SOUTH COAST HOMEOWNERS ASSOCIATION

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Volume 15, Number 5 **July 2002**
Michael J. Gartzke, CPA, Editor

IN THIS ISSUE

UPCOMING SOUTH COAST MEETING

ANNUAL LEGAL FORUM WITH BETH GRIMM
Reviewing and Amending CC&Rs re: Maintenance Responsibilities and Insurance Claims

Water leaks, mold, inspection and owner responsibility
Thursday, July 25, 7PM

Holiday Inn, Goleta – 5650 Calle Real

For the past several years, South Coast HOA has been pleased to host Beth A. Grimm, Esq., an attorney in private practice in Pleasant Hill, California (Bay Area). Beth's law practice emphasizes services to community associations and its members. She is a prolific author. She publishes the California Homeowner Association *Legal Digest* newsletter and is very active in the legislative arena through the Community Association Institute's (CAI) California Legislative Action Committee (CLAC). She has written extensive for CAI as well as the Executive Council of Homeowners (ECHO). The sessions always include plenty of time for questions from the audience. As with most of our programs, **there is no charge to attend.** (After all, do you get paid to be on the board?). Don't miss this excellent program.

September 27 – CAI Channel Islands HOA Expo and Conference – Seaside Park, Ventura – 2 – 8 PM (More information to follow)

Mold
Wanted! Dead or Alive
Part Three

By Bart Mendel and Jacklyn Wolf, Santa Barbara Building Associates

Editor's Note: Bart Mendel, principal of Santa Barbara Building Associates has provided construction management services to area associations for several years. Bart has done South Coast seminars and is a presenter for CAI's ABCs for Association Leaders program. His firm specializes in repairs to buildings, diagnosing water infiltration problems and resultant mold. Further information can be obtained through their web site – **www.sbbldg.com** or by calling them at 805-964-9810.

In our first article (January 2002) we explored mold, its causes and diagnosis. In our second (March 2002), we discussed the potential health effects of mold on humans, the lack of industry wide standards for mold remediation and the importance of establishing a reasonable standard of care in mold remediation projects. In this final article of the series, we will present suggestions for developing proactive board policies and procedures regarding mold and water infiltration issues and discuss approaches to cost control.

Is your Association at the age where various building systems are degenerating? Have maintenance calls and costs risen sharply in the last few years? Are there reported leaks from multiple water sources? Do these leaks typically require callbacks and seem progressively more difficult to repair? Do residents complain about health problems and mold? If you have answered yes to several of these questions, your Association will benefit by developing a Mold Evaluation and Remediation Policy. This proactive step will outline the guidelines for how your Association will respond to water infiltration issues and health concerns of residents, as well as investigate, test and remediate mold problems if they do arise. The establishment of pre-emptive policies will help to demonstrate proper diligence in the eyes of your homeowners and help protect your Association from perceptions of negligence and potential future liability. Following are issues that need to be considered to formulate such a policy.

Early Response. Every Association should respond quickly to water infiltration issues and mold concerns. Make a quick response the cornerstone of your policies. Remember that unchecked water infiltration is what causes mold; conversely, if water damage is dried out within 72 hours, mold rarely develops. On an emergency basis, call your plumber promptly for plumbing leaks. However, if water damage has occurred for some time, you may already have mold and a plumber unfamiliar with mold abatement can inadvertently spread the mold to the balance of the unit by cutting open the drywall of a mold infested wall. Make sure that your emergency response plumber is familiar enough with mold to know what he should not do himself and must leave to the remediation professionals. Keep meticulous maintenance records; these will prove invaluable in diagnosis of mold conditions later on.

