me, nobody ever told me about it." Or, "I have a friend who works in a law office who says that because you never gave me notice of that rule, you can't enforce it against me now. " The purpose of this article is to give you some handy tips on how to find out if this wayward resident is correct and, if he or she is not, to shift the burden of argument to the erroneous complainer. With more and more notice requirements being imposed on associations by the Davis-Stirling Act and governing documents, it is especially important to set up a routine that is both reliable and admissible in court to show that the notice procedures were properly followed.

The Form is Called a "Proof of Service by Mail"

The cornerstone for this recommended notice procedure is California Code of Civil Procedure Section 1013a. This section provides the substance of a simple form which is generally used in a litigation context but which is easily transplanted into any instance where you want to establish that a notice was given. Generally it provides that an affidavit be executed showing:

1. the exact title of the document served;
2. the name and residence or business address of the person making the service;
3. that he or she is a resident of or employed in the county where the mailing occurs;
4. that he or she is over the age of 18 years and not a party to the cause;
5. the date and place of deposit in the mail;
6. the name and address of the person served as shown on the envelope; and
7. that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid.

A form meeting these requirements follows this article.

In a litigation context, a copy of the form always accompanies those documents which are required to be served on other parties. In a non-litigation context, the Association has the option of attaching it or simply leaving the original in the file for future reference should that be necessary.

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Large Mailings

How might this form be used in a mass mailing? A good technique involves creating sheets of mailing stickers and the following process:

1. Make a photocopy of each of the sheets of stickers before removing any of the individual labels;

2. Clear your work space and put sufficient envelopes and contents beside your stickers;

3. Apply the stickers to all of the envelopes or flyers. After stuffing of envelopes, postage and whatever else is necessary to get the bundles out, you should find that there are no more stickers left on your label sheets.

4. The same person should then bundle and deposit the mailing into the U.S. Mail. Note that it should be sent first-class.

5. That same individual should fill out the proof of service form identifying the substance of the mailing, and stating that copies were provided to the people identified on the attached list. Then staple the previously made photocopy of the mailing stickers to the proof of service.

6. Place the original signed proof of service in your file along with your copy of the notice.

Individual Mailings

In other situations, you may be mailing a notice such as a governing document violation to a specific person. Use of the form in this process is simpler because you simply fill out the form directly and with no exhibit. If you want to add some psychological impact, you can actually enclose a copy of the proof of service with the original notice or correspondence. The original signed proof of service form should be kept in your file.

What About Using Certified Mail With Return Receipt Requested?

There is a distinct psychological impact when an owner signs for a letter or receives the postal notice that such a letter is waiting to be picked up at the post office. If you send a letter certified with return receipt requested, make that notation on the face of the letter. Also note that a copy

is being sent first-class mail and use the proof of service on this back-up mailing. At least one copy is then "sure to get through," signature or not. The first-class mail copy with the proof of service will establish the presumption that the mailing was received, even when an attempt to get an executed return receipt has failed.

What to do if Challenged

In the event that someone challenges your contention that he or she received a document or some notice in a timely fashion, your first step should be to go back to your file and find out if the claim is correct. If your proof of service shows that notice was in fact given, you can often eliminate the issue of receipt by proffering the proof of service form in conjunction with Evidence Code Section 641. That section provides:

> A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

The evidentiary presumption that the document was received effectively shifts the burden to the other party to establish that he or she did not receive the communication. If you've ever thought about it, you know that establishing that something did not happen is a formidable challenge. The important thing is that by using a simple form you can put the burden of arguing about notice on the individual and save the Association's time and energy for more substantive matters.

Let the resident or owner know notice is not an issue - period. In Small Claims Court (where technical rules of evidence do not strictly apply), bring copies of the mailed notice and the original proof of service. Offer it to the Court. In any other court action, be sure to let the Association attorney know you have the proof of service in the file. If the individual cannot establish he or she did not receive it, there is a presumption it was received.

In Summary

The use of a proof of service by mail is a cost effective and simple tool which associations and property managers should make greater use of. By adapting this simple tool most frequently used in litigation to the day to day management of your Association, you can send a clear message to those who would challenge the manner in which you conduct Association business. You will not be "side tracked" by hollow claims that a notice or other communication was not sent and received. The proof of service by mail is a simple, inexpensive and reliable form that will leave a clean record that "official notices" were sent and received. Use it.