Investigation. There are three key elements in diagnosing mold conditions: the repair history of the home, a visual inspection, and if required, a mold test. Considered together, these three elements will inform a proper remediation plan. If you have multiple homes with water infiltration problems, a survey of homeowners followed by a visual examination of each problem unit is in order. The first step in any remediation project is to determine the extent of the mold, and if possible, the cause of the water infiltration problems. To attack individual units willy-nilly, without having an overall appreciation of the scope and extent of the problem only exacerbates costs and delays the resolution of the mold problems. Again, the key to mold remediation is detecting and repairing problems quickly, so mold does not spread from a relatively small concentration of common spores to a "secondary infection" with rampant toxic mold growth and adverse health effects. Once a visual evaluation by a trained professional determines significant water infiltration and the probability of mold, testing is in order. It can take two to four weeks or more to receive lab results from mold testing plus an analysis by your expert on remediation protocols.

Mold Experts. It is critical that your Association retain professionals experienced in mold diagnosis and remediation. During the evaluation, your expert will assess each home's conditions and advise whether or not remediation or further investigation is warranted. The Business Judgment Rule generally protects from personal liability those board members who retain an expert and follow their advice. Beware of multiple experts on the same project. Once a dispute arises between a homeowner and the Association, each with its own mold expert, remediation costs can escalate along with the frustration of all parties. Generally, the costs can double or treble, since the home must be remediated to the combined protocols of both.

Remediation Procedures. Once remediation is indicated, how will your Association proceed? Who will handle the myriad communication and project management aspects of multiple homes with mold? Determine your project team well in advance of having to start the work; it is difficult to interview experts on an emergency basis, and once again, the mold continues to grow and cause potential health problems with every passing day. Make it part of your policy that residents must vacate the unit during remediation activities until satisfactory clearance is achieved. What will the Association do if a resident's personal contents are contaminated? Most Associations defer to the homeowners and their personal insurance carriers the responsibilities and costs for packing up, moving out, cleaning, and returning of personal contents. Unless your governing documents say otherwise, California Civil Code does not require the Association to pay for homeowners' temporary housing and relocation expenses during construction. Be careful with that first unit being remediated: concessions granted to the first homeowner may set an expensive precedent for future ones.

Access Policy. Your Board should be aware of the need for a clear Access Policy because of the cost ramifications of delays in the project schedule – more mold, more health problems and ultimately more cost. Your Access Policy should clearly define conditions in which access is required and consequences to the homeowner if access is denied, such as the cost for cross contamination of adjacent units. Early in the project, discussion among Board members and their expert and legal advisors should determine when mold remediation is obligatory and how it is to be achieved. Because mold does not differentiate between property lines, homeowners may be required to provide access to their homes for remediation of adjacent homes. Your Association may already have an access policy in place within the CC&R's. You may consider amendment of your CC&R's or the instigation of a new rule to expand the Association's right of access for mold issues. Consult your attorney on any changes to your governing documents.

Cost control. While liability concerns dominate mold remediation discussions, this liability inevitably carries with it significant costs, both in the form of direct expenses for experts, testing, remediation and repairs, as well as in increased legal expenses and higher insurance premiums. Like any project, mold remediation must be managed. While reliance on experts is a critical step in the process, be wary of giving a testing company carte blanche to test, a remediation company an open checkbook, or a homeowner the entitlement to reimbursement for living expenses. Larger projects benefit from a project manager who specializes in mold and water infiltration.

Explore options for funding such as claims to the Association's master insurance policy. You may benefit from a coverage analysis by an attorney. While it is important to make sure that all potential claims are reported to your insurance carrier, submitting claims for units that will not be covered increase administrative expenses and premiums and should be avoided.

Mold contamination in homes can evoke strong emotional responses. In trying to address and respond responsibly to these issues in your Association, Boards can easily become emotionally embroiled as well and be drawn far afield in both their investigative and repair efforts. Reliance on clearly defined and established policies will provide security in the form of welcomed and defined boundaries. These pre-emptive policies can demonstrate that your Board established an appropriate standard of care to protect your Association and its homeowners from unnecessary cost expenditures, health concerns and undue liability.

If you need either of the first two articles, email the editor at gartzke@silcom.com or call 964-7806 and we will get them to you by email or post.

Reserve Studies (Part II):

Cash Flow Analysis Versus Straight-Line Depreciation

By: Chris Andrews, Stone Mountain Computing Corporation

Editor's Note: Chris Andrews is a frequent contributor to South Coast from presenting programs to providing newsletter articles. Chris has been performing reserve studies for over 10 years. He can be reached at 805-681-1575 or by mail to P. O. Box 1369, Goleta, CA 93116. Part 1 of this article appeared in our May issue and is available upon request.

The primary purpose of a reserve study is to determine how much money your association should save each year to pay for long-term capital expenses such as roofing, paving, pools, etc. There are two general analysis methods used in most reserve studies today: *Straight-Line Depreciation* and *Cash Flow Analysis*. A common question board members ask about their reserve studies is which is the best analysis method to use.

This article will make a case that reserve cash flow analysis generally yields more precise funding recommendations than the straight-line depreciation method. Because of the deficiencies of straight-line analysis, cash flow analysis should be the method of choice for most associations.

First, some definitions:

Straight-Line Depreciation – This method is used to determine how to pay for the fractional depreciation that occurs each year on assets that depreciate over time. For example, if an asset, such as asphalt sealcoat is done every 3 years, it "loses" one third of its value each year until it is "used up." The loss in value over a period of time is called "depreciation." Straight-line analysis would therefore dictate that your association should save one third of the cost of the asphalt sealcoat in their reserve account, each year. This calculation is performed for all assets (referred to as "reserve components") and the annual depreciation costs are totaled to yield the Straight-Line Depreciation recommended reserve funding level. When associations attempt to do their own reserve studies, they often use this method because it is easy to conceptualize.

Reserve Cash Flow Analysis – "Cash flow analysis" refers to the practice of tracking the inflows and outflows of cash from year to year over an extended period. It is the formal accounting method used to prove that a series of cash flows can fund a series of expenses. For reserve studies, cash flow analysis relies on the construction of a list of future reserve expenses—usually for the next 30 years—in conjunction with standard cash flow analysis. The cash inflows are the various sources of reserve income from member fees, special assessments, reserve account interest, etc. Cash outflows occur whenever a reserve expense must be paid for. The bottom line of the cash flow analysis shows the year-end reserve account balance for each year in the 30-year projection. To be both accurate and realistic, the impact of inflation on future reserve expenses should also be calculated, as should the impact of taxes on the reserve account interest.

In short, reserve cash flow analysis is a financial simulation showing whether or not projected reserve account income can pay for projected future reserve expenses over a long-term period, usually 30 years.

Upon calculating your first reserve cash flow analysis, if it predicts that your reserve account is going to go negative in 10 years, you then increase the reserve funding level and run the cash flow analysis again several times until the correct funding level is achieved. Many reserve studies simply calculate a recommended reserve funding level using the straight-line method and then plug that number into a cash flow projection to prove that their funding recommendation is correct . But to a scrutinizing board member who dutifully examines their reserve study, this method often shows huge reserve surpluses in future years. Thus, the exercise of plugging straight-line results into cash flow analyses often merely proves their straight-line depreciation funding recommendation is imprecise.

The most accurate cash flow analysis method is to use the computer to run through an iterative process to determine what the optimal annual reserve funding level should be such that your reserve account never goes negative for the duration of the projection. This is called “cash flow optimization.”

To illustrate the actual differences between straight-line depreciation funding and cash flow recommendations, refer to the accompanying bar chart taken from a real reserve study. The first bar chart shows what happens when the reserve funding recommendation derived from a straight-line analysis ($17,742) is plugged into the cash flow model and the resulting yearly reserve expenses and year-end reserve balances are charted for the next 30 years. Note how the straight-line funding recommendation would result in huge reserve surpluses in future years. (Nearly $450,000)

The second bar chart demonstrates that the optimized cash flow ($12,552 – a $5,190 savings) does *not* result in large reserve surpluses in future years for the very same projected reserve expenses. In fact, the cash flow funding amount can be optimized such that the reserve account doesn’t go below a certain minimum amount in any year in the 30-year projection. This example shows a $20,000 minimum future reserve balance as a buffer for unexpected reserve expenses.