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PROOF OF SERVICE BY MAIL AND OTHER MEANS©
(CCP §1013a and §2015.5)

I, _____, declare:

I am over the age of eighteen years. If this matter involves litigation, I am not a party. My business address is: _____

On _____, I served the following document:

_____

addressed as follows:

_____

_____

_____

☒ Check as appropriate:

Mail

☐ By depositing a true copy thereof in the United States mail at _____, California, in a sealed envelope, with first-class postage thereon fully prepaid.

☐ By depositing a true copy thereof in the United States mail at _____, California, in a sealed envelope, with Certified mail, Return Receipt Requested, postage thereon fully prepaid.

☐ By depositing a true copy thereof in the United States mail at _____, California, in a sealed envelope, with Express Mail postage thereon fully prepaid.

Other Means

☐ By facsimile transmission to: _____

☐ By personally delivering a true copy thereof at the address set forth above.

☐ By causing such envelope(s) to be delivered by messenger this date to the address(es) shown above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____ _____

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.

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"GRANDFATHERING"

A Tool To Phase In Change And Avoid Conflict©

by Glenn H. Youngling, Esq.

There is often an "art" to changing status quo. Sometimes the community association board is confronted with inconsistent or conflicting policies and practices of prior boards. Sometimes, while there may be consistency in past practices, they are simply not realistic or desirable to continue. In order to change status quo or adopt new standards but not injure or cause unfairness, the "art" of grandfathering can be a problem avoidance tool. Most often these are architectural standards, but they may also include subjects such as pets or vehicles.

Black's Law Dictionary defines a grandfather clause in part as:

> Provision in a new law or regulation exempting those already in or a part of the existing system which is being regulated. An exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction.

The definition does not, however, do justice to what can be a very flexible and creative tool. For example, the definition implies a permanent exemption. But in many instances, particularly when creating exceptions to association standards or requirements, permanent exceptions are not advisable. More creative criteria for establishing flexible grandfather policies may include:

1. **DATE**. A definite calendar deadline by which to conform. For example, one year from the date of the agreement or, better yet, a specific calendar date.

2. **UNRELATED EVENT**. An event which is easily verifiable. For example, on change of ownership, or when an owner no longer resides at the location.

3. **RELATED EVENT**. Often changes are most easily made in conjunction with some other related event. For example, a skylight might be removed when the project is next reroofed. Exterior paint color may be brought into conformity at the next regularly scheduled painting. All present dogs in residence might be permitted to stay but no new pets will be allowed.

4. **HYBRID**. Generally this takes two or more variables and provides that on the soonest or latest of the variables, the obligation will spring into the present. For example on the sooner of two years or date of sale.

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When an Association decides to enforce a restriction that has not be uniformly applied in the past, it may be necessary to work with owners who may have relied on past lax practices. Grandfathering may be a useful transition tool. However, figuring out who should be grandfathered and how to grandfather them may pose yet another challenge. There are several approaches to consider.

a. **ACTIVE ASSOCIATION POLICING**. Representatives of the association go out and attempt to find violations and advise the individual owners what each can expect as part of the transition.

b. **SELF POLICING**. A grace period is offered for persons who come forward and "register." This may be attractive if owners know they will be offered a grandfather approach rather than face strict enforcement later.

c. **PASSIVE ASSOCIATION POLICING**. Such an approach is linked to the owner coming to the Association and requesting some other action which is discretionary. The association then links the two subjects. For example, the association will withhold ruling on any new architectural change request until old violations are addressed.

d. **TEMPORARY INCENTIVE OFFERS**. The association may opt to pay for or share certain costs. For example, the association might decide to pay for fence restoration in exchange for an agreement giving it future control over such work with an agreement of cost sharing.

In planning how to best change status quo, a variety of overlapping facets must be thought through. For example, consider the governing documents, law, politics, personalities, economics and priorities, then "draw a line in time" and consistently apply the new standard to all new situations. Simultaneously implement a plan to deal with existing conditions or circumstances. Also, consider formalizing agreements reached by recording them with title to the property. In the process, you may find creative "grandfathering" to be the key to short and long term success.

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Ten Things You Should Know About Tree Law

by Glenn H. Youngling, Esq.