Having described the two reserve analysis methods, here are some comparisons of the straight-line depreciation method and cash flow analysis:

- Straight-line implementations in reserve studies often don’t factor in interest earnings on reserves and taxes on those earnings. After-tax interest on reserves can contribute substantially to reserves over time. Ignoring interest earnings can result in reserve funding levels that may be unnecessarily high.
- Many straight-line reserve funding recommendations only represent the summation of the next year’s depreciation on all reserve components without regard to whether or not the association has diligently saved reserve funds to cover depreciation-to-date. Suppose an association should theoretically have $50,000 in reserve to cover depreciation-to-date and they only have $40,000. They would have $10,000 of what is referred to as “unfunded depreciation liability.” If the association approves a reserve budget for next year to fund only next year’s depreciation, they will continue to be behind by $10,000. Associations that have a running total of unfunded depreciation liability must not only fund for the coming year’s depreciation, but they must pay down their unfunded depreciation from past years of inadequate reserve funding.
- Many reserve studies based on straight-line depreciation do not properly factor in inflationary effects on future costs. Rather, they simply depreciate against the *current* replacement cost of each reserve component, not the inflation-adjusted *future cost*. For example, suppose the current cost to replace the flat roofs in your association is $100,000 and your flat roofs will last 10 years. A simple straight-line analysis would recommend setting aside $10,000 per year for your roof replacement fund. However, if we project a 3% compounded inflation rate for those next 10 years, the future replacement cost will actually be $134,392 (net inflationary compounding factor is 1.344). Thus in the year of replacement, after saving $10,000 for 10 years, your roof replacement fund could be deficient by $34,392!
- Straight-line analysis is somewhat “near-sighted” in that it doesn’t look beyond the first eserve expense event in a series. For example, suppose your association will incur

small expenses in the near future for roofing repairs, but repairs in subsequent years will be progressively more costly. A cash flow analysis can effectively model these factors to precisely reflect reality, but the straight-line analysis typically doesn't look beyond the first expense event for each reserve component. Once the first reserve expense event has been paid for, the next expense event (costing more money) appears in the next year's reserve study, and the resulting straight-line reserve funding recommendation jumps up, often leading to irregular reserve funding recommendations from year to year.

- Straight-Line doesn't properly handle "one-time expenses". Suppose you have only 2 reserve components: a $10,000 "one-time" event scheduled for next year (say removal of a sauna) and a $100,000 reroofing project scheduled in 10 years (e.g. $10,000 per year roof depreciation). The straight-line analysis method may yield a recommendation that you increase fees dramatically to fund the $10,000 one-time event *in addition* to funding the $10,000 per year roof depreciation. Yet the cash flow might indicate that there's enough cash in the "pool" of funds (for both the sauna removal and future reroofing) to pay for the sauna removal next year without raising funding levels quite as much. Associations that depend on straight-line analysis and also have several one-time large expenses usually have wide fluctuations in reserve funding levels from year to year because these one-time expenses drop out of the analysis once they're completed. The cash flow analysis, therefore, provides for a smoother reserve funding from year to year than the straight-line.

- In a similar sense, one drawback of the cash flow analysis is that some long-term reserve components can have a useful life longer than the "horizon" of the cash flow. In other words, if the cash flow projection looks ahead 30 years, the replacement of your association's 35-year roofs will not appear in the cash flow. Nor will its sizable expense participate in the cash flow calculations. Then when the roof is 5 years old, you'll see a large roof replacement expense suddenly appear in the last year of the 30-year cash flow analysis. Resulting funding recommendations derived from the cash flow method will then be higher than the prior year because now there is a "new" 30-year expense to fund. Nevertheless, it is surprising how easy it is to fund a large expense if you have 30 years. Often the sudden appearance of reserve components at the end of the 30-year cash flow does not drastically alter the resulting funding recommendation.

- Straight-Line Analysis has an unfortunate side effect of causing people to think in terms of how much money they have in their roofing fund and how much money they have in their roofing fund, and how much in their paving fund, etc. They go to great lengths to document for their membership how their reserve funds are "earmarked" for each reserve category. This is often an exercise in futility because, when they need cash, they inevitably dip into the roofing funds to help pay for the painting, or vice versa. The cash flow analysis method is also referred to as "cash flow pooling" because reserve funds for all future reserve expenditures are assumed to be "pooled" and are not specifically earmarked for each particular reserve component.

- The percent-funded estimate derived from straight-line analysis is over-rated as a measure of the health of an association's reserves. There are many associations who are less than 100% funded. Yet, cash flow analysis analyzing the very same data used in the straight-line analysis indicates that these associations *can* fund foreseeable expenses because their *rate of contribution* to reserve each year is significant enough to eventually catch up to the depreciation that has occurred on their assets. Cash flow analysis is the formal accounting method used to prove that a series of cash flows can fund a series of expenses over time.

- Straight-line analysis isn't as useful as cash flow analysis for investment planning. It is much easier to use a cash flow analysis to determine how to ladder CD investments so you will have CD's locked up when you don't need funds and then maturing at the time you need funds.

In summary, of the two common methods used to determine reserve funding budgets, the straight-line depreciation method has more limitations than the cash flow analysis method. If your association is relying on straight-line depreciation analysis, you may want to construct a cash flow analysis to prove that your level of reserve funding is indeed appropriate.

Moon Walking

A short essay on communication

By: Gregory Feet, Manager, Encina Royale

Editor's Note: Greg is the on-site manager at Encina Royale in Goleta, one of the largest community associations in Santa Barbara County. He can be reached at 964-4797.

We've all heard the expression *"if they can put a man on the moon, why can't they* [cure the common cold, design a solar-powered semi truck, etcetera]." The grumbling comment is the preference of armchair critics the likes of Archie Bunker and even my own dad, but it crumbles under minor scrutiny for the simple reason that we *could* in fact, rid our clothes of static cling if only we invested half a trillion dollars, twenty cold war years of continental competition, and the dreams of a dozen Cold War adversaries into the effort.

Evaluating a manager's performance in terms of individual projects reminds me of the moon effort logic. If we, as managers (or multi-taskers of any species) are so smart, then why was there a grade-school level error in the footnote of our last budget, and why did it take two days to replace the sidewalk light bulb at unit 2B2?

Perhaps the biggest challenge (I swore off using the word "problem" at my last positive management seminar) of multi-taskers is that, guess what? Nothing we do, no project we undertake, no hiring process we expedite, will ever turn out as good as it could have if we had twice as much time. More depressing; everything we do could be done better by a single devoted enthusiast or focussed committee, particularly if the Boards we report to are drawn from retired professionals, academics, and U.S. Presidents (I'm sure there's one or two somewhere in the community I serve).

Thus our problem—er, challenge. It seems we are doomed to undertake, and be judged by, work that is not, in reality, our "best effort". Which means that perfectionists are at a disadvantage in our profession. Why is this the case? Because perfectionists don't know the secret to success in multi-tasking. What is the secret? Heck, I don't know. I just divide my day by the tasks that need to get done, and do my best per allotted minute.

Actually I do know the secret, even though I forget it sometimes, and then pay dearly.

The saving grace of the manager's apparently doomed existence is to *simply address each and every problem, listen well, care about the people you serve, and avoid procrastination*. (This is in addition to memorizing the Encyclopedia Britannica). And what all this and more translates into is Communication with a capital C.

I've found that the residents and golf members I've served in the past ten years don't value a perfect job anywhere near as much as they appreciate a timely appraisal of their problem (oops, challenge), even if the solution ultimately offered is something less than what they hoped for.

Communication opens up vast new worlds for us. We really can take a month to replace a light bulb if only we confess the bad news head-on and do so with an honest and justified reason. People don't relish anticipation unless it's related to televised sports. The problem, er, challenge, is that the day goes by in a whirl for managers; but for those we serve, it ticks away in half-lives. Picture the slow-mo sequences of an Olympic diver and you will know what it's like for a resident to wait for her sticky patio gate to be fixed.