For most community associations, trees are a significant part of the value of the property as well as the quality of life for residents. As they mature, however, trees can also pose significant challenges when they eventually threaten improvements near them or simply reach the end of their serviceable life span. Problems can include root damage to walkways, foundations and underground lines. Leaf debris, blocked views, diseases and sewer line blockages can all cause economic and emotional turmoil. Disputes over trees can pit neighbor against neighbor in bitter disputes where emotions drive decision making and the economic and practical circumstances may be distant considerations.

For those turning to the law for a simple and direct solution to a tree problem, they will likely be disappointed. While giving little guidance on how to handle tree problems, the law instead can impose harsh penalties on those who would take matters into their own hands. Having knowledge of these legal limitations is important before going back into the deliberations that may be dominated by emotions and aesthetics.

(1) TREE OWNERSHIP:

The law of tree ownership is deceptively simple on the face of it. Trees with trunks standing wholly upon the land of one owner belong exclusively to that owner, although their roots grow into the land of another (Civil Code §833). Trees with trunks standing partly on the land of two or more adjacent owners, belong to them both (Civil Code §834). The rise of community associations has brought some unusual variations to the law of tree ownership. For example, in some planned developments, a tree may be on an owner's lot and be the property of that owner even though the Association is assigned responsibility to maintain the tree and other landscaping. Root damage to foundations, walkways and sewer lines may pit the owner who wants to preserve the tree and have the Association pay for the damage, against an association without the ownership authority to remove and replace the tree. There is no definitive law addressing distinctions between ownership and control in this type of context.

(2) TREBLE DAMAGE:

For the overzealous, taking action first and then being educated about the consequences may be a painful experience. The law provides that a person who wrongfully damages or removes a tree is liable to the owner for three times the amount of actual damages or detriment suffered (Code of Civil Procedure §733). If, however, the damage was unintentional or under mistaken belief as to ownership, then the amount owed is only twice the amount of the damage (Civil Code §3346). An arborist should be consulted to

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quantify the damage. Also, intentionally or carelessly harming someone's tree may be a misdemeanor, punishable by a fine of up to $1,000, up to six months in jail, or both (Penal Code §384a).

(3) OVERHANGING BRANCHES & ROOTS:
Neighbors have a right to cut off branches and roots that extend onto their land, but with limitations. They may not trim past the property line, enter on the neighbor's property without permission (unless there is imminent peril), cut down the tree itself, or cut so extensively as to jeopardize or destroy the tree. An arborist should be consulted before anyone considers unilaterally cutting back a tree that belongs to a neighbor.

(4) TREE ORDINANCES:
An increasing number of cities are passing tree ordinances which include restrictions on removal of trees of certain types and/or size. Also, some ordinances prohibit the planting of certain types of trees. Tamper with a "heritage tree" even on your own property and you may regret it. Many cities have these ordinances on their websites.

(5) LICENSED CONTRACTORS:
A landscaper or other hired person may work on a tree up to 15 feet above ground. Any higher and the work must be performed by a licensed tree contractor (Business & Professions Code §7026.1(c)).

(6) UNLICENSED CONTRACTOR PERILS:
An owner who hires someone without proper license may face significant liability. This commonly occurs when a worker falls from a ladder and sues the owner for catastrophic injury. Without a proper license, the liability insurer may treat the worker as an employee (Labor Code §2750.5) for which the owner should have worker's compensation insurance. Worker's compensation insurers routinely reject such claims because the worker was not identified previously and included in the premium calculation. Thus the owner could face liability not covered by either type of insurance.

(7) ARBORIST:
An arborist can be thought of as a professional tree consultant. Some are also licensed contractors but generally they are independent. For any association with a significant inventory of trees, an arborist should be on the team of professionals that the association periodically consults. Their recommendations can also be of tremendous assistance in getting neighbors to focus realistically on problems that may be caused by trees. Further, following an arborist's recommendations can reduce the liability exposure that comes falling trees and branches.

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(8) VIEWS:

Some cities have view ordinances intended to reasonably protect views. They may specify a process to address and hopefully resolve owner disputes over trees and views. Such ordinances have been upheld in court (*Kucera v. Lizza* (1997) 59 C.A.4th 1141). In the case of *Wilson v. Handley* (2002) 97 C.A. 4th 1301, a Court even held that a row of trees on a property could constitute an illegal spite fence. Although not common, some CC&Rs also address views. If there is a problem, both sources should be checked.