Does this mean the good manager jumps on every job or complaint within a half-hour of reaching her desk (to show I'm a mainstream thinker, I'll use the feminine gender for awhile)? Does this mean she takes calls as they are phoned in instead of asking the office manager to "take a message." Does this mean she listens daily to the "chronic complainers" and actually attempts to capture the seed of truth that even the most compulsive resident's suggestion holds somewhere in the deep folds of emotionalism?

Yes to all of the above and more. Again, this is all Communication—hey, I just realized that communication is the main reason managers are even employed. I…I…I just realized that Communication is the Fountainhead, the shrine, the comet tail that we might hope to hitch a ride on when it reaches its closest point to earth. Communication is probably a cult in one or more Middle Eastern countries.

But let's not get carried away (I admit I was) Showing residents that you really care--and you must truly care, or die a slow and unloved death in the management trade--does not mean doing everything they demand. It means doing what's right and explaining why it's right and why other options are wrong or impractical.

Which is a pursuit as noble as any space mission, and probably cheaper.

USE CAUTION WHEN ENFORCING PET RESTRICTIONS

California HOA incurs $18,000 in penalties plus legal fees in pet dispute

In mid-May, the San Francisco Chronicle reported that a Placer County Homeowner Association incurred $18,000 in penalties as a result of a California Fair Employment and Housing Commission hearing where the plaintiffs' alleged discrimination against the association because the association would not allow the mentally disabled couple to keep a companion dog in their home as an accomodation for their disabilities.

According to the article, the wife, a paralegal, fell in love with Pookie, a 11-pound wire-haired terrier mix while at an animal shelter in April 1999, thinking the dog could help relieve the depression that she and her husband both suffered. She had been under treatment since

1996 and her husband had been disabled since a 1992 auto accident. "After the dog, I would get out of the house a lot more, take the dog for a walk… Getting up in the morning was a lot easier", the wife said.

Two months later, the association found out that they would have to get rid of the dog or face fines of $50 per day. The couple took Pookie to a friend's house four days after receiving the association's notice. Several months later at work, the wife learned that a pet could be considered a companion animal – one that provides a therapeutic benefit to a person with a disability. So she and her husband got their therapists to write to the association seeking an exemption to the no-dog rule. The association allows cats, birds, hamsters, etc. and had suggested that one of these animals would achieve the same result as a dog.

When the wife spoke with the association's managing agent, asking him to waive the ban on dogs, the agent laughed and said he would see them in court. The association's attorney said the agent's laughter was really an expression of good-natured confusion about which of the couple was disabled – first the husband, then the wife. The attorney said the association would appeal the damage award, arguing that the couple had failed to document their need for a dog.

Under the ruling, the association's attorney said it would be "extremely difficult for management of homeowner associations or a board of directors to make an objective determination as to whether or not an individual is entitled to a pet." The ruling found that the association had "an overwhelming disregard of their rights as persons with disabilities". The commission awarded the plaintiff's $12,500 for emotional distress, $5,000 in civil penalties and $500 for costs of attending the commission proceedings – total $18,000 plus legal fees.

Points to consider:

- What constitutes a disability? How "disabled" does one have to be? Physical disabilities are easier to see than mental ones. How do you know if it is for real or is something being made up to circumvent the rules? Does the association have to accept the findings of the couple's therapist or could the association hire its own expert to evaluate them? Would it be an invasion of the couple's privacy to subject them to an independent evaluation to determine the extent of the disability?

- Watch what you say. How much weight was given to the alleged cavalier nature of the association's and its manager's response?

- Should associations that have pet restrictions disclose that exceptions may be available to disabled residents and what needs to be done to document a disability?

- What hassles will the association incur if the companion animal is noisy, disruptive or threatening to others in the association? Just look at what happened with the dogs in the San Francisco apartment building attacking and killing a resident.

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