(9) SOLAR RIGHTS:

Public Resources Code §25982 provides that a neighbor may not plant a tree or shrub that will cast a shadow greater than 10% over a neighbor's solar collector between the hours of 10 a.m. and 2:00 p.m. Some exceptions are made for trees existing before installation of the solar panels.

(10) RESERVE STUDY:

Common Area trees are often an important and valued part of Common Area aesthetics. Many Associations however, ignore the cost of maintaining trees, especially as they reach maturity. The costs of root control, root damage, pruning, removal and replacement can be substantial. An arborist should be consulted periodically and a long term plan integrated into the reserve study to satisfy the Association's obligation to project Common Area needs over thirty years.

In Summary

Like any other improvement to real property, trees require periodic attention. Their life cycle requires advance planning and can have considerable economic consequences. For any such plan, it is also important that people be a component. How will they be educated, how will surprises be avoided and how will support for necessary or desirable changes be garnered? As you go about planning ahead, keep in mind the ten points raised above and hopefully you will avoid surprises that could otherwise turn a challenging task into an ordeal.

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WEBSITE MUSTS FOR MANAGERS AND DIRECTORS

Secretary of State Business Service Center:

This site provides information about corporations, limited partnerships and other entities that file with the Secretary of State. Check on corporate status, and agents for service of process. A recent sampling of two hundred small to mid-sized condominium associations revealed over 25% were suspended! If you should find your association is suspended, call the Secretary of State (916-654-3203) and they tell you why and what you need to do to revive the corporation.

- A suspended corporation's name may be reserved and adopted by another corporation.
- A suspended corporation cannot appear in court to defend or prosecute a claim.
- A suspended corporation's contracts may be void or voidable.

www.ss.ca.gov/busines/business.htm

Contractor's State License Board:

The Contractor's State License Board is perhaps the single most important site a manager or director should use routinely. If the work requires a license and is over $500 verify that the contractor is validly licensed. If the contractor's business is incorporated, check the Secretary of State website to be sure the corporation is in good standing.

- Hiring an unlicensed contractor may leave an Association, individual directors and/or manager liable for a wide range of damages. Some of the highest risk claims are excluded in insurance policies leaving individuals and Associations exposed. It's not worth the risk!

www.cslb.ca.gov

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RULES AND POLICIES
Requirements for
ADOPTING AND/OR AMENDING

Civil Code §§ 1357.100 *et seq*.
(Effective 1/1/04)

- 30 days prior to adopting or changing a rule or policy, the Board shall deliver written notice of the proposed rule or revision to all owners
    - *Notice must include*
        - *text of the proposed rule*
        - *description of the purpose and effect*
- After the 30 day notice, any decision whether or not to adopt the rule must be made at a board meeting
- If the rule is adopted, then within 15 days notice must be delivered to owners

30 days		15 days	
Board Proposal Mailed		**Response Deadline. Board can Revise or Adopt** (if revise, arguably triggers new 30 day period)	**Mail Final Notice**

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WHEN PROCEDURE APPLIES:

- Must be used for new or changed rules relating to:
  - *use of common area/ exclusive use common area*
  - *architectural alterations*
  - *member discipline*
  - *payment plan standards*
  - *assessment dispute resolution*

WHEN IT DOESN'T APPLY:

- Need not be used for new or changed rules relating to:
  - *Common Area maintenance decisions*
  - *assessment amounts*
  - *change required by law*
  - *repeat of existing law or governing documents*

REMEMBER

- For rule to be valid and enforceable, must be
  - *in writing*
  - *within authority of board*
  - *not inconsistent*
  - *adopted in good faith*
  - *reasonable*

- Emergency rules can be adopted without delay, but are only effective for 120 days

- Members have ability to reverse new or changed rules
  - *Special meeting required to reverse rule*
  - *Special meeting request must be delivered within 30 days after notice of rule change*
  - *Majority of a quorum can reverse rule*
  - *Reversed rule may not be re-adopted for 1 year; but different rule on same subject may be proposed*
  - *15 day notice requirement of results of member vote*
  - *Special meeting/rule reversal procedure does not apply to emergency rules*

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